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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

REPLY BRIEF OF APPELLANT

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I.

INTRODUCTORY STATEMENT

Appellant, State of Washington, respectfully submits this reply on one issue presented in the Brief of Respondent.

II.

ISSUE PRESENTED

(1) Does State v. Carpenter, 117 Wn. App. 673, 72 P.3d 784 (2003), apply to this case?

III.

ARGUMENT

A. *CARPENTER* WAS WRONGLY DECIDED AND IS FACTUALLY DISTINGUISHABLE.

The respondent argues that State v. Carpenter governs this case. While that case is factually similar to this one, it is distinguishable in its most critical aspect. That case also misapplied precedent that was inapplicable to an SRA sentencing such as this case. For that reason it is wrongly decided and should not be followed.

The defendant in Carpenter had pled guilty as a juvenile in adult court to second degree assault, an offense that was not subject to

“automatic decline” of juvenile court jurisdiction. Id. at 675-676. Apparently realizing that no declination hearing had been conducted on that offense, the prosecution attempted to do so while two robbery counts, which were potential third “strikes” under the Persistent Offender statute, were pending trial. Id. at 676-677. The trial court declined jurisdiction *nunc pro tunc* on the assault charge and later counted that offense as a “strike” when the defendant was convicted of the robbery charges. Id. at 677. Division Two, on direct appeal, reversed the sentence on the basis that the assault conviction did not exist until the date of the declination ruling. Id. at 679-682.

The current case is not that one. Unlike Carpenter, we do not know if jurisdiction was ever declined or not. In Carpenter, the prosecution conceded that point by seeking declination during the course of the pending robbery proceedings. Here, the prosecution simply offered a facially valid conviction to prove the prior conviction. It was defendant who claimed, but never proved, that the conviction was entered by a court that lacked jurisdiction – a claim that could not be properly entertained in this case anyway as it depended upon facts beyond the face of the document. Factually, Carpenter is too significantly different to be of much value in this case.

The Carpenter opinion is legally dubious on two grounds. First, its determination that the assault conviction was only valid from the date of the declination hearing is questionable after In re PRP of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004), as argued in the original briefing (Brief of Appellant at 10-11). Those arguments will not be repeated here. Carpenter predated Dalluge by one year and simply did not have the benefit of that case's reasoning.

The other reason that Carpenter fails legally involves its failure to apply State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert. denied* 479 U.S. 930 (1986). As noted in the original briefing, Ammons does not permit constitutional challenges to the use of prior convictions at an SRA sentencing proceeding. 105 Wn.2d at 187-189. (Brief of Appellant at 6-9). The Ammons court, citing to State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980), expressly noted that it had used a different approach in sentencing under the old habitual offender statute by requiring the government to establish the constitutional validity of a prior conviction. 105 Wn.2d at 187. It nonetheless declined to apply that approach to the SRA given the legislative directive. Instead, a conviction could be used unless it had previously been found to be invalid or was facially invalid. Id. at 188. Immediately after noting Holsworth, the Ammons opinion stated its holding: "We hold that the

State does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding.” Id. at 187.

In the context of sentencing under the Persistent Offender Act, the Washington Supreme Court again noted, *and declined to apply*, Holsworth to “three strikes” sentencing. State v. Manussier, 129 Wn.2d 652, 681-682, 921 P.2d 473 (1996). Thus, it is surprising that Division II in Carpenter looked to Holsworth in permitting what appeared to be a collateral attack on the assault conviction. Ammons had already circumscribed sentencing issues related to prior convictions. Carpenter was wrongly decided on that point.¹ This court should decline to follow the decision.

Defendant had an appropriate remedy if he believed his earlier robbery conviction was invalid. He could have filed a collateral attack and proved his point. State v. Ammons, *supra* at 188. If the claim were proven, the trial court would then have decided whether jurisdiction would have been retained or not. In re Dalluge, *supra*. It was thus improper for the trial court here to ignore the governing precedent, extend the scope of a sentencing challenge from simple facial validity into a

¹ It appears under the facts that the question of jurisdiction over the old assault case was not in question in Carpenter and a court applying judicial estoppel could easily have precluded the State from taking a contrary position at sentencing if that had been in issue. There simply was no need to get into the Holsworth discussion.

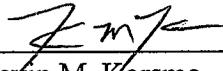
collateral attack, and then ignore the remedy that does apply in collateral attack proceedings. For all of those reasons, the trial court erred in this sentencing.

IV.

CONCLUSION

For the reasons stated herein and previously, the sentence should be reversed and the matter remanded for sentencing as a persistent offender.

Respectfully submitted this 27th day of March, 2007.



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