

**NO. 45260-0-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**MICHAEL D. OLMSTED,**

Appellant.

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

The Honorable Robert Lewis, Judge

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**SUPPLEMENTAL  
BRIEF OF APPELLANT**

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The sentencing court erred in including a facially invalid conviction for assault in the second degree in Michael Olmsted's criminal history.

2. The sentencing court erred in relying on the facially invalid assault in the second degree conviction to sentence Olmsted to life in prison as a persistent "three strike" offender.

3. Olmsted's conviction for a 1994 assault in the second degree is constitutionally invalid as it was not entered knowingly, intelligently, and voluntarily.

4. The sentencing court erred in including the 1994 assault in the second degree in Olmsted's offender score as Olmsted's guilty plea to that charge was not knowing, intelligent, and voluntary.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the sentencing court improperly sentenced Olmsted to a life sentence as a three-strike persistent offender when it relied at sentencing on a facially invalid 1994 conviction for assault in the second degree?

2. Whether the sentencing court improperly included Olmsted's 1994 assault in the second degree conviction in Olmsted's offender score

when his guilty plea to a non-existent knowing assault in the second degree made his plea unknowing and unintelligent?

C. SUPPLEMENT FACTS

A jury found Michael Olmsted guilty of Assault in the Second Degree, domestic violence. CP 47, 49. The court heard sentencing over two days. RP 4 578-637. The State argued Olmsted's conviction was a third strike under the state's persistent offender law. If true, the only sentence the court could impose was a life sentence. RP 4 631-34.

The State argued Olmsted had two prior "strike offenses," a 1994 Assault in the Second Degree and a 1996 Assault in the First Degree.<sup>1</sup> Both convictions were from Clark County. At the sentencing hearing, the State provided the court with various exhibits to include Exhibit 5. Supplemental Designation of Clerk's Papers, Sentencing Exhibit 5. Exhibit 5 consists of the following three certified documents from Clark County Superior Court file 94-1-01518-4: the Information, the Statement of Defendant on Plea of Guilty; and the Judgment and Sentence.

On close scrutiny, the documents admitted as Exhibit 5 under case number 94-1-01518-4 told the sentencing court three things.

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<sup>1</sup> The validity of the Assault in the First Degree is not disputed.

First, the Information, filed November 9, 1994, charged Olmsted by Count 5 with a “knowing assault” for an incident occurring on November 2, 1994. Specifically,

That he, MICHAEL DON OLMSTED, in the County of Clark, State of Washington, on or about the 2<sup>nd</sup> day of November, 1994, did knowingly assault Matthew McGrady, a human being, with a deadly weapon, to wit: a pool cue or club, in violation of RCW 9A.36.021(1)(c), contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

Second, under the Statement of Defendant on Plea of Guilty, Olmsted pleaded guilty to Count 5 on December 9, 1994. The plea form listed the elements for Assault in the Second Degree: “On November 2, 1994, in Clark Cy, WA, Def. knowingly assaulted Matthew McGrady with a deadly weapon, to wit: a pool cue.”<sup>2</sup> Olmsted’s statement on plea said, “On Nov. 2, 1994, in Clark Cy, WA, I did assault Matt McGrady with a pool cue. I waive my right to assert self-defense in order to take advantage of a plea bargain.”<sup>3</sup>

Third, the Judgment and Sentence reflects Olmsted pleaded guilty to Assault in the Second Degree (supposedly) in violation of RCW 9A.36.021(1)(c), and Olmsted received a twelve month and one day exceptional sentence upward by agreement.<sup>4</sup>

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<sup>2</sup> Plea Form page 1

<sup>3</sup> Plea Form page 7

<sup>4</sup> Judgment and Sentence pages 1, 3, 4

At sentencing on the current offense, Olmsted's only objection was to the adequacy of the "point count" on a fingerprint comparison completed by the State's fingerprint expert. RP4 631.

D. ARGUMENT

1. BECAUSE OLMSTED'S 1994 ASSAULT IN THE SECOND DEGREE IS FACIALLY INVALID, OLMSTED IS NOT A PERSISTENT OFFENDER AND MUST BE RESENTENCED WITHIN A STANDARD RANGE.

Olmsted's 1994 second degree assault conviction is facially invalid. In 1994 there was no such crime in Washington as a *knowing* assault with a deadly weapon. Because the conviction is not facially valid, Olmsted's persistent offender sentence must be reversed and his case remanded to the trial court for resentencing within the standard range.

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986). Generally, the defendant has no right to contest prior convictions at a subsequent sentencing because there are more appropriate methods for contesting the validity of prior convictions. *Id.* at 188. But it is error for a prior conviction that is unconstitutionally invalid on its face to be considered at sentencing. *Ammons*, 105 Wn.2d at 187-88.

A judgment and sentence is invalid on its face when the judgment and sentence, without further elaboration, evidences an error. *In re Clark*, 168 Wn.2d 581, 585-86, 230 P.3d 156 (2010); *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002)(judgment and sentence facially invalid when defendant pleaded guilty and was sentenced under a statute that did not exist until two years after offense occurred); *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). “On its face” includes the judgment and sentence and documents signed as part of a plea bargain. *In re Clark*, 168 Wn. 2d at 585-86; *Thompson*, 143 Wn. App. at 866-67; *State v. Phillips*, 94 Wn. App. 313, 317, 972 P.2d 932 (1999) (citing *Ammons*, 105 Wn.2d at 187–89).

Here, Olmsted pleaded guilty in 1994 to knowingly assaulting another person with a deadly weapon in violation, as charged, of RCW 9A.36.021. But in 1994, under RCW 9A.36.021(1)(c), it was a crime in Washington to assault another with a deadly weapon only if the assault was an intentional act, rather than a mere knowing act. Former RCW 9A.36.021(1)(c)(1988). The knowing assault of another with a deadly weapon - in violation of RCW 9A.36.020 - was repealed in 1988. RCW 9A.36.020 (repealed by Law 1986, ch. 257, § 9, eff. July 1, 1988). The repealed RCW 9A.36.020(1)(c), made it a crime when,

(1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

.....

(c) Shall *knowingly assault* another with a weapon or other instrument or thing likely to produce bodily harm[.]

*State v. Weiding*, 60 Wn. App. 184, 186, 803 P.2d 17 (1991). The knowing second degree assault Olmsted pleaded guilty to in 1994 was not a crime. The State's Exhibit 5 proves Olmsted's 1994 assault in the second degree was facially invalid.

Under RCW 9.94A.570, a persistent offender shall be sentenced to life in prison without the possibility of release. A persistent offender is a defendant who has been convicted of a most serious offense and has two prior felonies that are also most serious offenses. RCW 9.94A.030(37)(a). Both first degree and second degree assault are most serious offenses. RCW 9.94A.030(32)(a); 9.94A.030(32)(b); RCW 9A.36.010(2).

An appellate court reviews de novo a trial court's decision to consider a prior conviction as a most serious offense for persistent offender purposes. *State v. Thieffault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). A prior conviction that is unconstitutionally invalid on its face may not be considered at sentencing. *Ammons*, 105 Wn.2d at 187-88; *State v. Webb*, 183 Wn. App. 242, 333 P.3d 470 (2014). The sentencing court erred in considering Olmsted's facially invalid 1994 second degree

assault conviction for persistent offender purposes. Olmsted's persistent offender "three strikes" sentence must be reversed and remanded for resentencing without the 1994 assault.

2. OLMSTED'S 1994 GUILTY PLEA TO KNOWING ASSAULT IN THE SECOND DEGREE WAS NOT A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA.

To be constitutionally valid, a guilty plea must be knowing, intelligent, and voluntary. As Olmsted's uninformed plea to the non-existent 1994 knowing assault in the second degree was none of the above, he is entitled to be resentenced without the 1994 assault conviction factored into his criminal history.

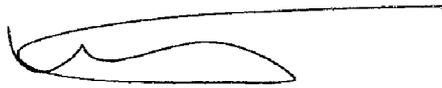
"Due process requires that a guilty plea be knowing, voluntary, and intelligent." *State v. Easterlin*, 159 Wn.2d 203, 208, 149 P.3d 366 (2006) (quoting *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 590, 741 P.2d 983 (1987)). "A plea is not voluntary in the constitutional sense unless the defendant has adequate notice and understanding of the charges against him." *Easterlin*, 159 Wn.2d at 213 (quoting *Hews*, 108 Wn.2d at 590); accord, *Webb*, 333 P.3d at 475 (2014). Olmsted did not have adequate notice and understanding of his 1994 assault plea because the State charged and the court sentenced him for a crime that did not exist when the alleged act occurred. Olmsted is entitled to remand for

resentencing with no consideration given to the 1994 assault conviction.  
*Webb*, 333 P.3d at 475 (2014).

E. CONCLUSION

Olmsted's persistent offender sentence must be reversed and remanded for resentencing. On remand, the sentencing court cannot consider Olmsted's invalid 1994 assault conviction as criminal history and Olmsted cannot be resentenced as a persistent offender.

Respectfully submitted this 4th day of February 2015.



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Attorney for Michael D. Olmsted

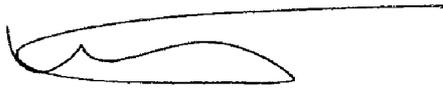
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Supplemental Brief to: (1) Anne Mowry Crusier, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Micheal D. Olmsted/DOC# 961702, Clallam Bay Corrections Center, 1830 Eagle, Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed February 4, 2015, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Michael D. Olmsted

## COWLITZ COUNTY ASSIGNED COUNSEL

**February 04, 2015 - 11:23 AM**

### Transmittal Letter

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