IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33911-4-III

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER JOHN BLAIR, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Christopher Blair was sentenced to a prison-based drug offender sentencing alternative sentence after he was terminated from drug court. At sentencing, he challenged the inclusion of 2 points in his offender score based upon a prior conviction for theft of a motor vehicle involving a snowmobile, arguing that a snowmobile does not meet the statutory definition of a "motor vehicle." The trial court disagreed and sentenced Blair based on an offender score of "9." Blair now appeals and challenges the computation of his offender score.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in including Blair's prior conviction for theft of a motor vehicle in his offender score.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a snowmobile a "motor vehicle" within the meaning of RCW 9A.56.065?

ISSUE 2: Was Blair's guilty plea to theft of a motor vehicle facially invalid when the State's allegations failed to establish all the essential elements of the charge?

IV. STATEMENT OF THE CASE

The State charged Christopher Blair with theft of a motor vehicle and taking a motor vehicle without permission by driving a pickup away from a dealership lot. CP 4. He executed a drug court waiver and agreement relinquishing certain trial rights in exchange to participate. CP 19-22. Unfortunately, Blair did not succeed in completing the program and he was terminated from drug court. CP 35-36.

Before sentencing, Blair argued that his prior convictions for theft of a motor vehicle were facially invalid because they involved snowmobiles, which did not meet the statutory definition of motor vehicles. CP 39. Accordingly, Blair requested that the court impose an exceptional sentence downward by treating the thefts as non-motor vehicle related, which would reduce his offender score by two points. CP 39. The parties did not otherwise disagree as to the offender score. RP 24; CP 63-64.

The trial court declined to impose the exceptional sentence and imposed a DOSA sentence of 25 months' imprisonment followed by 25 months' community custody based upon an offender score of 9. RP 31; CP 67, 69. Blair timely appeals. CP 79.

V. ARGUMENT

The sole issue on appeal is whether the trial court erred in including Blair's prior convictions for theft of a motor vehicle in his offender score when Blair argued the prior convictions were constitutionally invalid. Because the prior convictions were constitutionally invalid on their face, the State was precluded from using them to establish Blair's offender score.

Prior convictions that are constitutionally invalid may not be used to support guilt for another offense. *Burgett v. Texas*, 389 U.S. 109, 115, 88 S. Ct. 258, 19 L.Ed.2d 319 (1967). Due process principles, while not precluding the defendant from carrying some burden to overcome the presumption of regularity of the prior judgment, nevertheless limit the State's ability to rely on prior convictions that lack suffer from constitutional infirmity. *See Parke v. Raley*, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L.Ed.2d 391 (1992).

However, the State does not have an affirmative duty to demonstrate the constitutional validity of prior convictions before including them in an offender score calculation. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). However, a prior conviction that is constitutionally invalid on its face may not be considered. *Id.* at 187-88; *State v. Thompson*, 143 Wn. App. 861, 866, 181 P.3d 858 (2008); *State v. Phillips*, 94 Wn. App. 313, 317, 972 P.2d 932 (1999). The defendant, rather than the State, bears the burden of establishing the unconstitutionality of the prior convictions at a sentencing proceeding. *Thompson*, 143 Wn. App. at 866 (*quoting In re Pers. Restraint of Williams*, 111 Wn.2d 353, 368, 759 P.2d 436 (1988)).

A judgment and sentence is facially invalid when it, together with the associated documents establishing the plea, evidences the invalidity without further elaboration. *In re Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). The charging document may be considered in evaluating whether the judgment and sentence is facially invalid. *See In re Stoudmire*, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000) (considering information setting forth charges and alleged dates of commission in determining that the charges were brought after the statute of limitations had expired, rendering the judgment and sentence facially invalid); *In re Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (considering

documents signed as part of plea agreement that showed the petitioner was charged with an offense that was not a crime until two years after the commission of the offense); *see also In re Coats*, 173 Wn.2d 123, 139-40, 267 P.3d 324 (2011) (describing cases in which Washington courts have looked beyond four corners of judgment and sentence and considered various related documents, including the charging document, in determining whether the judgment and sentence is facially invalid due to legal error).

In the present case, Blair contended that the judgment and sentence supporting his 2011 convictions for theft of a motor vehicle were invalid because the charging documents did not allege facts sufficient to support each essential element of the charge – the stolen snowmobiles alleged in the information do not meet the statutory definition of a "motor vehicle." CP 42, 57. To the extent the State argued and the trial court agreed, that Blair's challenge could only be raised through a collateral attack, *Ammons* squarely contradicts this argument and establishes that the prior convictions could not be used to establish Blair's score if they were constitutionally invalid on their face. RP 28-29, 31.

On the merits, moreover, Blair has demonstrated facial constitutional invalidity. To be constitutionally valid, a charging

document must state facts supporting each element of the offense. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989); *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). While courts will construe pleadings not challenged until after conviction liberally, review of the information must show that the necessary facts appear in the charging document. *Kjorsvik*, 117 Wn.2d. at 105.

In the present case, the State was required to allege sufficient facts to establish that Blair stole a motor vehicle contrary to law, and the facts set forth in the information supporting that charge are that Blair stole a pair of snowmobiles. RCW 9A.56.065. The statute does not define "motor vehicle." A general definition is provided in RCW 9A.04.110(29), which states, "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail." Because a snowmobile is not an aircraft or a vessel, to support the charge of theft of a motor vehicle, a snowmobile must be within the meaning of a "motor vehicle" within the vehicle and traffic laws.

Title 46 RCW governs "motor vehicles" in the State of Washington. Its definition of "motor vehicle" incorporates its definition

of "vehicle" by establishing a motor vehicle as "every vehicle that is self-propelled." RCW 46.04.320. And a vehicle is defined as "every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles." RCW 46.04.670.

A snowmobile is separately defined under Title 46 as

> [A] self-propelled vehicle that is capable of traveling over snow or ice that (1) utilizes as its means of propulsion and endless belt tread or cleats, or any combination of those or other similar means of contact with the surface upon which it is operated, (2) is steered wholly or in part by skis or sled type runners, and (3) is not otherwise registered as, or subject to, the motor vehicle excise tax in the state of Washington.

RCW 46.04.546. On its face, a snowmobile is not a "motor vehicle" within the meaning of Title 46 because it is not capable of being moved upon a public highway; it is capable only of traveling over snow or ice.

Moreover, the legislative history plainly indicates that the legislature intended to prevent disruption to daily life resulting from the loss of a car upon which families rely. In 2007, the legislature established the crime of theft of a motor vehicle as a separate offense from ordinary theft and enacted provisions that increased punishment for repeat offenses.

T.S.H.B. 1001, 60th Leg., 2007 Reg. Sess. In explaining the purpose of the enactment, the legislature stated:

> Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles.

Id. This language strongly implies that the legislature's focus was deterring thefts of vehicles that serve as primary modes of transportation, not devices that are used primarily as extravagant forms of recreation. While certainly the theft of a snowmobile has an effect on the victim, it does not create the kind of everyday upheaval that the legislature identified as its focus in establishing special penalties for car theft.

Because a snowmobile is not a "motor vehicle" within the meaning of RCW 9A.56.065, the charging document and the resulting judgment and sentence are constitutionally defective. Moreover, the invalidity is facial as it is apparent on the face of the documents. Accordingly, the trial court erred in relying upon the convictions in calculating Blair's offender score. *See Ammons*, 105 Wn.2d at 187-88.

The error was prejudicial because the two convictions counted as 3 points rather than 1, resulting in an offender score of 9 rather than 7. CP 61; RP 28. "[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice" and requires resentencing. *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Because the sentence imposed here exceeds the trial court's statutory authority, reversal is required. *Id.*

VI. CONCLUSION

For the foregoing reasons, Blair respectfully requests that the court vacate his sentence and remand the cause for resentencing based on an offender score of 7.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 17th day of March, 2016 in Walla Walla, Washington.

Breanna Eng