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Sup. Ct. No. _____
COA No. 24864-0-III

OCT 30 2007
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TUCERO A. KNIPPLING,

Defendant/Respondent.

PETITION FOR REVIEW

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I.

IDENTITY OF PETITIONER

Petitioner, State of Washington, was the plaintiff in the Superior Court, and the appellant in the Court of Appeals.

II.

COURT OF APPEALS DECISION

Petitioner seeks review of the published Court of Appeals decision entered October 2, 2007, which affirmed a trial court ruling refusing to find the defendant a persistent offender. A copy of the Court of Appeals opinion is attached as Appendix A.

III.

ISSUE PRESENTED FOR REVIEW

(1) Is a judgment and sentence invalid on its face if it does not establish how an “adult” court obtained jurisdiction over a “juvenile”?

IV.

STATEMENT OF THE CASE

Defendant/respondent Tucero Knippling was convicted in the Spokane County Superior Court on ten felony counts arising from three different completed or attempted home invasion robberies. Several of the counts were “most serious offenses.” CP 20-21, 35.

The prosecutor had previously given notice of intent to seek sentencing as a persistent offender based on a 1999 second degree robbery conviction and a 2002 second degree assault conviction. CP 15. The defense filed a sentencing memorandum challenging use of the 1999 conviction, contending that defendant had been 16 at the time of the offense and there had been no declination of juvenile court jurisdiction entered in that case. CP 38-41, 75-78. The prosecution contended that the judgment was valid on its face and simply did not show how the 1999 matter was before the adult court. Defendant’s remedy was to collaterally attack the 1999 conviction. RP 15-17, 24.

The trial court, the Honorable Jerome Leveque, found that there had been 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. CP 98-116. The Court of Appeals, Division III, affirmed the ruling in a published opinion. The court determined that the State had failed to meet its burden of proving the existence of the 1999 conviction because it did not show that the adult court had jurisdiction over the offense. *See* Appendix A at 4, 6. Relying on an earlier Court of Appeals opinion, State v. Carpenter, 117 Wn. App. 673, 72 P.3d 784 (2003), Division III concluded that whether the 1999 conviction had been entered by a court of competent jurisdiction was not a collateral attack on that conviction. *See* Appendix A at 7. The Court of Appeals, without any analysis, dismissed the State’s argument that this matter was controlled by the decision in State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986), and that the trial court’s actions and remedy were inconsistent with the decision in In re PRP of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004). *See* Appendix A at 7-8.

This petition timely followed.

V.

ARGUMENT

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that the decision is in conflict with previous rulings of this court. Review is thus appropriate under RAP 13.4(b)(1).

Petitioner believes this matter was previously settled by this court's decision in State v. Ammons, *supra*. 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 Ammons 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 Knippling in the trial court were "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 an incomplete review of the wrong file. The trial court erred in concluding from a silent document that the 1999 judgment was invalid on its face.

The Court of Appeals ruling conflicts with Ammons by requiring the prosecution to prove the constitutional validity of the 1999 conviction. For that reason, this court should grant review. In addition, the result of this action is that the lower court rulings also conflict with the decision in In re PRP of Dalluge, *supra*.

In Dalluge this court ruled that when a trial court fails to conduct a declination hearing, the remedy is to remand for the trial court to do so. 152 Wn.2d at 783, 785-786. The trial court and Court of Appeals bypassed that action here, effectively leaving the State in worse position than if the 1999 conviction had been set aside. If the conviction had been set aside in a collateral attack, the trial court would consider anew whether declination would have been granted and the conviction could be reinstated or the pleas set aside. Id. at 786.¹ Instead, the prosecution is left with an

¹ Petitioner does not dispute the Carpenter court’s determination that if there is a retroactive declination, the date of conviction would be the date of the retroactivity ruling, effectively keeping respondent outside the scope of the persistent offender statute. See RCW 9.94A.030(33).

unusable, but not invalidated, prior conviction that did not even factor into the offender score calculation.

The decision of the Court of Appeals conflicts with both Ammons and Dalluge. Review is therefore appropriate. RAP 13.4(b)(1).

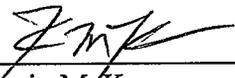
VI.

CONCLUSION

Petitioner asks this Court to grant the petition for review and reverse the decisions of the Court of Appeals and the trial court.

Respectfully submitted this 30th day of October, 2007.

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APPENDIX A

FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 24864-0-III
)	
Appellant,)	
)	Division Three
v.)	
)	
TUCERO ANTONIO KNIPPLING,)	
)	PUBLISHED OPINION
Respondent.)	

SCHULTHEIS, A.C.J. — Tucero Knippling was convicted of various counts of robbery and burglary. The State sought to sentence him under Washington’s Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. The judgment on one of the predicate convictions showed that Mr. Knippling was a juvenile at the time of the offense. But the State presented no evidence that juvenile jurisdiction was waived or declined. The trial judge concluded that the State failed to prove a predicate offense and ordered a standard range sentence. On appeal, the State claims that Mr. Knippling was required to collaterally attack the judgment on the predicate offense. We disagree and affirm.

FACTS

On August 4, 2005, Mr. Knippling was charged with 11 felony counts involving conspiracy to commit and/or principal or accomplice liability for various degrees of attempted or completed burglary and robbery and possession of stolen property. The charges arose from two residential break-ins and an attempted home break-in in Spokane County on April 19, 24, and 28 of that year.

The jury convicted Mr. Knippling on all but one charge, for a total of two counts of conspiracy to commit first degree burglary, two counts of first degree burglary, three counts of second degree robbery, two counts of conspiracy to commit second degree robbery, and one count of first degree possession of stolen property. The prosecution sought to have Mr. Knippling sentenced as a persistent offender, based on his convictions for a 1999 second degree robbery and a 2002 second degree assault.

Mr. Knippling resisted, contending that he was 16 years old at the time of the 1999 robbery conviction and the State must show that either he waived juvenile jurisdiction or the trial court ordered declination. The prosecutor argued that because declination was not something that could be determined from the face of the judgment and sentence, Mr. Knippling had to seek to set aside the 1999 conviction in a separate proceeding collaterally attacking the judgment.

After reviewing the 1999 file, the trial judge found that there was no written order or notation waiving or declining jurisdiction to adult court. The judge therefore

concluded that the 1999 superior court should have remanded for declination or obtained a waiver, and thus lacked jurisdiction to enter the judgment and sentence without declination. Mr. Knippling was sentenced to concurrent standard range sentences on December 15, 2005.

The State appealed the sentence. On May 24, 2006, the trial judge entered a letter in the court file that set forth findings of fact and conclusions of law related to the sentencing.

DISCUSSION

A standard range sentence is generally not appealable. RCW 9.94A.585(1); *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). But a standard range sentence can be appealed if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements. *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006) (citing *State v. Mail*, 121 Wn.2d 707, 711-13, 854 P.2d 1042 (1993); *State v. Onefrey*, 119 Wn.2d 572, 574, 835 P.2d 213 (1992); *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989); *State v. McNeair*, 88 Wn. App. 331, 336, 944 P.2d 1099 (1997)). Review of a trial court's calculation of the offender score and sentence under the POAA is de novo. *State v. Rivers*, 130 Wn. App. 689, 699, 128 P.3d 608 (2005), *cert. denied*, 127 S. Ct. 1882 (2006).

Under the POAA, or the "three strikes law," trial courts are required to sentence "persistent offenders" to life in prison without possibility of parole. RCW 9.94A.570.

An offender can be a “persistent offender” if he or she is convicted of any felony considered a “most serious offense” and has been twice previously convicted of such offenses or equivalent offenses in other states. Former RCW 9.94A.030(28) (2003); former RCW 9.94A.030(32)(a) (2003).

The SRA requires the trial court to conduct a sentencing hearing. RCW 9.94A.500(1). The trial court must decide by a preponderance of the evidence whether a defendant has a criminal history and specify the convictions it has found to exist. *State v. Thorne*, 129 Wn.2d 736, 781, 921 P.2d 514 (1996). “Sentencing under the persistent offender section of the SRA raises two questions of fact, ‘whether certain kinds of prior convictions exist and whether the defendant was the subject of those convictions.’” *State v. Lopez*, 107 Wn. App. 270, 278, 27 P.3d 237 (2001) (quoting *Thorne*, 129 Wn.2d at 783), *aff’d*, 147 Wn.2d 515, 55 P.3d 609 (2002).

The State bears the burden of proving that the predicate convictions exist for the purpose of a POAA sentence. *Lopez*, 147 Wn.2d at 519; *see* RCW 9.94A.500(1). This burden is on the State “because it is ‘inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.’” *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). Here, the State simply failed to meet its burden.

A defendant is not required to challenge the predicate convictions that the State presented and used to calculate his offender score at sentencing. Rather, a defendant is free to challenge an erroneous sentence based on a miscalculated offender score at any time. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 874-75, 123 P.3d 456 (2005). When a defendant does not challenge the State's representation of his prior convictions at sentencing and instead challenges his offender score for the first time on appeal, we generally remand for an evidentiary hearing. *Ford*, 137 Wn.2d at 485.

"[A] remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction." *Lopez*, 147 Wn.2d at 520. But where, as here, "the defendant raises a specific objection and 'the disputed issues have been fully argued to the sentencing court, we . . . hold the State to the existing record.'"¹ *Id.* at 520 (alteration in original) (quoting *Ford*, 137 Wn.2d at 485).

¹ The State argues that the trial court erred by entering findings of fact and conclusions of law after the State filed its appeal. Although the practice of submitting late findings is disfavored, entry of findings during the pendency of an appeal does not generally require reversal unless the delay was prejudicial or the findings have been altered to address issues raised by the appeal. *State v. Cannon*, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996) (citing *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984)). The State has the burden of proving prejudice. *State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998). When comparing the findings of fact and conclusions of law contained in the trial judge's letter with the court's oral ruling five months earlier, it does not appear that the findings and conclusions were tailored to meet arguments raised in the State's brief.

The trial court here found there was no evidence in the 1999 record that a declination hearing occurred or that Mr. Knippling waived juvenile jurisdiction. The State essentially argues that the finding is not based on substantial evidence because the trial court did not review the hearing transcript. But the State does not argue that a declination or waiver did, in fact, occur.

A waiver of any right under the Juvenile Justice Act of 1977, chapter 13.40 RCW, must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived. RCW 13.40.140(9). Juvenile proceedings are required to be transcribed to ensure an accurate record. RCW 13.40.140(5). This is the responsibility of the court, not the juvenile. *State v. Golden*, 112 Wn. App. 68, 80, 47 P.3d 587 (2002). “When neither party contends a proceeding was held and nothing in the record suggests there was even any discussion of it, we may presume the proceeding did not take place.” *Id.* Under the circumstances presented, the finding is supported by substantial evidence.

Importantly, Mr. Knippling briefed the sentencing issue in a memorandum filed on November 29, 2005, more than two weeks before the sentencing. The State maintained

Alternatively, the State asks that the trial court’s letter be stricken. A motion may be included in the body of a party’s brief only when, if granted, it would preclude hearing of the case on the merits. RAP 17.4(d). Because the State’s motion would not preclude a hearing on the merits, it is not properly before the court. The motion is therefore denied. *State v. Saas*, 118 Wn.2d 37, 46 n.2, 820 P.2d 505 (1991).

its position that it need not prove waiver or a declination order. Notably, the State did not seek to delay the sentencing hearing in order to obtain the transcript. Our Supreme Court has affirmatively held that the State is not allowed a second opportunity to provide evidence it should have submitted at the sentencing hearing. *Lopez*, 147 Wn.2d at 522.

“[W]here the State fails to carry its burden of proof after a specific objection, it would not be provided a further opportunity to do so.” *State v. McCorkle*, 137 Wn.2d 490, 497, 973 P.2d 461 (1999) (citing *Ford*, 137 Wn.2d at 485).

The State contends that Mr. Knippling’s sentencing argument is an improper collateral attack on the judgment. The court in *State v. Carpenter*, 117 Wn. App. 673, 678, 72 P.3d 784 (2003) disagreed:

Initially, the State counters that Carpenter’s argument is an improper collateral attack on his 1996 conviction. We disagree. It is not a collateral attack because it is directed to the present use of a prior conviction to prove that Carpenter is a persistent offender.

Moreover, the State bears the burden of proving by a preponderance of the evidence that two applicable prior convictions exist when seeking a POAA sentence. Thus, Carpenter’s argument first raised at sentencing, as it relates to his persistent offender status, is a proper defense to the State’s proof and we address it.

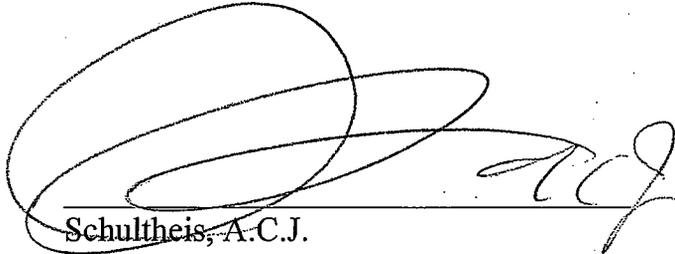
(Footnote and citations omitted.)

We reject the State’s claims that *Carpenter* was incorrectly decided or distinguishable on the facts. The State’s arguments based on other cited authority are equally unpersuasive. *E.g.*, *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d

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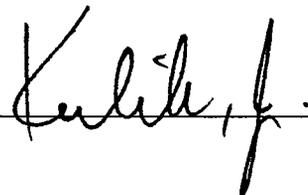
796 (1986); *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 100 P.3d 279 (2004); *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 55 P.3d 615 (2002).

Without evidence of the declination or waiver, the State failed to prove the existence of the 1999 conviction by a preponderance of the evidence. We therefore affirm.

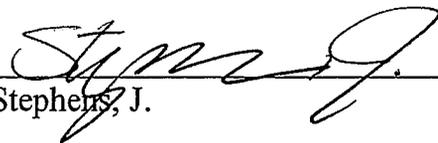


Schultheis, A.C.J.

WE CONCUR:



Kulik, J



Stephens, J.