

**FILED**  
OCT 9 2008

No. 80848-1

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

TUCERO KNIPLING,

Respondent

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Before a defendant may be sentenced as a persistent offender the State must prove the person was previously convicted of two prior most serious offenses as an “offender.” Where the State concedes its proof does not establish that Mr. Knippling was an offender at the time of one of his prior convictions, did the trial court err in refusing to find Mr. Knippling was a persistent offender?

B. SUMMARY OF CASE AND ARGUMENT

Following his present convictions for several most serious offenses, the State contended Mr. Knippling was a persistent offender based in part on a 1999 conviction of second degree robbery.

In 1999 Mr. Knippling, then 16, was charged in Superior Court with first-degree robbery, an offense for which the Superior Court has automatic jurisdiction pursuant to RCW 13.40.030. Mr. Knippling pleaded guilty to the lesser offense of second-degree robbery, an offense for which the juvenile court has exclusive jurisdiction absent a decision to decline jurisdiction pursuant to RCW 13.40.110. This Court has previously determined that where a charge of an automatic-decline offense is amended to a lesser offense for which decline is not automatic, the Superior Court must

remand the matter to the juvenile court to determine whether to decline jurisdiction. State v. Mora, 138 Wn.2d 43, 49, 977 P.2d 564 (1999). The State did not offer any evidence that a decline hearing was held at the time the 1999 charges were amended. Petition for Review at 2.

In the present case, the Superior Court concluded the State did not prove Mr. Knippling was a persistent offender because absent a decline hearing, the Superior Court did not have jurisdiction and the 1999 offense was not valid. The State appealed.

The Court of Appeals affirmed, concluding the State failed to prove Mr. Knippling was a persistent offender. State v. Knippling, 141 Wn.App. 50, 57-58, 168 P.3d 426 (2008).

The trial court's findings of fact and the opinion of the Court of Appeals each concluded the 1999 offense was not valid because the court lacked jurisdiction. That conclusion is inconsistent with the trial court's inclusion of the offense in its finding of Mr. Knippling's criminal history. CP 83. As argued below, even if the conviction is "valid" as a prior offense, the judgment does not suffice to prove Mr. Knippling was an "offender" as defined in RCW 9.94A.030(34). Thus, Mr. Knippling contends the trial court and

Court of Appeals correctly concluded the State failed to prove he is a persistent offender.

C. ARGUMENT

THE TRIAL COURT AND COURT OF APPEALS  
PROPERLY FOUND THE STATE HAD FAILED TO  
PROVE MR. KNIPPLING WAS A PERSISTENT  
OFFENDER

Before a court may sentence someone as a persistent offender the State must prove the person has separately committed and been convicted of two prior most serious offense as an offender and that those offense would be included in his offender score. RCW 9.94A.030(37)(a)(ii). The trial court and Court of Appeals correctly concluded the State did not meet its burden.

The State has focused its arguments solely on the question of the facial validity of the prior judgment without any consideration of how it failed to established Mr. Knippling was a persistent offender, specifically its failure to offer any proof that Mr. Knippling was an "offender" at the time he was convicted of a 1999 robbery. Rather than explain its failure of proof, the State has repeatedly and wrongly attempted to recast the issue presented as one involving a collateral attack on what the State baldly claims is a facially valid judgment. But as is made clear below, even assuming the facial

validity of the 1999 judgment the State did not meet its burden of proof and Mr. Knippling is not collaterally attacking that judgment.

1. The State was required to prove Mr. Knippling was an “offender” at the time he was convicted of prior most serious offenses. Generally, to establish a person’s criminal history the State must only produce a prior judgment that is not “constitutionally invalid on its face.” State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986). Due process requires the State prove an individual’s criminal history and offender score by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

A persistent offender is a person who:

[h]as, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted;

RCW 9.94A.030(37)(a)(ii). Similarly, the State bears the burden of establishing “two applicable convictions exist.” State v. Carpenter, 117 Wn.App. 673, 678, 72 P.3d 784 (2003) (citing State v.

Manussier, 129 Wn.2d 652, 681-82, 921 P.2d 473 (1996), cert. denied. 520 U.S. 1201 (1997)). To meet this burden, the statute requires the State satisfy two separate components of proof to establish someone is a persistent offender. Taking these requirements in reverse order, the State must first prove that the prior offenses would be included in the person's offender score. See e.g. State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 284 (1999) (if an offense has "washed out" it cannot constitute a strike because "would [not] be included in the offender score"). To meet this burden Ammons requires nothing more than that the State produce a judgment that is valid on its face. Having met that burden, the State must still prove the defendant was convicted of the prior offenses "as an offender." RCW 9.94A.030(37)(a)(ii).

"Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. . . .

RCW 9.94A.030(34).

This second requirement exists for the single purpose of barring the use of juvenile offenses as strikes. State v. J.H., 96 Wn.App. 167, 178, 978 P.2d 1121, review denied, 139 Wn.2d 1014

(1999), cert. denied, 529 U.S. 1130 (2000). To be sure, the SRA does not place a similar limitations on the use juvenile priors in other aspects of sentencing. See e.g., RCW 9.94A.030(12) (including juvenile adjudications in definition of “conviction”); Laws 1990, ch.3, § 706 (amending former RCW 9.94A.360 to include juvenile offenses in calculation of offender score); State v. Johnson, 118 Wn.App. 259; 76 P.3d 265 (2003), review denied sub nom., State v. Newell, 151 Wn.2d 1002 (2004) (juvenile priors may disqualify adult defendant from DOSA). The critical distinction between these sentencing provisions and the persistent offender provisions is that the latter expressly limits its reach to priors convictions in which the defendant was an “offender,” i.e., over the age of 18, properly declined, or subject to automatic decline.<sup>1</sup>

2. The State did not prove Mr. Knippling was an “offender” at the time of the 1999 robbery. It is not the defendant’s burden to disprove the State’s sentencing allegations where the State has

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<sup>1</sup> One might contend that the difference in multipliers for juvenile as opposed to adult priors would require the State to prove that a prior offense was indeed a proper adult conviction. But the Court need not reach that question here, first because all but one of Mr. Knippling’s 11 current convictions are for violent offenses or four conspiracy to commit violent offenses and pursuant to RCW 9.94A.525(8) a prior violent offense counts as two points regardless of whether it is an adult or juvenile offense. The sentence on the sole nonviolent offense, for which a juvenile prior would only contribute ½ point, is substantially shorter and concurrent to the remaining sentences thus renders any impact harmless.

failed to support them with competent proof. Ford, 137 Wn.2d at 482. Assuming the State presented sufficient evidence that Mr. Knippling's 1999 offense should be included in his offender score, i.e., produced a judgment which was not invalid on its face, the State did not present any evidence to establish Mr. Knippling was an "offender" at the time he was convicted of the 1999 offense.

To meet its burden the State was required to prove that at the time of the 1999 offense Mr. Kipling was (1) 18 years of age; (2) charged an convicted of an offense for which the Superior Court has jurisdiction pursuant to RCW 13.04.030; or (3) the juvenile court had properly declined jurisdiction. The judgment which the state offered listed Mr. Knippling's age at the time as 16. The judgment was for second-degree robbery, an offense for which a decline hearing is necessary. The "judgment simply did not show how the matter was before the adult court." Petition for Review at 2. The State offered no additional proof that Mr. Knippling was an offender at the time of the 1999 offense.

But rather than recognize its failure of proof, as both the trial court and Court of Appeals did, the State doggedly insists it need not present anything more. The State could only make such a claim by misunderstanding the requirements of RCW 9.94A.030 defining

persistent offender and failing to appreciate the burden it must carry. As it has readily conceded, the State did not offer any evidence to establish Mr. Knippling was an offender. Thus, the State failed to establish he was a persistent offender.

Continuing in its miscasting of the issue, the State contends it the trial court improperly permitted Mr. Knippling to collaterally attack a facially valid judgment. First, the judgment was not facially valid.

This Court has previously said:

There are three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.

In re the Personal Restraint of Dalluge, 152 Wn.2d 772, 779, 100 P.3d 279 (2004) (internal quotations omitted, citing State v. Werner, 129 Wn.2d 485, 493, 918 P.2d 916 (1996)). It is beyond dispute the face of the judgment establishes Mr. Knippling was not yet 18 nor convicted of an automatic-decline offense. Thus, the trial court and Court of Appeals properly concluded the judgment was not valid.

But regardless of the judgment's validity, the trial court properly concluded the State had not met its burden. In reaching this conclusion, the court did not allow Mr. Knippling to collaterally

attack the prior conviction. In fact the Court included the 1999 offense in its offender score calculation. Had the court found the conviction invalid it could not have done so. Plainly the Court found the judgment was valid and concluded the offense was a part of Mr. Knippling's criminal history, but that it did not suffice to prove he was an offender at the time of the offense. The Court of Appeals properly concluded "it is not a collateral attack because it is directed to the present use of a prior conviction." Knippling, 141 Wn.App. at 58 (citing Carpenter, 117 Wn.App. at 678)

The State has never contended Mr. Knippling was properly declined at the time of the 1999 conviction. Knippling, 141 Wn.2d at 57. Indeed, the State's proposed remedy, a retroactive declination hearing, implicitly acknowledges he was not. Instead, the State simply contends it need not prove he was an offender. The State contention shifts the burden of proof to Mr. Knippling to prove he was not an offender at the time of the prior offense, and that he is not now a persistent offender. The State's contention would presumptively allow the use of juvenile offenses as strikes unless the defendant could prove they are not. To require a defendant to disprove the State's allegations, unsupported by facts, that he is a persistent

offender is contrary to due process and the SRA. Ford, 137 Wn.2d at 480-81

3 The proper remedy for the State's failure to prove a defendant is a persistent offender is to sentence the person within the standard range. Where, after the opportunity to do so, the State fails to offer sufficient proof that a person is a persistent offender the State will not be afforded another opportunity to do. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). The Court of Appeals properly concluded that despite Mr. Knippling's specific objection, the State failed to offer proof that he was an offender at the time of 1999 offense. Knippling, 141 Wn.App. at 57-58. Thus, Court of Appeals properly affirmed the sentence.<sup>2</sup>

The State maintains that even if he is correct, Mr. Knippling's remedy is to have a retroactive decline hearing regarding his 1999 offense pursuant to Dalluge. In Dalluge, a personal restraint petition, the petitioner alleged that where he had been charged with

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<sup>2</sup> Because the trial court did not find the 1999 offense was a most serious offense, and because the Court of Appeals affirmed that decision, if this Court agrees with the lower courts no further proceedings are required in the trial court. As such, the recently amended RCW 9.94A.525(21), Laws 2008, ch. 231, §§ 1-5, allowing the State to present additional evidence on remand is inapplicable. Moreover, because Mr. Knippling has not challenged the inclusion of the 1999 offense in his criminal history, those provisions would be inapplicable on remand. Thus, Mr. Knippling does not believe briefing on this point is necessary. If the Court disagrees Mr. Knippling requests the opportunity to submit additional argument on that point.

an automatic-decline offense, first-degree rape, when the charges were reduced to a nonautomatic-decline offense, second-degree rape, the superior court was required to remand the matter to juvenile court. 152 Wn.2d at 775. This Court agreed concluding that once the charges were amended the Superior Court lacked jurisdiction of the matter Id. at 783. Because the petitioner had turned 18 the Court concluded the proper remedy was:

remand to the adult criminal court 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. 786-87. Thus, the State contends Mr. Knippling's case should be remanded for a retroactive decline hearing as in Dalluge.  
Petition at 7.

The State's claimed remedy stems from its insistence that Mr. Knippling is collaterally attacking his 1999 offense. Certainly, Dalluge makes clear that if Mr. Knippling chose to attack his 1999 offense he could. But as is equally clear, he is not yet done so. Thus, the remedy is not to remand this case for a retroactive decline hearing. Instead, the remedy is to do precisely what the trial court and Court of Appeals did, conclude the State failed to

offer sufficient proof that Mr. Knippling was an offender at the time of the 1999 offense.

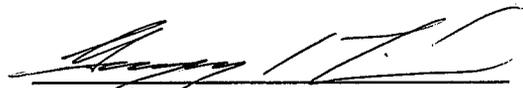
To require Mr. Knippling to seek a retroactive decline hearing as a remedy here would countenance the very sort of collateral attack which Ammons found unacceptable. The availability of that separate remedy has nothing to do with the proper sentence in this case. The State agrees when in a footnote in its petition for review it acknowledges that even with such a hearing the 1999 offense could not be considered a prior most serious offense in the present case, as it would only constitute a conviction from the date of the retroactive decline hearing. Petition at 7 (citing Carpenter, 117 Wn.App. 673 and RCW 9.94A.030(33)). Thus, even under the State's proposed remedy, Mr. Knippling is entitled to collaterally attack his 1999 offense and the State will be foreclosed from seeking a persistent offender sentence. Thus, the State concedes its proposed remedy will have zero impact on Mr. Knippling's current sentence.

The trial court properly sentenced Mr. Knippling.

D. CONCLUSION

For the reasons above, this Court should affirm the conclusion of the trial court and Court of Appeals that the State did not prove Mr. Knippling is a persistent offender.

Respectfully submitted this 30<sup>th</sup> day of September, 2008.



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Attorney for Petitioner

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
PETITIONER,	)	
	)	
v.	)	NO. 80848-1
	)	
TUCERO KNIPLING,	)	
	)	
RESPONDENT.	)	

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MARK LINDSEY	<input checked="" type="checkbox"/>	U.S. MAIL
SPOKANE COUNTY PROSECUTOR'S OFFICE	<input type="checkbox"/>	HAND DELIVERY
1100 W. MALLON AVENUE	<input type="checkbox"/>	_____
SPOKANE, WA 99260-0270		
<input checked="" type="checkbox"/> TUCERO KNIPLING	<input checked="" type="checkbox"/>	U.S. MAIL
794799	<input type="checkbox"/>	HAND DELIVERY
COYOTE RIDGE CC	<input type="checkbox"/>	_____
PO BOX 769		
CONNELL, WA 99326		

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2008.

X \_\_\_\_\_  
*[Signature]*

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