

NO. 65804-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVIE GOLDEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREG CANOVA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An appellate court will remand for resentencing when a trial court's admittance of an out-of-state prior conviction has not been established by a preponderance of the evidence by the State. Here, the trial court properly conducted a comparability analysis of the foreign conviction based on documents provided by the State and found that the prior conviction was the equivalent of the Washington crime of Theft in the First Degree. Did the trial court properly include the out-of-state prior in calculating the defendant's offender score?

2. Remand for entry of an order amending the judgment and sentence modifying a miscalculated term of community custody is appropriate if the court imposed a term outside of the Sentencing Reform Act. Did the trial court err in sentencing the defendant to 24-36 months of community custody when he was convicted of Attempted Robbery in the First Degree, a violent offense?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Stevie Golden was charged by information with one count of Attempted Robbery in the First Degree. CP 1. On March 5, 2009,

a jury returned a guilty verdict to that charge. CP 6. The defendant was sentenced on April 7, 2009 to 40 months of confinement based on an offender score of three which included three convictions out of Missouri. CP 6-14. He appealed his sentence claiming that the State failed to prove his 2001 Missouri conviction was a comparable Washington felony. CP 28-37. The State conceded that the record was insufficient to establish that the Missouri conviction was comparable to the Washington crime of Theft in the First Degree. CP 17. On May 21, 2010, the trial court resentenced the defendant after hearing argument from the parties and conducting a comparability analysis. CP 19-27. The trial court found that the elements of the 2001 Missouri Stealing conviction was comparable to the elements of the Washington statute for Theft in the First Degree. CP 19-27. The court also imposed 24-36 months of community custody. CP 19-27. The defendant now appeals.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INCLUDED THE DEFENDANT'S 2001 MISSOURI CONVICTION FOR STEALING AFTER CONDUCTING A COMPARABILITY ANALYSIS.

RCW 9.94A.525(3) provides that out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. The critical determination is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington. State v. Bush, 102 Wash.App. 372, 377, 9 P.3d 219 (2000).

In determining whether foreign convictions are comparable to Washington felony offenses, the Washington Supreme Court devised a two-part test for comparability. State v. Lavery, 154 Wash.2d 249, 255, 111 P.3d 837 (2005) citing State v. Morley, 134 Wash.2d 588, 952 P.2d 167 (1998). Under this two-part test, foreign convictions are included in the defendant's score if there is either legal or factual comparability. State v. Farnsworth, 133 Wash.App. 1, 17, 130 P.3d 389 (2007) citing State v. Lavery, 154 Wash.2d at 255, 111 P.3d 837. Legal comparability exists when the elements of the foreign conviction are substantially similar to

the elements of a Washington crime. Id. More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed. State v Morley, 134 Wash.2d 588, 606, 952 P.2d 167(1998). If the elements are not identical, or if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. Id. citing State v. Duke, 77 Wash.App. 532, 535, 892 P.2d 120 (1995).

This second step of the test determines factual comparability. While it may be necessary to look to the record of the foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Morley, at 606. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial. Id. A certified copy of the judgment and sentence is the best evidence of a prior conviction, but other documents of record may be introduced to establish the criminal

history. State v. Ortega, 120 Wash.App. 165, 173, 84 P.3d 935 (2004). In Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254 (2005), the Supreme Court addressed the issue of documents to consider by a later court in determining prior convictions. The Court held that a later court is limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. Id. Sentencing courts engaging in a comparability analysis rely only on facts proved at trial or in a plea, or admitted or conceded by a defendant. (Copies of minute orders, defendant's guilty pleas, charging documents identifying the crimes charged along with their elements, and abstract of judgment were all ample documents to demonstrate the prior conviction.) See State v. Winnings, 126 Wash.App. 75, 92, 107 P.3d 141 (2005).

In the present case, the defendant was charged under Missouri's statute for Stealing. The relevant statute reads:

A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.

Missouri Revised Statute 570.030.

Subsection 3 of the statute further defines alternatives in which conduct under this provision would constitute a class C felony when value of property or services is an element:

Notwithstanding any other provision of the law, any offense in which the value of property or services is an element is a class C felony if:

- (1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars; or
- (2) The actor physically takes the property appropriated from the person of the victim; or
- (3) The property appropriated consists of:
  - (a) Any motor vehicle, watercraft or aircraft; or
  - (b) Any will or unrecorded deed affecting real property;

The subsection then continues to provide numerous alternative means of committing the crime of Stealing that are not relevant to this case.

The corresponding Washington statute RCW 9A.56.030 provides:

- (1) A person is guilty of theft in the first degree if he or she commits theft of:
  - (a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;
  - (b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another; or
  - (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.
- (2) Theft in the first degree is a class B felony.

In comparing the statutory elements under the first step of the Morley analysis, it would appear that the Missouri statute is more broad or contains alternatives not listed under the Washington theft statute. Therefore, further analysis is required.

The next step is to look to the record of the Missouri conviction. At the resentencing, the State provided a packet of additional documents in support of the Missouri conviction, certified copies of the court docket, Information, First Amended Complaint, Complaint, Probable Cause Statement, and Judgment. CP 65-77. Additionally, the record reflects that the previously submitted certified documents were to supplement the record. 1RP 14<sup>1</sup> Those documents include Certified Sentence and Judgment and Department of Corrections Face Sheet. CP 44-64.

In reviewing the charging documents from Missouri, the defendant was originally charged with Robbery in the First Degree. The charge was then amended down to Stealing as reflected in the First Amended Complaint and Information. CP 72, 73. Both documents lay out the elements of the offense, specifically:

...on or about the 1<sup>st</sup> day of August, 2001, in the County of Boone, State of Missouri, the defendant appropriated United States Currency by physically

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<sup>1</sup> Verbatim Transcript of Recorded Hearings May 14, 2010 and May 21, 2010.

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.

The trial court compared the elements set forth in the Missouri Amended Complaint and RCW 9A.56.030 and found that the elements are identical. The trial court included the Missouri conviction for Stealing in the defendant's criminal history. 1RP 19-21.

The defendant alleges that the State still needed to establish that the facts contained within the charging documents were proven beyond a reasonable doubt or that the defendant admitted to those facts under a factual comparability analysis. The defendant bases this assertion on State v. Bunting, 115 Wash.App. 135, 61 P.3d 375 (2003). However, his reliance on Bunting is misplaced. There, the court rejected the use of the equivalent of a probable cause statement to establish the element of intent which was not evidenced in the Indictment or the foreign statute, but required under Washington law. The court held that without proof that the facts were admitted to or had been proven beyond a reasonable doubt, the facts contained in the "Official Statement of Facts" were mere allegations. Id. at 142-43.

On the contrary, the Bunting court recognized that the relevant document in the comparability analysis was the indictment because Bunting pled guilty to armed robbery; the only acts he conceded were the elements of the crime stated in the indictment. Id. at 143. Stated another way, the State had not established comparability because the intent element was not contained in the indictment or charging document. Therefore, in order to rely on other foreign records to support the element of intent, the State must prove that the facts contained in the "Official Statement of Facts" were admitted or proven beyond a reasonable doubt.

Furthermore, in State v. Booker, this Court held that the State's reliance on a certified Judgment and Sentence and Information to establish factual comparability was proper. State v. Booker, 143 Wash.App. 138, 176 P.3d 620 (2008). There, the out-of-state Information contained the same elements required to prove a Washington felony firearms offense and therefore the State met its burden of proving by a preponderance of the evidence that Booker was convicted of a crime comparable to possession of a firearm by a felon in Washington. Id. at 143. In State v. Farnsworth, the court held that the federal statute did include alternative elements, however, the indictment was specific to the

particular element to which Farnsworth was charged, which was comparable to the Washington firearms offense. State v. Farnsworth, 133 Wash.App. 1, 20, 130 P.3d 389 (2007). The court held that the indictment clearly charged Farnsworth with possession of only a firearm, not ammunition; the greater breadth of the federal statute does not render the federal conviction incomparable to the Washington offense. Id.

In the present case, the reasoning is directly on point. The elements contained in the Missouri Information and Amended Complaint are identical to the elements of the Washington Theft in the First Degree under subsection (b). The record is clear that the defendant does not dispute his plea of guilty to the crime of Stealing. Therefore, the defendant concedes to the facts and elements contained in the Information and Amended Complaint.

Moreover, in reviewing the Docket Entry under the Missouri case number, the same day that the Information amending down the charge to Stealing was filed, the defendant entered a plea of guilty in open court. CP 70. The docket also states that findings were made and set forth in open court. CP 70. The court immediately imposed its sentence. CP 70. Additionally, under the document entitled Judgment, the record reflects the following:

The court informed the defendant of verdict/finding, asks the defendant whether (s)he has anything to say why judgment should not be pronounced, and find that no sufficient cause to the contrary has been shown or appear to the court.

CP 76.

All of these documents are filed under the same case number and established that the defendant's original charge of robbery in the first degree was amended down to stealing and on the same day, he entered a guilty plea and sentence imposed. The record of this Missouri conviction establishes that the defendant conceded to the facts and elements contained in the charging documents.

Therefore, the State has met its burden of proving the defendant's Missouri conviction for Stealing to be comparable to a Washington felony and is properly included in the defendant's criminal history by the trial court.

**2. THE TRIAL COURT IMPOSED AN INCORRECT TERM OF COMMUNITY CUSTODY IN ERROR.**

RCW 9.94A.030(45)(a)(i) sets out the statutory definition of a violent offense. Under this provision, a violent offense is defined as

any felony defined under law as a class A felony or an attempt to commit a class A felony.

RCW 9A.56.200(2) defines robbery in the first degree as a class A felony. Therefore, the crime of attempted robbery in the first degree is a violent offense.

The term of community custody for a violent offense is defined under RCW 9.94A.701(2). It states that for violent offenses, the court shall order an offender to community custody for eighteen months.

Here, at the resentencing, the trial court correctly identified attempted robbery in the first degree as a violent offense. 1RP 24. However, the court was mistaken that the defendant was subject to a 36-month term of community custody. 1RP 24. Accordingly, the error was amplified when the community custody term was marked as a range consistent with a serious violent offense, 24-36 months. CP 23. The State concedes that the community custody range imposed by the trial court was erroneous. The appropriate community custody term as defined under RCW 9.94A.701(2) is eighteen months.

The State asks this court to remand to the trial court for entry of an order amending the Judgment and Sentence to reflect a community custody term of 18 months.

D. CONCLUSION

Based on the above arguments, the court should affirm the inclusion of the defendant's 2001 Missouri conviction for Stealing as proper and comparable to a Washington felony.

The State respectfully requests remand to the trial court for entry of an order amending the Judgment and Sentence regarding the term of community custody.

DATED this 27 day of April, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen M. Cyr, attorney for the Appellant, of the Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101 containing a copy of Brief of Respondent to be sent to Court of Appeals, in State v. Stevie Golden, Cause No. 65804-2-I, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Janice Schwarz  
Done in Kent, Washington

Date 4/27/11

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