NO. 43179-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LORENZO WEBB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Presiding Judge

No. 10-1-02833-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show any error the trial court's determination that his 1982 and 1992 Washington convictions for assault in the second degree are comparable to a most serious offense?

2. Did the trial court properly reject defendant's argument that the court should not include his 1992 conviction in his criminal history when defendant failed to show that its constitutional facial invalidity?

3. Did the trial court properly sentence defendant as a persistent offender?

B. STATEMENT OF THE CASE.

1. Procedure

On July 6, 2010, the Pierce County Prosecuting Attorney filed an information charging appellant, LORENZO WEBB (defendant), with assault in the second degree with a deadly weapon enhancement. CP 1-2. The information was later amended to add an alternative means of committing assault in the second degree so that the jury could consider whether the assault was committed by :1) use of a deadly weapon ; or 2) recklessly inflicting substantial bodily harm. CP 12-13.

The trial commenced on June 1, 2011, before the Honorable Edmund Murphy. RP 1-3.[1] After hearing the evidence the jury found defendant guilty of assault in the second degree (by intentionally assaulting and recklessly inflicting substantial bodily harm) and returned a special verdict that the defendant and victim were members of the same family or household. 6/8/11.RP 3-7; CP 132 -137.

The sentencing hearing took place over three dates, January 27, February 3, and March 2, 2012. RP 361, 380, 430. The State provided certified copies of the judgments of defendant's prior convictions as well as other relevant court documents pertaining to those judgments. RP 383-386. The State also called several witnesses to testify when defendant had been released from confinement on his prior convictions, when he had been booked into jail for probation violations on his prior convictions, and to testify that a comparison of the fingerprints on these prior judgments matched the defendant's known prints. RP 386-415.

The State contended that defendant was a persistent offender based upon his current conviction for assault in the second degree, and his 1982 and 1992 convictions for assault in the second degree from Pierce County, Washington. CP 176-223, 159-171, 172-175. Defendant contended that

---

[1] There are ten volumes comprising the entire verbatim report of proceedings. Seven of these volumes comprise the majority of the trial proceedings and the pages are sequentially numbered from 1 through 465. The State shall reference these volumes as "RP." All other volumes shall be referred to by referencing the court date the transcript pertains to, followed by an "RP."

neither of these pre -December 2, 1993, were comparable to a strike offense. CP 145-153, 225-230. Defendant further contended that the 1992 conviction was constitutionally invalid on its face and should not be included in defendant's criminal history. CP 145-153.

The court found that the State had shown that the prior convictions belonged to defendant and that they did not wash-out. RP 431-432, 450-452, CP 282-287. It further found that both defendant's 1982 and 1992 convictions were comparable to strike offenses. RP 444- 450; CP 282-287. It also found that defendant had not met his burden of showing a constitutionally defective judgment as to the 1992 conviction. RP 442-444. The court reduced it ruling to findings of fact and conclusions of law. CP 282-287; *see*, Appendix A. The court then sentenced defendant as a persistent offender to a sentence of life without the possibility of parole. CP 240-253.

From entry of this judgment, defendant filed a timely notice of appeal. CP 259-273,

2. Facts

[A detailed summary of the evidence adduced at trial is not required as defendant does not contest his conviction and his appellate issues pertain only to his sentence. The following is a brief summary of the facts underlying his conviction.]

Georgia Phelps testified that on July 2, 2010, she was living with the defendant in an apartment located at 402 North G Street in Tacoma Washington. RP 125. She and the defendant had been in a relationship for approximately seven months, but for the couple of weeks leading up to July 2, they had had several arguments. RP 126-27. On the night of July 2, 2010, they got into another argument, and Ms. Phelps told defendant that she wanted him to move out. RP 129-30. Ms Phelps told defendant that she was going to go to a neighbor's for a bit, but as she tried to leave he slammed the door on her, catching her arm and hand between the door and the casing. RP 129, 131. This infuriated Ms. Phelps and she reiterated that she wanted him out of her home and that he needed to be gone when she got back from the neighbor's. RP 132. Defendant responded " If you want out, I'll take you out. I'll kill you, you fucking bitch." RP 135. He then grabbed her head and repeatedly slammed it into the corner of the wall, then the floor, then the wall again. *Id.* At one point defendant threw Ms Phelps backwards towards the refrigerator and into the kitchen; when she looked at defendant again, he was holding a large kitchen knife. RP 136, 141-42. Ms. Phelps asked him not to kill her. RP 136, 140. Ms Phelps has difficulty recalling the exact sequence of events after that but she remembers that she ended up back near the front door. RP 136-38. Defendant stood with the knife in his hand, holding it above

his head, with the blade pointing down and towards her. RP 137. He then started hitting her head against the wall again. RP 138. Ms Phelps remembers being hit repeatedly by his fist, but was eventually able to crawl out of the apartment on her hands and knees. RP 138-39. Neighbors came to her assistance. RP 139.

Police arrived on the scene after receiving a call about a possible domestic violence assault; Ms Phelps was taken to the hospital in an ambulance where she received treatment, including stitches, for her injuries. RP67, 143-44. Ms. Phelps had numerous bruises and lacerations on her head and body. RP 144-163. The bruises took about six weeks to fade and she was left with some scarring above her eye. RP 165. She also suffers from dizzy spells since the assault, and the top of her head remained tender at the time of trial, nearly a year after the assault.. RP 164-66.

Police officers arrested defendant at the apartment as he was trying to leave. RP 68-70.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT'S 1982 AND 1984 ASSAULT IN THE SECOND DEGREE CONVICTIONS WERE PRIOR MOST SERIOUS OFFENSES.

An offender convicted of a "most serious offense" must be sentenced to life imprisonment without early release if he has at least two prior convictions for most serious offenses, and those prior convictions would be included in his current offender score. RCW 9.94A.37(a)(i)(ii); ***State v. Failey***, 165 Wn.2d 673, 675, 201 P.3d 328 (2009). A "most serious offense" includes second degree assault, any felony with a deadly weapon finding and "[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense." RCW 9.94A.030(32)(b), (t), (u).

While most case law on comparability has considered the comparability of foreign convictions to Washington offenses, a similar procedure is used to determine whether a pre-1993 Washington conviction to should count as a strike offense *See* ***Failey***, 165 Wn 2d at 677. Generally, a court employs a two-part comparability analysis. *See*, ***State v. Johnson***, 150 Wn. App. 663, 676, 208 P.3d 1265, *review denied*, 167 Wn.2d 1012, 220 P.3d 208 (2009). The court first determines whether the elements of the pre-1993 offense are substantially similar to a post-1993 Washington strike offense. ***Failey***, 165 Wn.2d at 677; ***Johnson***, 150 Wn.

App. at 676, 208 P.3d 1265. If the elements of the prior offense are broader, the court must determine whether the offense is factually comparable; i.e., whether the conduct underlying the prior offense would have constituted a most serious offense or a comparable Washington statute. *Id.* When a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt. ***Johnson***, 150 Wn. App. at 676. If a prior conviction is neither legally nor factually comparable, it does not count as a most serious offense. ***Johnson***, 150 Wn. App. at 677, 208 P.3d 1265.

In the case now before the court, defendant challenges the trial court's determination that his 1982 and 1992 Washington convictions for assault in the second degree each qualify as a most serious offense as they are comparable to the current offense of assault in the second degree. The court entered findings of fact and conclusions of law regarding this ruling. CP 282-287. Defendant did not assign error to any, therefore the findings are verities on appeal. ***State v. Broadaway***, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

a. <u>The Court Properly Found That The 1982 Conviction For Assault In The Second Degree Was Comparable To The Current Assault In The Second Degree</u>.

The State submitted a certified copy of defendant's 1982 conviction for assault in the second degree in Pierce County Cause No. 82-1-01616-2. EX 1; RP 383. The judgment indicates that it concerns an

assault in the second degree but does not contain any reference to a particular statute. EX 1. Defendant pleaded guilty to an amended information; the amended information charged defendant with violating 9A.36.020(1)(b), by "knowingly inflict[ing] grievous bodily harm upon George Ritter". EX 1C. In defendant's guilty plea statement he admitted that he " hit Mr. Ritter in the face causing injury." EX 1A.

In 1982, the relevant portion of the assault in the second degree statute read:

> Every person who, under circumstances not amounting to assault in the first degree, shall be guilty of assault in the second degree when he:
> ...
> (b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon.

Former 9A.36.020; 1979 Laws of Washington, 1st Ex. Sess. Ch. 244, §9; ***State v. Adlington-Kelly***, 95 Wn.2d 917, 920, 631 P.2d 954 (1981).

Firstly, the term "assault" has never been statutorily defined in Washington; it has long been the law here that the three common law definitions of assault are to be used. ***State v. Byrd***, 125 Wn.2d 707, 712, 887 P.2d 396 (1995); ***State v. Jimerson***, 27 Wn. App. 415, 418, 618 P.2d

1027 (1980). The three common law definitions[2] of assault might be summarized as describing an actual battery, an attempted battery, and causing reasonable apprehension of bodily harm. ***State v. Abuan***, 161 Wn. App. 135, 154, 257 P.3d 1 (2011)(quoting ***State v. Elmi***, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). There has been no change in the law defining the term "assault" since defendant was convicted in 1982. Each of the common law definitions of the term assault requires some intentional action. Thus, proof of an intentional act of assault was required in 1982 for any assault crime.

Since 1909, there has been more than one degree of assault in Washington. ***Adlington-Kelly***, 95 Wn.2d at 924. Under the 1982 statutes, the primary difference between first and second degree assault was one of intent. First degree assault required either an intent to kill a human being

---

[2] A jury is typically instructed that :

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
>
> *See,* ***State v. Smith*** 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007).

or the intent to commit a felony by a means likely to produce death, while "[i]n second degree assault, the specific intent was to 'injure'or 'inflict grievous bodily harm' upon another, with or without a weapon." *Id.* "Grievous bodily harm" was properly defined as including any "hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature." ***State v. Salinas***, 87 Wn.2d 112, 121, 549 P.2d 712 (1976).

The current statute proscribing assault in the second degree set forth a number of alternative means of committing that offense:

> 1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

RCW 9A.36.021. The Legislature defined "substantial bodily harm" as meaning "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). In 1975, the Legislature defined four kinds of culpability- intent, knowledge, recklessness, and criminal negligence. RCW 9A.08.010. Under the statute, "[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. RCW 9A.08.010(2).

The trial court found that the 1982 conviction was comparable to current means of committing assault in the second degree by "intentionally assault[ing] another and thereby recklessly inflict[ing] substantial bodily harm under RCW 9A.36.021(1)(a). *See* RP 449-450; CP 282-287. The court reasoned that the definition of assault required an intentional act in 1982, which is equivalent to "intentionally assaults" element of the current statute. *Id.* It further found that the element of "reckless infliction of substantial bodily harm" required a lesser culpability level than the 1982 offense so that it was satisfied by the 1982 element of "knowing infliction

of grievous bodily harm." *Id.* The court also found that grievous or great bodily harm was equivalent to "substantial bodily harm." Consequently, the court found that the 1982 crime was legally comparable to the current assault in the second degree which is a most serious offense. *Id.* The trial court further found that defendant was an "offender" when he committed this offense and that the conviction did not wash-out; these findings are unchallenged. CP 282-287.

Defendant fails to show any error in the court's analysis. He contends that the 1982 crime did not require an intentional act but he fails to address that the definition of assault in Washington has remained constant and has always required an intentional act. *See* ***State v. Hopper***, 118 Wn.2d 151, 158-159, 822 P.2d 775 (1992), *see also*, ***State v. Ashcraft***, 71 Wn. App. 444, 453-54, 859 P.2d 60 (1993)("we also note that a difference in the use of the terms "knowingly" and "intentionally" between the [former and post- July 1988 assault in the second degree] statutes does not change the effect of the law. For purposes of assault, 'knowingly' has been deemed equivalent to 'intentionally.' RCW 9A.08.010(2).").

Defendant further relies upon ***State v. Hovig***, 149 Wn. App. 1, 202 P.3d 318 (2009) for the contention that as pain is no longer an element of the crime of assault in the second degree, that the injury required in 1982 is not comparable to the injury needed for a post-December, 1993 assault in the second degree. While it may be true that pain need no longer be

shown, it is likely that pain will be a component of substantial bodily injury. Defendant fails to explain how grievous bodily injury, which is an injury or hurt calculated to interfere with the health or comfort of a person because it is painful or hard to bear, would not also meet the definition of substantial bodily injury, which is an injury that causes a temporary but substantial disfigurement or loss or impairment of the function of any body part. Consequently, his arguments fail.

Besides the legal comparability, the defendant admitted that he "hit Mr. Ritter in the face causing injury" which acknowledges an intentional act of assault in fact. As the "intentional act" requirement is also satisfied by the defendant's admissions at the time of his plea ,and the injury required is legally comparable, the court's ruling should be upheld.

b. The Court Properly Found That The 1992 Conviction For Assault In The Second Degree Was Comparable To The Current Assault In The Second Degree

The State submitted a certified copy of defendant's 1992 conviction for assault in the second degree in Pierce County Cause No. 92-1-02264-0. EX 3D; RP 384. The judgment indicates that it concerns an assault in the second degree with a deadly weapon finding under RCW 9A.36.020(1)(b) and 9A.94A.310 and .370. EX 3D. Defendant pleaded guilty to an amended information; the amended information charged

defendant with violating 9A.36.020(1)(b), by knowingly inflicting grievous bodily harm upon Karen A. Rembert with a weapon - to wit: a knife. EX 3B. In defendant's guilty plea statement he admitted that in April 1992, he " got into an argument with Karen Rembert over drugs and caused serious injury to her with a knife." EX 3C. Defendant received a sentence that included an additional 12 months[3] for the deadly weapon finding. EX 3D.

In 1992, the assault in the second degree statute read:

> 1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
>
> (e) With intent to inflict bodily harm, exposes or transmits human immunodeficiency virus as defined in chapter 70.24 RCW; or

---

[3] The judgment reflects that defendant's standard range was 33-43 months, and that 12 months should be added for the deadly weapon finding. Defendant received a sentence of 55 months. EX 3D.

(f) With intent to commit a felony, assaults another; or

(g) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

RCW 9A.36.021; Laws 1988, ch. 158, § 2, ch. 206, § 916, ch. 266, § 2 (eff. July 1, 1988).

The court below noted that "assaulting another with a deadly weapon" was a means of committing assault in the second degree both prior to and after December 2, 1993, making this means a "most serious offense" even if committed prior to December 2, 1993. RP 443. The court noted that defendant admitted to assaulting another person with a knife in his plea, and his plea to assault in the second degree also included a plea to a deadly weapon enhancement.[4] RP 443. Thus, the court correctly found that legally and factually this 1992 crime was comparable to the assault with a deadly weapon means of committing assault in the second degree. The court's ruling could also be sustained as defendant's 1992 conviction was a felony with a deadly weapon enhancement which makes it comparable to a "felony with a deadly weapon finding" which is a most serious offense under RCW 9.94A.030(32)(t).

---

[4] While the 1992 charging language did not mirror the language in RCW 9A.36.021, the court found that it was sufficient to apprise defendant of the essential elements of assault in the second degree and that it was clear to defendant that he was pleading guilty to an assault with a deadly weapon. RP 442- 444. *See, **State v. Hopper***, 118 Wn.2d 151, 822 P.2d 775 (1992); ***State v. Kjorsv***ik, 117 Wn.2d 93, 812 P.2d 86 (1991).

The trial court further found that defendant was an "offender" when he committed this offense and that the conviction did not wash-out; these findings are unchallenged. CP 282-287. Thus, the trial court properly included this as a prior most serious offense.

The trial court's determination that defendant's 1982 and 1992 convictions were comparable to most serious offenses should be upheld.

2. THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S ARGUMENT THAT HIS 1994 JUDGMENT WAS CONSTITUTIONALLY INVALID ON ITS FACE.

A defendant's criminal history is used to determine the offender score which in turn is used to determine the applicable presumptive standard sentence range. ***State v. Ammons***, 105 Wn.2d 175, 187, 713 P.2d 719 (1986), *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). The State must prove the defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500(1). "Criminal history" means the list of a defendant's prior convictions. ***Ammons***, 105 Wn.2d 175, 185. While the best evidence of a prior conviction is a certified copy of the judgment, the State may also introduce "other comparable documents of record or transcripts of prior proceedings." ***State v. Ford***, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

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. ***Ammons***, 105 Wn.2d 175, 187. The ***Ammons*** court stressed the policy reasons behind this rule:

> To require the State to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

Ammons, 105 Wn.2d at 188. The court articulated that for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant's rights were violated. ***Ammons***, 105 Wn.2d at 189.

A sentencing court may not consider a prior conviction that has been previously determined to have been unconstitutionally obtained or that is constitutionally invalid on its face. ***Ammons***, 105 Wn.2d at 187-188. There is a distinction in the law between a judgment that shows *facial constitutional invalidity*, which is relevant to a challenge to the use of a prior conviction at a sentencing hearing and a judgment that is *invalid on its face*, which might be relevant in determining whether a time bar is applicable to an untimely collateral attack. The analysis used to

determine facial constitutional invalidity differs from that used to determine whether a judgment is invalid on its face.

Both the United States and Washington Supreme Courts have addressed what constitutes facial constitutional invalidity so as to render the conviction invalid for sentencing purposes. ***Custis v. United States***, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994); ***State v. Roberts***, 142 Wn.2d 471, 529, 14 P.3d 713 (2000). In ***Custis v. United States***, the Supreme Court made it unequivocally clear that a defendant in a federal sentencing proceeding has no constitutional right to collaterally attack the validity of a prior conviction, unless it was obtained in violation of the right to counsel as established in ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). ***Custis*** concerned a defendant who challenged the use of his prior convictions at a sentencing hearing for a variety of reasons including: 1) the denial of the effective assistance of counsel; 2) an involuntary guilty plea; and, 3) inadequate advisement of his rights in opting for a "stipulated facts" trial. In rejecting these as a basis for a sentencing court to review the constitutionality of the prior conviction, the United States Supreme Court articulated that one reason the denial of appointment of counsel is treated differently than other claims is the relative ease in determining whether such an infirmity exists as the "failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order", whereas "determination of claims of ineffective assistance of counsel, and failure

to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era." ***Custis***, 511 at 496; *see also* ***Johnson v. United States***, 544 U.S. 295, 303, 125 S. Ct. 1571, 161 L. Ed. 2d 542 (2005)("We recognized only one exception to this rule that collateral attacks were off-limits [at sentencing hearings], and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel.").

The Washington Supreme court relied on ***Custis*** when reaching a similar conclusion as to the type of challenge that may be raised in a sentencing proceeding. *See* ***State v. Roberts***, *supra*. Roberts asserted that the sentencing court should not have considered some of his Canadian convictions because there was no showing that he was informed of the same rights of which he would have been informed in an American court. The Court, noting that an attack on the validity of a plea does not implicate the facial constitutional validity of the judgment, rejected the argument stating:

> Even were this true, the Canadian convictions would presumably still be admissible. *See* ***Custis v. United States***, 511 U.S. 485, 496-97, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994) (while denial of counsel renders a prior conviction per se invalid for sentencing purposes, other alleged errors, including involuntary plea, do not). ***Custis*** makes the same point this court made in ***Ammons***: absent facial constitutional invalidity or an affirmative showing of infirmity by the defendant, the sentencing court should not be forced to conduct an appellate review of each of the

> defendant's priors. ***Custis***, 511 U.S. at 496; ***Ammons***, 105 Wn.2d at 188.

State v. Roberts, 142 Wn.2d at 529. The ***Roberts*** decision reiterated the same concerns the Court had expressed in ***Ammons*** when it stated that allowing defendants to bring any sort of constitutional challenge would "turn the sentencing proceeding into an appellate review of all prior convictions." 105 Wn.2d at 188.

As noted in ***Roberts*** and ***Custis***, if the defendant can show a previous judicial determination of the infirmity of a prior conviction or if the judgment reflects a denial of counsel on the prior conviction, then these claims, and only these claims, may be raised at a sentencing hearing to render the prior conviction constitutionally invalid for sentencing purposes. Other claims, even ones seemingly based on constitutional principles such as an involuntary plea, do not result in facial constitutional invalidity of a judgment. Under ***Ammons***, those type of constitutional claims must be raised in a collateral attack in the court where the prior judgment was entered or by filing a personal restraint petition. ***Ammons***, 105 Wn.2d at 188.

In the case now before the Court, defendant asked the Court to treat the 1992 conviction as being invalid on its face because it cited to the assault in the second degree statute that had been repealed in 1986- RCW 9A.36.020- rather the correct RCW 9A.36.021, which had been enacted to replace the former version of this offense. 1986 Laws of Washington Ch.

257, § 5, 9, 10. Defendant contends that his judgment shows that he was convicted of a crime that did not exist, relying upon ***In re Personal Restraint of Thompson,*** 141 Wn.2d 712, 10 P. 3d 380 (2000).

First and foremost, defendant's claim did not fall into either of the two constitutional challenges that may be raised in a sentencing hearing under ***Roberts*** and ***Custis:*** he did not allege that his prior conviction was obtained without the benefit of counsel, nor did he show a prior judicial determination that his 1992 conviction was constitutionally infirm. Thus, under ***Ammons***, he must challenge his 1992 conviction in a personal restraint petition, rather than in the sentencing hearing on a new offense.

Additionally, defendant's reliance on ***Thompson*** is misplaced. ***Thompson*** concerned a defendant who entered a plea to first degree rape of a child for a crime that was alleged to have occurred between "1/1/85 through 12/31/86." The legislature did not enact this crime, however, until 1988, and improper sexual intercourse with minors occurring prior to that date had to meet the elements of a different crime- first degree statutory rape. ***Thompson***, 141 Wn.2d at 717, 722. The court found that a judgment reflecting the commission of a crime before the legislature had criminalized that behavior constituted a facial invalidity such that the one year time bar for collateral attacks found in RCW 10.73.090 could not be applied to Thompson's untimely collateral attack.

The current case however, concerns a crime-assault in the second degree - that has long been on the books in the State of Washington.

Adlington-Kelly, 95 Wn.2d at 924 (since 1909 there has been more than one degree of assault in Washington). In 1986, the legislature repealed the statute proscribing assault in the second degree in RCW 9A.36.020 at the same time it enacted a new statute, RCW 9A.36.021, proscribing assault in the second degree. 1986 Laws of Washington, Ch. 257, § 5, 9, 10. These changes became effective on July 1, 1987. 1986 Laws of Washington, Ch. 257, § 12. Both the new and the old assault laws proscribed assaulting another with a deadly weapon, albeit is slightly different language. Compare, 1979 Laws of Washington, 1st Ex. Sess. Ch. 244, §9; (a person is guilty of assault in the second degree when he "shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm."), and 1986 Laws of Washington Ch. 257, § 5 (a person is guilty of assault in the second degree when he "assaults another with a deadly weapon."). Despite the change in statutory language, the crime of assault in the second degree existed both before and after the 1986 legislative changes took effect; it was always illegal to assault another person with a knife. The error in defendant's judgment concerned the statutory citation, which does not render it constitutionally infirm.

The trial court found the decision in ***State v. Hopper***, 118 Wn.2d 151, 822 P.2d 775 (1992) instructive, as it presented a similar, albeit reverse, example of an erroneous statutory reference to assault in the second degree. Hopper had committed an assault in the second degree on June 30, 1988, the last day that RCW 9A.36.020 was in effect. The

information charging him cited to RCW 9A.36.021, which took effect on July 1, 1998. 118 Wn.2d at 159. Hopper raised a challenge to this defective information for the first time on appeal. The court summarily rejected his argument stating:

> Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." CrR 2.1(b). We have consistently upheld convictions based on charging documents which contained technical defects such as this one. This rule is also applied by federal courts. Since no prejudice is alleged here, the information was not defective because of the error in the citation.

Hopper, 118, Wn.2d at 159-160(internal citations omitted). After reading this case, the court below examined the information charging defendant with the 1992 offense and found that it sufficiently informed him of the essential elements of assault in the second degree and defendant had not shown any prejudice flowing from the erroneous statutory reference. Thus, the court properly rejected petitioner's claims as to the constitutional deficiency of the 1992 conviction.

It was the defendant's burden to show that his 1992 conviction was constitutionally invalid so as to preclude its use in a subsequent sentencing hearing. As he did not show that he was denied the assistance of counsel in 1992, or that another court had held that 1992 conviction to be constitutionally invalid, the trial court properly rejected his arguments.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the judgment entered below.

DATED: December 7, 2012.

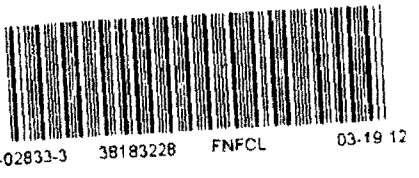
MARK LINDQUIST
Pierce County
Prosecuting Attorney

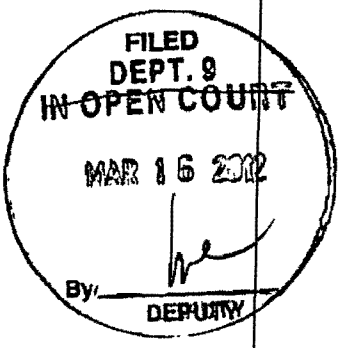
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-7-12 Theresa Kan
Date Signature

APPENDIX "A"





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LORENZO WEBB, Defendant.	CAUSE NO. 10-1-02833-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING PERSISTENT OFFENDER DECLARATION/SENTENCE

THIS MATTER came on for sentencing on March 2, 2012, before the Honorable Edmund Murphy. After considering the materials submitted by the State, including the exhibits, and hearing arguments of counsel, the court found the defendant to be a persistent offender and sentenced him to life in prison without the possibility of release or parole.

Being duly advised in this matter, the court hereby enters the following findings of fact and conclusions of law relating to the defendant's status as a persistent offender and the resulting sentence of life without parole imposed by the court:

FINDINGS OF FACT

I.

In 1982, the defendant was convicted of Assault in the Second Degree in Pierce County Superior Cause No. 82-1-01616-2.

II.

In 1992, the defendant was convicted of Assault in the Second Degree in Pierce County Superior Court Cause No. 92-1-02264-0.

III.

In 2010, when the defendant committed his current crime, Assault in the Second Degree was a most serious offense under RCW 9.94A.030(32)(b) (2010).

IV.

In 2010, when the defendant committed his current crime, RCW 9.94A.030(32)(u) allowed for any felony offense in effect prior to December 2, 1993 that is comparable to a most serious offense under subsection (32) to be included in the definition of "most serious offense "

V.

In this case, the defendant was convicted of Assault in the Second Degree.

VI.

In 2010, when the defendant committed his current crime, Assault in the Second Degree was a Class B felony under RCW 9A.36 021(2)(a). The defendant's conviction for Assault in the Second Degree is a most serious offense / strike under RCW 9.94A.030(32)(b)(2010).

VII.

The defendant was born on September 7, 1957. His most serious offense crimes were committed in 1982, 1992, and 2010, therefore the defendant was over the age of eighteen each time he committed one of his most serious offenses. Therefore, the defendant qualifies as an "offender" at each of the relevant times as that term was defined in RCW 9.94A.030(34)(2010).

VIII.

Assault in the Second Degree is a Class B felony under RCW 9A.36.020 (1982) and 9A.36.021 (1992, 2010). Per the "wash" out provisions of the SRA, class B felonies are included in the defendant's offender score unless the defendant has spent, since the last date of confinement pursuant to a felony conviction, ten consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(2).

IX.

The defendant was released from his prison confinement for his 1982 Assault in the Second Degree conviction on September 24, 1985. He committed two counts of Forgery on October 22, 1991 and was released from confinement pursuant to that conviction on April 13, 1992. On April 21, 1992 the defendant committed Assault in the Second Degree with a Deadly Weapon and was released from confinement pursuant to that conviction on October 18, 1995. The defendant was returned to custody pursuant to that conviction on January 24, 1996 for a community custody violation.

On December 27, 1995 the defendant committed the crime of Willfully Violating Community Custody Conditions. On March 14, 1996 the defendant was booked into the Pierce County Jail pursuant to that charge, and on March 29, 1996 he was sentenced to two months in custody. Pursuant to Department of Corrections and Pierce County Jail records the defendant was transported from the Pierce County Jail to the Department of Corrections on April 2, 1996 then returned to the Pierce County Jail from DOC/McNeil Island on May 9, 1997 and released from the jail on June 7, 1997. On August 3, 2005 the defendant was booked into the Pierce County Jail pursuant to his 1992 Assault in the Second Degree conviction for a probation hold and was released on August 4, 2005.

The defendant also has intervening misdemeanor convictions; two counts of Assault in the Fourth Degree committed on April 6, 2001 and Unlawful Possession of Drug Paraphernalia committed on November 8, 2005.

The defendant's convictions are not, therefore, subject to the wash-out provision.

X

The defendant was convicted of, sentenced, confined, and released on his first most serious offense (assault in the second degree) before he committed his second most serious offense. He was convicted of, sentenced, confined, and released on his second most serious offense (assault in the second degree) before he committed this, his third most serious offense. Therefore, under even the most strict interpretation, the defendant qualifies as a persistent offender under RCW 9.94A.030(37) (2010).

XI.

When the defendant committed his current crime, and at every time since, the only lawful sentence to be imposed on a person who qualifies as a persistent offender is a sentence of life in prison without the possibility of release or parole. ***See*** RCW 9.94A.570 (2010).

From the above findings, the court hereby makes the following conclusions of law:

CONCLUSIONS OF LAW

I.

The defendant's 1982 conviction for assault in the second degree is comparable, pursuant to RCW 9.94A.030(32)(u), to the most serious offense of assault in the second degree as it existed after December 2, 1993. In 1982 the assault in the second degree statute required knowing infliction through an assault of great bodily harm. After 1993, the assault in the second

degree statute required an intentional assault and reckless infliction of substantial bodily harm. Great bodily harm is at least a harm that is equal to substantial bodily harm. WPIC 35.50 defined "assault" in 1982 as an intentional act. When an individual acts recklessly, he also acts knowingly. RCW 9A.08.010. Therefore the defendant's 1982 conviction for assault in the second degree is a most serious offense.

II.

The defendant's 1992 conviction for assault in the second degree is comparable, pursuant to RCW 9.94A 030(32)(u), to the most serious offense of assault in the second degree as it existed after December 2, 1993. Assault with a deadly weapon was a means of committing assault in the second degree both before and after 1993. Therefore, the defendant's 1992 conviction for assault in the second degree is a most serious offense.

III.

The citation in the amended information to the former assault in the second degree statute, RCW 9A.36.020, rather than the statute that was in effect at the time of the conviction, RCW 9A.36.021, in the defendant's 1992 conviction for assault in the second degree does not render the judgment and sentence, and the conviction, constitutionally invalid on its face. The defendant was provided sufficient notice of the crime that he was charged with and pleading guilty as the language is clear in the plea form and the judgment and sentence that the defendant was pleading guilty to an assault with a deadly weapon.

IV.

The defendant is a persistent offender.

V.

The defendant is sentenced to life in prison without the possibility of release or parole.

The court's oral ruling on this issue was given in open court in the presence of the defendant on March 2, 2012.

The defendant's presence has been waived at the hearing for presentment of these finds of fact and conclusions of law, signed this 16th day of March, 2012.

JUDGE EDMUND MURPHY

Presented by:

KARA E. SANCHEZ
Deputy Prosecuting Attorney
WSB# 35502

Approved as to form ~~and content~~ only with arguments & objections made on record

Laura Carnell
LAURA CARNELL
Attorney for Defendant
WSB# 27860

FILED
DEPT. 2
IN OPEN COURT
MAR 16 2012
By

PIERCE COUNTY PROSECUTOR

December 07, 2012 - 4:03 PM

Transmittal Letter

Document Uploaded: 431793-Respondent's Brief.pdf

Case Name: ST. v. Webb

Court of Appeals Case Number: 43179-3

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

sheriarnold2012@yahoo.com