

65804-2

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No. 65804-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVIE GOLDEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

 1. THE STATE FAILED TO PROVE MR. GOLDEN'S 2001 MISSOURI CONVICTION FOR "STEALING" WAS FACTUALLY COMPARABLE TO A WASHINGTON FELONY 3

 a. To prove a foreign conviction is factually comparable to a Washington felony, the State may rely only on facts that were proved beyond a reasonable doubt at trial or admitted by the defendant during the course of a guilty plea 3

 b. The State did not prove Mr. Golden's 2001 Missouri conviction for "stealing" was factually comparable to Washington felony theft..... 9

 2. THE TRIAL COURT ERRED IN IMPOSING A 24- TO 36-MONTH TERM OF COMMUNITY CUSTODY..... 10

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. VI	
U.S. Const. amend. XIV	5

Washington Cases

<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980)	10
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	12
<u>In re Pers. Restraint of Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005)	4, 5, 6, 7, 8
<u>State v. Bunting</u> , 115 Wn. App. 135, 61 P.3d 375 (2003).....	7, 8
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	4, 10
<u>State v. McCorkle</u> , 137 Wn.2d 490, 973 P.2d 461 (1999)	4
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998)	4

United States Supreme Court

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	6
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	6
<u>Jones v. United States</u> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)	6
<u>Shepard v. United States</u> , 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)	7

Statutes

Former RCW 9A.56.030 (2000)	9
Former RCW 9A.56.040 (2000)	9
Former RCW 9A.56.300 (2000)	9
Laws 2009, ch. 375, § 20	11
Laws 2009, ch. 375, § 5	11
RCW 9.94A.030	3, 11, 12
RCW 9.94A.701(1)(b)	12
RCW 9.94A.701(2).....	11
RCW 9A.28.020	2
RCW 9A.56.030(1)(b)	10
RCW 9A.56.190	2
RCW 9A.56.200(1)(b)	2

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Stevie Golden's 2001 Missouri conviction for "stealing" was comparable to a Washington felony and in including it in his offender score.

2. The trial court erred in imposing a 24- to 36-month term of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If a prior out-of-state conviction is not legally comparable to a Washington felony, the State must prove it is factually comparable before a trial court may include it in the defendant's offender score. To prove an out-of-state conviction is factually comparable, the State may rely only on facts that were proved at trial or admitted by the defendant during the course of a guilty plea. Did the State prove Mr. Golden's 2001 Missouri conviction for "stealing" was factually comparable, where the State presented only a copy of the charging document and did not prove Mr. Golden admitted the alleged facts when he pled guilty to the crime?

2. Did the court exceed its statutory authority in imposing a 24- to 36-month term of community custody, where the statute authorized the court to impose only an 18-month term?

C. STATEMENT OF THE CASE

On September 11, 2008, Mr. Golden was charged with one count of attempted first degree robbery, RCW 9A.28.020, RCW 9A.56.200(1)(b) and RCW 9A.56.190. CP 1. After a jury trial, he was convicted as charged. CP 6-14.

At sentencing, the trial court calculated Mr. Golden's offender score as a "3." CP 7. The court found Mr. Golden had three prior convictions from Missouri for "stealing" that counted in his offender score. CP 12.

Mr. Golden appealed, arguing the court erred in finding his 2001 conviction for stealing was comparable to a Washington felony and in including it in his offender score. CP 16. The State conceded that the record did not support the trial court's finding that the 2001 conviction was comparable to a Washington felony. CP 17. This Court accepted the State's concession and reversed and remanded for resentencing. CP 17.

At resentencing, to prove the comparability of the 2001 Missouri conviction, the State presented a copy of the Missouri charging document. Sub #107¹ at 8. The charging document alleged

¹ A supplemental designation of clerk's papers has been filed for this document.

that on or about the 1st day of August, 2001, in the County of Boone, State of Missouri, the defendant appropriated United States Currency, by physically taking it from the person of Kyle Volrath which property was in the possession of Kyle Volrath, and defendant appropriated such property without the consent of Kyle Volrath and with the purpose to deprive him thereof.

Id. But the State presented no documents to show Mr. Golden admitted those alleged facts when he pled guilty to the crime.

Nonetheless, the court found the 2001 Missouri conviction was comparable to a Washington felony and included it in Mr. Golden's offender score. CP 20, 25. The court also imposed 24 to 36 months of community custody, finding the current offense was a "serious violent offense." CP 23 (citing RCW 9.94A.030).

D. ARGUMENT

1. THE STATE FAILED TO PROVE MR. GOLDEN'S 2001 MISSOURI CONVICTION FOR "STEALING" WAS FACTUALLY COMPARABLE TO A WASHINGTON FELONY

a. To prove a foreign conviction is factually comparable to a Washington felony, the State may rely only on facts that were proved beyond a reasonable doubt at trial or admitted by the defendant during the course of a guilty plea.

Where a defendant's prior convictions are from another state, the Sentencing Reform Act (SRA) requires the trial court to translate

the convictions "according to the comparable offense definitions and sentences provided by Washington law" before they may be included in the offender score. RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether an out-of-state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the out-of-state crime with the comparable Washington felony offense. If the elements are comparable, the out-of-state conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

Here, the State conceded in Mr. Golden's first appeal, and this Court agreed, that the 2001 Missouri conviction for "stealing" was not legally comparable to a Washington felony. CP 17. Thus, on remand, the State was required to prove the 2001 conviction was factually comparable.

Where a foreign conviction is not legally comparable to a Washington felony, the current sentencing court may look at the record of the prior conviction to assess whether the defendant's underlying conduct would have violated the comparable Washington felony statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. But the court may examine only those documents that show conclusively that the facts necessary to establish comparability were proved to a jury or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258. The mere fact of the prior conviction is not sufficient to make this showing. Id.

These limits on the judge's fact-finding function are constitutionally mandated. It is well-established that the Sixth² and Fourteenth³ Amendments to the United States Constitution require that "[o]ther than the fact of a prior conviction, any fact that

² The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

³ The Fourteenth Amendment states that "nor shall any state deprive any person of life, liberty, or property, without due process of law."

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Prior convictions are exempted from the Apprendi rule because they have been established by procedures that satisfy constitutional due process and Sixth Amendment guarantees. Apprendi, 530 U.S. at 488; accord Jones v. United States, 526 U.S. 227, 249, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (leaving intact prior conviction exception only because prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Thus, at sentencing, a court may find that a prior conviction exists without running afoul of Apprendi, only because the fact of the prior conviction necessarily rests on a finding of guilt by a jury or the defendant's guilty plea. Lavery, 154 Wn.2d at 256.

In the case of foreign convictions that are not legally comparable to Washington felonies, however, the mere fact of the prior conviction is not sufficient to establish that the facts necessary

to demonstrate comparability were ever proved to a jury or admitted in the course of a guilty plea. Id. at 257. As this Court explained:

If the statutory formulation of the out-of-state crime did not contain one or more of the elements of the Washington crime on the date of the offense, it means that the out-of-state court or jury did not have to find each fact that must be found to convict the defendant of the essential elements of liability under the Washington counterpart crime.

State v. Bunting, 115 Wn. App. 135, 140, 61 P.3d 375 (2003).

Moreover, there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense. Lavery, 154 Wn.2d at 257.

Thus, although the sentencing court may look at the underlying record to assess whether the conduct would have violated the comparable Washington statute, that inquiry is strictly limited. The court may examine only those documents that conclusively demonstrate the relevant facts were proved to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. Shepard v. United States, 544 U.S. 13, 21, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); Lavery, 154 Wn.2d at 258; Bunting, 115 Wn. App. at 142-43. The elements of the foreign crime remain the cornerstone of the analysis, as "[f]acts or allegations contained in the record, if not directly related to the elements of the charged

crime, may not have been sufficiently proven at trial." Bunting, 115 Wn. App. at 141 (quoting Morley, 134 Wn.2d at 606).

In Bunting, for example, to prove a prior Illinois offense was factually comparable to a Washington felony, the State submitted an "Official Statement of Facts," a complaint, and the indictment, which arguably alleged the necessary facts. Bunting, 115 Wn. App. at 141. This Court held the documents were not sufficient to prove the required missing element, however, as they did not "clearly indicate that this element was proved or conceded by Bunting's guilty plea." Id. at 143.

Thus, if a prior conviction resulted from a guilty plea, the current sentencing court may not rely on the charging document alone, as it would not show the defendant necessarily admitted those facts in pleading guilty. Shepard, 544 U.S. at 24-25 (plurality opinion). As the Washington Supreme Court recognized in Lavery, without additional documents conclusively demonstrating the facts that the defendant admitted in pleading guilty, including the prior conviction in the offender score violates the defendant's due process and jury trial rights. Lavery, 154 Wn.2d at 258.

b. The State did not prove Mr. Golden's 2001 Missouri conviction for "stealing" was factually comparable to Washington felony theft. To support its argument that Mr. Golden's 2001 Missouri conviction for stealing was comparable to Washington felony theft, the State submitted a copy of the Missouri "Sentence and Judgment." CP 56. The document shows that Golden was convicted for "stealing" in violation of Mo. Rev. Stat. § 570.030; that the conviction was a class C felony; and that Golden pled guilty and received a five-year sentence. Id. But the document does not show what subdivision of the statute Golden was convicted of violating. Thus, it is possible Golden was convicted of violating Mo. Rev. Stat. § 570.030(3)(3) (2000), which covers a broader range of property than Washington's felony theft statute. See Former RCW 9A.56.030 (2000); former RCW 9A.56.040 (2000); former RCW 9A.56.300 (2000).

On remand following Mr. Golden's first appeal, the State also submitted a copy of the Missouri charging document. Sub #107 at 8. That document alleged Mr. Golden committed the crime of "stealing" by "physically taking" United States Currency "from the person of Kyle Volrath" without Mr. Volrath's consent and with "the purpose to deprive him thereof." Id. In Washington, a person who

takes "[p]roperty of any value, other than a firearm as defined in RCW 9A.56.030(1)(b) or a motor vehicle, . . . from the person of another" commits the crime of felony theft. RCW 9A.56.030(1)(b). Thus, if the State proved Mr. Golden admitted the alleged facts during the course of his guilty plea, the 2001 Missouri conviction would be comparable to a Washington felony.

But the State did not make the required showing. The State did not prove Mr. Golden admitted the necessary facts when he pled guilty. While Missouri alleged Mr. Golden took property from the person of another, the record does not establish that Mr. Golden adopted that allegation in pleading guilty. The trial court therefore erred in including the 2001 Missouri conviction in Mr. Golden's offender score.

c. Mr. Golden must be resentenced. Where a sentence is erroneous due to the miscalculation of the offender score, the defendant is entitled to be resentenced. Ford, 137 Wn.2d at 485. That is the remedy here.

2. THE TRIAL COURT ERRED IN IMPOSING A 24- TO 36-MONTH TERM OF COMMUNITY CUSTODY

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, the court imposed 24 to 36 months of community custody under the mistaken impression Mr. Golden was convicted of a "serious violent offense." CP 23 (citing RCW 9.94A.030). The court exceeded its statutory authority in doing so, as the SRA authorizes only a determinate term of 18 months community custody for attempted first degree robbery.

RCW 9.94A.701(2) provides:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

The statute took effect July 26, 2009. See Laws 2009, ch. 375, § 5. It unequivocally applies to Mr. Golden's sentence. See Laws 2009, ch. 375, § 20 ("This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after July 26, 2009.").

Attempted first degree robbery is a "violent offense" within the meaning of RCW 9.94A.701(2). The definition of "[v]iolent offense" includes "[a]ny felony defined under any law as a class A felony or an attempt to commit a class A felony." RCW

9.94A.030(53)(a)(i). First degree robbery is a class A felony. RCW 9A.56.200(2). Neither first degree robbery nor attempted first degree robbery is included within the definition of "serious violent offense," which carries a longer term of community custody. See RCW 9.94A.030(44); RCW 9.94A.701(1)(b). Therefore, the court was authorized to impose only 18 months of community custody, not 24 to 36 months.

A sentence in excess of statutory authority is subject to challenge, and the person is entitled to be resentenced. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (and cases cited therein). Because the court exceeded its statutory authority in imposing a 24- to 36-month term of community custody, the sentence must be reversed and remanded for resentencing.

E. CONCLUSION

The trial court erred in including Mr. Golden's 2001 Missouri conviction for stealing in his offender score and in imposing a 24- to 36-month term of community custody. He must be resentenced.

Respectfully submitted this 28th day of February 2011.


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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 65804-2-I
v.)	
)	
STEVIE GOLDEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2011.

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