

61869-5

61869-5

No. 61869-5-

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

2009 SEP 14 11:44 AM
COURT OF APPEALS
CLERK

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LANGSTEAD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglas McBroom

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. LANGSTEAD'S RIGHT TO EQUAL PROTECTION IS VIOLATED BY THE ARBITRARY ALLOCATION OF LESSER DUE PROCESS PROTECTIONS IN THE "THREE STRIKES" CONTEXT AS CONTRASTED TO WHERE RECIDIVISM IS CLASSIFIED AS AN 'ELEMENT.' 2

 2. THERE IS NO SUBSTANTIVE DIFFERENCE BETWEEN THE 'KINDS' OF RECIDIVISM REPRESENTED IN THE TWO CLASSIFICATIONS 4

 3. THE STATE'S HYPERBOLIC CLAIM THAT LANGSTEAD'S EQUAL PROTECTION ARGUMENT "WOULD INVALIDATE THE POAA" AND THE SRA SENTENCING SCHEME IS BASED UPON A FALSE PREMISE..... 6

B. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Furth</u> , 5 Wn.2d 1, 4 P.2d 195 (1940).....	8
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	6
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	1
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	3
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	4, 7, 8

United States Constitutional Provisions

U.S. Const. amend. 6.....	3
U.S. Const. amend. 14.....	3

Statutes

RCW 25.50.110.....	2
RCW 9.68A.090	2, 5
RCW 9.94A.010	6
RCW 9.94A.030	4
RCW 9.94A.510	6, 7
RCW 9.94A.515	7
RCW 9A.46.020	2
RCW 9A.88.010	2, 5

A. ARGUMENT IN REPLY

Robert Langstead appeals his three-strikes sentence. Langstead chiefly argues that his state and federal constitutional right to equal protection was violated by the use of a prior conviction to impose a persistent offender sentence by a diminished standard of proof, based on the Legislature's classification of the prior conviction as a "sentencing factor", where in other circumstances the Legislature has chosen to treat recidivism as an element that must be proven to a jury beyond a reasonable doubt. Langstead argues that as in both circumstances, the goal is the same – to deter reoffense and protect the public by punishing recidivist offenders more harshly – there is no rational basis for the different classifications and standards of proof.

The State advances a number of purported reasons to conclude that a rational basis for the differing classifications exists. None of the reasons identified by the State withstand scrutiny. Langstead's sentence must be reversed and remanded for a standard range sentence.¹

¹ State v. Recuenco, 163 Wn.2d 428, 431, 180 P.3d 1276 (2008).

1. LANGSTEAD'S RIGHT TO EQUAL PROTECTION IS VIOLATED BY THE ARBITRARY ALLOCATION OF LESSER DUE PROCESS PROTECTIONS IN THE "THREE STRIKES" CONTEXT AS CONTRASTED TO WHERE RECIDIVISM IS CLASSIFIED AS AN 'ELEMENT.'

In the context of certain offenses, the Legislature has elected to punish recidivism by elevating crimes from a misdemeanor to a felony based upon the defendant's prior criminal misconduct. For example, the crime of Communicating With A Minor for Immoral Purposes is elevated from a gross misdemeanor to a felony if the defendant was previously convicted of a felony sex offense. RCW 9.68A.090(2). The crime of Indecent Exposure is elevated from a misdemeanor to a felony if the defendant was previously convicted of Indecent Exposure or a felony sex offense. RCW 9A.88.010(c). The crime of violating a no-contact order is elevated from a gross misdemeanor to a felony if the defendant has two prior convictions for violating a no-contact order or court order. RCW 25.50.110(5). The crime of harassment is elevated from a gross misdemeanor to a felony if the defendant was previously convicted of "any crime of harassment." RCW 9A.46.020(c).

In each of these circumstances, the prior conviction is an element that must be proven to the jury beyond a reasonable

doubt. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). But, where the Legislature has classified the prior conviction as a prior felony “strike,” the State need only prove the conviction to a judge by a preponderance of the evidence. It is this significant difference in the due process protections afforded the accused based upon the Legislature’s classification of the prior offense that defies rational basis scrutiny.

Thus, as an initial matter, the State mistakes Langstead’s argument. The State believes the distinction hinges on the Legislature’s decision to make “specific crimes more serious by reason of specific, related prior crimes” as contrasted to the Legislature’s intent to “[i]ncreas[e] the punishment for felonies in general, and for certain ‘most serious offenses’ in particular, by taking recidivism into account.” Br. Resp. at 16-17. While Langstead questions whether a meaningful distinction can be drawn between “making specific crimes more serious” (and thereby increasing the penalties for those crimes) and “increasing the punishment,” the State’s argument misses the mark. In both instances, the Legislature’s intent is to punish recidivism, yet in the first circumstance the defendant receives the full panoply of due process protections afforded by the Sixth and Fourteenth

Amendments, and in the second he is expressly denied them. This classification violates equal protection.

2. THERE IS NO SUBSTANTIVE DIFFERENCE BETWEEN THE 'KINDS' OF RECIDIVISM REPRESENTED IN THE TWO CLASSIFICATIONS.

The State believes a distinction can be drawn between the nature of recidivist behavior at issue in the two classifications. In the first instance, the State claims the Legislature sought to address offenders who had committed “specific, related prior crimes” with the intent to “deter repeat offenses of a specific nature.” Br. Resp. at 17. In the second instance, the State asserts the intent is to punish the repeat commission of “certain most serious offenses” with the intent to “protect the public.” As the State’s labored efforts to differentiate between these two circumstances suggest, this is a distinction without a difference.

The POAA is aimed at punishing offenders who previously have been convicted of certain violent crimes and crimes against persons. State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514 (1996). These “specific, related” crimes are enumerated by statute in an exclusive list. RCW 9.94A.030(32); (37). The Legislature has also chosen to enhance the seriousness of certain crimes based on

the prior commission of any felony sex offense. See e.g. RCW 9.68A.090(2); RCW 9A.88.010(c). “Sex offense” is likewise defined by statute and includes, inter alia, almost any violation of RCW Chap. 9A.44, and any felony that was committed with sexual motivation. See RCW 9.94A.030(46).

As the breadth of the definition of “sex offense” intimates, the two categories overlap and contain many of the same offenses. In both circumstances, the legislative interest in deterrence through increased punishment and protection of the public is the same. Yet, in the first context, an offender previously convicted of kidnapping in the second degree with sexual motivation would be entitled to have this conviction proven to a jury beyond a reasonable doubt. But if the State sought to treat this same individual as a persistent offender, this same conviction would only have to be proven to a judge by a preponderance of the evidence. This Court should conclude there is no substantive difference between the two classifications, and no rational basis for differential treatment.

3. THE STATE'S HYPERBOLIC CLAIM THAT LANGSTEAD'S EQUAL PROTECTION ARGUMENT "WOULD INVALIDATE THE POAA" AND THE SRA SENTENCING SCHEME IS BASED UPON A FALSE PREMISE.

The State asserts that Langstead's equal protection argument, "taken to its logical conclusion, would invalidate not only the POAA but the sentencing scheme of the SRA in general – all prior convictions would have to be treated as 'elements' of the current crime and proved to a jury beyond a reasonable doubt." Br. Resp. at 17. But the State's "floodgates" argument is based on a false premise.

In enacting the SRA, the Legislature created a structured sentencing scheme which cabins but does not eliminate judicial discretion by requiring sentences be imposed within specified guidelines. RCW 9.94A.010. Standard sentence ranges for these offenses are set forth in a grid which correlates the length of a potential sentence to the seriousness level of a crime based on the offender's criminal history. RCW 9.94A.510; RCW 9.94A.525. The standard range is "a legislative determination of the applicable punishment range for the crime as ordinarily committed." State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997).

For example, without reference to the “persistent offender” sentencing scheme, the seriousness level of Langstead’s current offenses of robbery in the first degree and robbery in the second degree would be nine and four, respectively. RCW 9.94A.515. Like all felony offenders, including those offenders convicted under statutes that punish recidivism by making prior offenses elements of the charged offense, Langstead’s SRA offender score and standard sentencing range are calculated by counting his prior convictions and other current offenses. RCW 9.94A.510; .525. According to this uniform scheme, the State calculated Langstead’s standard range for the second-degree robbery counts as 63-84 months confinement and for the first-degree robbery counts as 129-171 months confinement. CP 180.

However, because the State sought to punish Langstead under the POAA, this uniform sentencing scheme was jettisoned, and instead of seeking a sentence within the grid provided in RCW 9.94A.510, the State was permitted to seek a sentence of life without the possibility of parole. This was perfectly permissible under Initiative 593. Thorne, 129 Wn.2d at 751-69. Yet, nothing prevented the State from proving Langstead’s prior “strike” offenses to a jury, and nothing prevented the State from establishing their

existence and validity beyond a reasonable doubt,² just as the State would be required to do if Langstead had been charged with an offense which classified the prior conviction as an “element.”

Langstead does not contend that the POAA must be dismantled, but rather that offenders punished under this scheme should receive the same due process protections as offenders who are entitled to have their prior convictions proven to a jury by virtue of the Legislature’s classification of those convictions. Thus, Langstead’s argument does not “invalidate the POAA” or the “sentencing scheme of the SRA in general.”³ Consistent with the guarantee of equal protection, this Court should conclude that where an individual is to be sentenced under the POAA, the State must provide the same full due process protections afforded other recidivist offenders.

² Until the enactment of the POAA, the State provided these protections as a matter of course under the habitual criminal statute. State v. Furth, 5 Wn.2d 1, 18, 4 P.2d 195 (1940). Indeed, at the time of the POAA’s enactment, the King County Prosecuting Attorney believed that these full due process protections should continue to be applied in persistent offender proceedings. See Thorne, 129 Wn.2d at 762 n. 5.

³ Furthermore, even assuming the State’s floodgates argument to have some potential merit, the State has not identified why subjecting prior convictions to a heightened standard of proof would be unduly onerous, as the State already tries prior convictions to juries (and obtains stipulations regarding criminal history from defendants) in numerous other circumstances.

B. CONCLUSION

For the foregoing reasons, and based on the reasons articulated in the Brief of Appellant, this Court should reverse Langstead's sentence and remand for resentencing within the standard range.

DATED this 4th day of September, 2009.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Susan F. Wilk', written over a horizontal line.

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

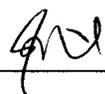
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 61869-5-I
v.)	
)	
ROBERT LANGSTEAD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DEBORAH DWYER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT LANGSTEAD 626281 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF SEPTEMBER, 2009.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710