No. 98071-3

COA # 51026-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD McLAUGHLIN,

Petitioner/Appellant.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO

AND

THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
SKAMANIA COUNTY

APPELLANT'S PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PARTY

Richard McLaughlin, appellant in the court of appeals, Division Two, is the Petitioner.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(3) and (4), Petitioner seeks review of the unpublished decision of the court of appeals, Division Two, in State v. McLaughlin, __ Wn. App. __ (2019 WL 6716307), issued on December 10, 2019.[1]

C. ISSUE PRESENTED FOR REVIEW

> Does the sentencing court err and violate the state and federal rights to trial by jury and proof beyond a reasonable doubt where that court finds foreign offenses "factually comparable" to a Washington offense by relying on facts alleged in the initial charging document even though the plea agreement did not include an admission to the original charges or a factual statement and the plea was to a reduced charge?

D. STATEMENT OF THE CASE

1. Procedural posture

Petitioner Richard McLaughling was convicted of unlawfully delivery of methamphetamine after jury trial in Skamania county and appealed to the court of appeals, Division Two. See CP 1-2, 138. On December 10, 2019, the court issued an unpublished decision, a copy of which is attached as Appendix A. This Petition timely follows.

2. Facts relevant to issue presented

At sentencing, the state argued that the trial court should rely

[1] A copy is attached hereto as Appendix A.

on convictions from Ohio as "sex offenses," which led to a "muliplier" applying to the current drug offense. CP 122-25; RP 298-302. To prove the prior offenses, the state presented an indictment from Ohio alleging two counts, one alleged under Ohio Revised Code 2907.12 and one under 2907.05. Brief of Appellant ("BOA") at Appendix A. The state also presented a document with a notation indicating the defendant had pled to "the reduced charge of" 2907.05 (F-3) and 2907.05 (F-3) for both counts. BOA at App. A. The plea documents did not contain a statement of facts, nor did the documents indicate that the defendant was stipulating to the facts alleged in the information in pleading to the reduced charge. App. A.

Mr. McLaughlin objected that the court could only rely on facts either admitted or proven beyond a reasonable doubt in the foreign proceeding, arguing that the state had failed to prove factual comparability. RP 319-22. The sentencing court first agreed that the relevant Ohio statute (2907.05) was more broad than the Washington crime of second-degree child molestation, then found factual comparability by relying on the allegations in the original Ohio charging document. RP 324-25.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS ERRED IN CONCLUDING THAT "FACTUAL COMPARABILITY" MAY BE FOUND BASED ON ALLEGATIONS IN A CHARGING DOCUMENT WHERE THE SUBSEQUENT PLEA IS TO A REDUCED CHARGE AND THE PLEA DOES NOT STIPULATE TO THE FACTS IN THE ORIGINAL CHARGE

When the defendant has a prior conviction from another state, the state must prove not only the existence of the prior conviction but also that the conviction was "comparable" to one in Washington state. RCW 9.94A.525(3); see State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). First, the sentencing court looks at whether the "foreign" conviction is "legally comparable," which means if the crimes are the same in both states. State v. Olsen, 180 Wn.2d 468, 472-74, 325 P.3d 187 (2014). If the fsoreign crime is defined more broadly, the crimes are not "legally comparable," and the foreign crime cannot be counted in the offender score unless the state shows that the prior conviction is "factually comparable." Id. To be "factually comparable," the foreign offense must be for conduct which would have amounted to a Washington offense. See State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), review denied, 161 Wn.2d 1009 (2007).

This case involves the limits of the sentencing court's ability to make findings in order to conclude that there is "factual comparability" to a Washington state crime. This Court has noted that constitutional limits constrain the analysis of "factual

comparability." See In re the Personal Restrain of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The state and federal rights to proof beyond a reasonable doubt and trial by jury regarding any fact used to increase a sentence limit the sentencing court's ability to simply make factual findings regarding a foreign offense. Id. As a result, the sentencing court may rely only on those facts beyond a reasonable doubt or admitted by the defendant in the foreign proceeding. See id.

Put another way, this Court has held that a sentencing court determining "factual comparability" must only consider facts admitted to, stipulated to or proven beyond a reasonable doubt, because the judge cannot make factual findings and use them to increase the sentence without offending the rights to proof beyond a reasonable doubt and trial by jury. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

In this case, this Court should grant review, because the court of appeals improperly affirmed a "comparability" finding based on facts which were not proven beyond a reasonable doubt or stipulated to as part of the prior conviction. The evidence below included a charging document which alleged a "felonious sexual penetration" of a named victim who was less than 13 years, using force, in violation of "Section 2907.12 of the Ohio Revised Code", and a violation of "section 2905.05" for sexual contact with someone less than 13 years old. RP 313-15.

But the defendant then pled guilty to "the reduced charge" of a "2907.05 RC (F-3)" and a "2907.05 RC (F-3). See Brief of Appellant ("BOA") at Appendix A. The plea form did not indicate a factual basis but instead indicated that the two crimes were "Gross Sexual Imposition F/3" and "Gross Sexual Imposition WITH SPECIFICATION F/3 ," and the judgment entry from the Ohio clerk noting this was pleading to a reduced charge. App. A.

Further, the plea form referred only to the prior indictment by saying the defendant "freely and voluntarily retract[ed]" his plea of not guilty to that indictment and entered a plea of guilty to the "following," listing the two counts of "gross sexual imposition." BOA at App. A. The plea did not include a separate statement of facts admitted, either. BOA at App. A.

In affirming, Division Two relied on this Court's decision in State v. Morley, 134 Wn.2d 588, 606 P.2d 167 (1998). App. A at 5. The court of appeals declared that case to hold that an indictment is properly considered as proof of "the defendant's conduct" in the foreign case. App. A at 5.

This Court, however, has limited that holding of Morley, in light of the state and federal constitutional rights to proof beyond a reasonable doubt and trial by jury. Morley's broad declaration of determining "factual comparability" was amended by this Court in Lavery explicitly because of concerns about how that holding "could prove problematic" in light of the constitutional rights to trial by jury

and proof beyond a reasonable doubt of any "fact that increases the penalty" for a crime. Lavery, 154 Wn.2d at 256. This limit was again reiterated in Thiefault, in which this Court held that the state and federal rights to proof beyond a reasonable doubt and trial by jury become a concern "when a court must look to the facts underlying the offense to determine its comparability." 160 Wn.2d at 419.

And again, in Olsen, supra, this Court repeated that Morley must not be read broadly, and that the Court had "narrowed Morley's factual prong to consider only facts that were admitted, stipulated or proved beyond a reasonable doubt." Olsen, 180 Wn.2d at 473-74.

Indeed, in Olsen, this Court granted review to determine whether our state's current comparability anlysis now violated the state and federal constitutional rights to trial by jury and proof beyond a reasonable doubt in light of more recent federal caselaw. 180 Wn.2d at 472. The Olsen Court noted there were such constitutional concerns when a sentencing court makes a disputed decision about what facts underlay the foreign plea, but upheld our system, because it "limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged **and clearly proved beyond a reasonable doubt to a jury or admitted by the defendant.**" 180 Wn.2d at 476 (emphasis added).

In holding that there was sufficient evidence to prove factual

comparability here, the court of appeals relied on the allegations set forth in the original information. More specifically, Division Two relied on the idea that a defendant who pleads guilty admits all of the elements of the crime "stated in the indictment." App. A at 4. But the defendant did not plead guilty to the original Ohio indictment and the plea documents admitting guilt did not adopt the facts set forth in that indictment or contain a statement of the facts underlying the pleas, which were to a reduced charge.

Notably, the relevant crime of "Gross Sexual Imposition" is not proved just by showing sexual conduct with a person under the age of 13. Former Ohio R.S. 2907.05 (1991) provided that the crime required "sexual contact with another. . . .not the spouse of the offender,"

> when any of the following applies:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
>
> (2) For the purpose of presenting resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.
>
> (3) The offender knows that the other person's judgment or control is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with his consent for the purpose of any kind of medical or dental examination, treatment, or surgery.
>
> (4) The other person, or one of the other persons, is less

> than thirteen years of age, whether or not the offender knows the age of such person.

See 1990 Ohio Laws File 118, HB 208. It is not inconceivable for a charged crime to be amended based on plea negotiations so that a defendant charged with committing a crime a particular way may agree to plea to different conduct than that originally charged. See, e.g., RCW 9.94A.450 (noting prosecutors may choose to reduce charges if there are evidentiary problems, willingness of the defendant to cooperate in other cases, facts which mitigate the seriousness of the conduct, or to correct errors in the initial charges, among other reasons); see also CrR 4.2(d) (limiting court discretion to reject pleas agreed to by the state and the accused).

This Court should grant review under RAP 13.4(b)(3) and (4). The court of appeals decision presents a significant question of state and federal constitutional law, as well as an issue of substantial public interest this Court should decide under RAP 13.4(b)(4). The issue of how to properly determine the factual comparability of a prior foreign conviction is one which this Court has had to provide guidance on before. See, e.g., Olsen, supra; Thiefault, supra; Lavery, supra. The Court has thus found the proper determination of factual comparability to be a significant enough concern in light of the state and federal rights to jury trial and proof beyond a reasonable doubt that it has seen fit to expend its valuable scarce resources on cases which present issues just like those presented in

this case. Division Two did not distinguish between a plea which admits the facts as charged in the indictment and a plea like the one here, which does not make such a "clear" admission. On review, this Court should hold that the court of appeals erred and Mr. McLaughlin's rights to proof beyond a reasonable doubt and for jury trial were violated when Division Two found factual comparability by relying on facts alleged in the original charging document but not clearly adopted or admitted in the subsequent, reduced-charge plea.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 9th day of January, 2020.

Respectfully submitted,

/s/ Kathryn Russell Selk
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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Skamania County Prosecutor's Office, and to Richard McLaughlin, by depositing a true and correct copy in U.S. mail, with first-class postage prepaid at his last known address: DOC 837031, Coyote Ridge CC, PO Box 769, Connell, WA. 99326.

DATED this 9th day of January, 2020.

/s/ Kathryn Russell Selk
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Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Richard Scott MCLAUGHLIN, Appellant.

No. 51026-0-II
|
Filed December 10, 2019

Appeal from Skamania Superior Court, Docket No: 16-1-00060-4, Honorable Randall Charles Krog, Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Cruser, J.

***1** Richard McLaughlin appeals his sentence for delivery of a controlled substance – methamphetamine. He argues that the trial court erred by finding a 1991 Ohio conviction for gross sexual imposition factually comparable to the Washington crime of second degree child molestation. McLaughlin also challenges the trial court's imposition of legal financial obligations (LFOs) despite a finding of indigence.

Because the trial court relied on facts included in the indictment that were directly related to the elements of the 1991 Ohio conviction, we hold that the trial court did not err in finding factual comparability and affirm that determination. However, we reverse McLaughlin's sentence and remand his case for resentencing using a correct offender score. Regarding LFOs, we hold that

the trial court did not err in imposing the crime victim penalty assessment but remand to the trial court to amend McLaughlin's judgment and sentence to reflect that the crime victim penalty assessment cannot be satisfied from funds that are subject to 42 U.S.C. § 407(a) and strike the criminal filing fee. Additionally, we remand for the trial court to determine whether the State has already collected McLaughlin's deoxyribonucleic acid (DNA), and upon submission of a verified petition of indigence, make an individualized inquiry into McLaughlin's ability to pay the crime analysis laboratory fee.

FACTS

On February 2, 2016, McLaughlin was arrested at his residence for delivery of methamphetamine based on a controlled purchase operation set up with a confidential informant. On September 6, the State charged McLaughlin with delivery of a controlled substance (methamphetamine). Following trial, a jury found McLaughlin guilty.

During sentencing, the State argued that McLaughlin's offender score was 4 with a range of "20 plus to 60 months" due to McLaughlin's relevant criminal history. 1 Verbatim Report of Proceedings (VRP) at 312. The crimes included in the relevant criminal history were (1) a 2009 Skamania County conviction for failure to register as a sex offender, (2) a 2002 Skamania County conviction of possession of controlled substance – methamphetamine, and (3) a 1991 Ohio conviction of gross sexual imposition. The State used McLaughlin's 1991 Ohio conviction as a multiplier of McLaughlin's possession of a controlled substance conviction, but did not count the Ohio conviction as a point in his offender score. The State presented a certified copy of the Ohio indictment. The relevant language contained within the Ohio indictment on gross sexual imposition is as follows:

> The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that Richard S. McLaughlin, on or about the 3rd day of July in the year Nineteen Hundred and Ninety-One at the County of Hamilton and State of Ohio aforesaid, had sexual contact with [DLB], a person who was not Richard S. McLaughlin's spouse at the time, and the said [DLB] was less than thirteen years of age.

***2** Second Suppl. Exs. at 3-4. [1]

1 In 1991, McLaughlin was charged with one count of felonious sexual penetration and one count of gross sexual imposition. He pleaded guilty to the reduced charge of "Gross Sexual Imposition F/3" on count 1 and "Gross Sexual Imposition With Specification

F/3" on count 2. Second Suppl. Exs. at 6. Only one count of gross sexual imposition was used to calculate McLaughlin's offender score. However, the record does not indicate which count the court used to calculate his offender score.

The State argued that the Ohio crime of gross sexual imposition was comparable to second degree child molestation in the State of Washington. Although the trial court stated that the definition of "sexual contact" is "somewhat broader" out of Ohio, it ruled that "the sexual contact would fit under Washington law of sexual contact if he'd committed those acts ... in the State of Washington." 1 VRP at 324-25. The trial court adopted the State's argument and set the offender score at 4 with a standard sentencing range of "20 to 60 months." *Id.* at 325. The court imposed a "midrange" sentence of 40 months. *Id.* at 326.

The trial court imposed mandatory LFOs, including (1) a criminal filing fee, (2) a DNA collection fee, (3) a crime laboratory fee, and (4) a crime victim penalty assessment. McLaughlin testified that he is disabled and receives social security disability benefits. The trial court found McLaughlin indigent and waived the mandatory drug fine.

ANALYSIS

I. COMPARABILITY OF OUT-OF-STATE CONVICTIONS

McLaughlin first argues that the trial court erred in finding the Ohio conviction factually comparable to the Washington crime of second degree child molestation because it relied on unproven facts. He argues that the documents reviewed by the trial court at sentencing—the indictment, plea agreement, and judgment and sentence—were not documents that the trial court is permitted to review in determining factual comparability. He contends that the State cannot present "facts" to prove comparability without violating his rights to proof beyond a reasonable doubt and trial by a jury. Appellant's Opening Br. at 11. McLaughlin further argues that the State failed to prove that the plea to having committed gross sexual imposition under former 29 Ohio Rev. Code § 2907.05 (1990) was for conduct that would have amounted to second degree child molestation if committed in Washington. We disagree with McLaughlin's contentions.

A. STANDARD OF REVIEW AND PRINCIPLES OF LAW

We review the classification of out-of-state convictions for sentencing purposes de novo. *State v. Jackson*, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005). To determine the comparability of a foreign offense, Washington courts first determine whether the foreign offense is legally comparable—meaning, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the crimes are not identical or the foreign statute is broader, the court then determines factual comparability.[2] *State v. Olsen*, 180 Wn.2d 468, 473, 325 P.3d 187 (2014).

2 The State concedes that the 1991 Ohio conviction is not legally comparable. Thus, we address only the factual comparability prong.

***3** Offenses are factually comparable when the conduct for which the defendant was convicted would have violated a Washington statute. *Id.* at 473. To determine factual comparability, the court may rely only on any facts that were admitted, stipulated, or proved to the fact finder beyond a reasonable doubt. *Id.* at 473-74. The State bears the burden of providing sufficient evidence to prove by a preponderance of the evidence that a foreign offense is comparable with a Washington offense. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 252, 111 P.3d 837 (2005).

" '[T]he 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." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (quoting *State v. Mutch*, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997)). When a defendant pleads guilty, the only acts conceded are "the elements of the crime stated in the indictment." *State v. Bunting*, 115 Wn. App. 135, 143, 61 P.3d 375 (2003).

B. RELEVANT OHIO AND WASHINGTON STATUTES

On August 28, 1991, McLaughlin pleaded guilty to "Gross Sexual Imposition With Specification F/3." Second Suppl. Exs. at 6-7. The relevant language of the Ohio law on "Gross Sexual Imposition" at the time of the 1991 conviction is as follows:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more persons to have sexual contact when any of the following applies:
>
> ....
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

Former 29 OHIO REV. CODE § 2907.05 (1990).

Ohio defined "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." Former OHIO REV. CODE § 2907.01(B) (1990).

The State compared the Ohio offense to the Washington offense of second degree child molestation under RCW 9A.44.086(1) which states, in relevant part,

> A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

C. FACTUAL COMPARABILITY

McLaughlin argues that the trial court erred by finding his 1991 Ohio conviction for gross sexual imposition factually comparable to the Washington crime of second degree child molestation. McLaughlin contends that the trial court erred because the State did not prove the age of the victim beyond a reasonable doubt, and at the time McLaughlin pleaded guilty, the crime of gross sexual imposition was a strict liability offense. We disagree.

1. AGE OF THE VICTIM

McLaughlin argues that the State "relied on the allegation that the victim was less than 13 as if it was proven, saying that proved that the defendant [McLaughlin] was convicted in Ohio of a specific section of the statute affected people that age, rather than any of the other sections of the Ohio law." Appellant's Opening Br. at 14. He relies on the fact that the plea form documents did not contain a statement of facts regarding age. However, this argument misinterprets the law.

***4** When making a factual comparability analysis, the sentencing court is not limited to facts contained in the plea form documents. *See* *Morley*, 134 Wn.2d at 606. In fact, " '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*. (quoting *Mutch*, 87 Wn. App. at 437). Additionally, "the State need not independently prove those facts related to the foreign conviction that were admitted by the defendant." *State v. Releford*, 148 Wn. App. 478, 482, 200 P.3d 729 (2009).

The Ohio indictment stated, under the second count for gross sexual imposition, that McLaughlin "had sexual contact with [DLB], a person who was not Richard S. McLaughlin's spouse at the time, and the said [DLB] was less than thirteen years of age." Second Suppl. Exs. at 4. While it is true that courts must remain focused on the elements of the charged crime, *Morley*, 134 Wn.2d at 606, the victim's age is a relevant element of the 1991 crime of gross sexual imposition. Former OHIO REV CODE § 2907.05(A)(4). When McLaughlin pleaded guilty to gross sexual imposition, he conceded to the "elements of the crime stated in the indictment." *Bunting*, 115 Wn. App. at

143. Therefore, McLaughlin conceded to the fact that "[DLB] was less than thirteen years of age." Second Suppl. Exs. at 4.

2. STRICT LIABILITY

McLaughlin further argues that the State failed to prove that the plea to having committed gross sexual imposition was for conduct that would have amounted to second degree child molestation if committed in Washington because at the time of his conviction, gross sexual imposition, as proscribed by former 29 Ohio Rev. Code § 2907.05, did not require proof of a culpable mental state. We disagree.

At the time of McLaughlin's gross sexual imposition conviction in 1991, former 29 Ohio Rev. Code § 2907.05 required proof of sexual contact. Ohio defined "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, *for the purpose* of sexually arousing or gratifying either person." Former OHIO REV. CODE § 2907.01(B) (emphasis added). McLaughlin refers this court to *Ohio v. Astley*, 36 Ohio App. 3d 247, 250, 523 N.E.2d 322 (1987), where the Tenth Appellate District of Ohio interpreted gross sexual imposition to be "a strict liability offense and requires no precise culpable state of mind. All that is required is a showing of the proscribed sexual contact." Former 29 OHIO REV. CODE § 2907.05.

However, other Ohio appellate courts did not agree with *Astley*. In April 1991, months before McLaughlin's conviction in October 1991, the Fourth District held that the "assertion that there is no *mens rea* element in proving sexual contact is misplaced based on the clear language" of former 29 Ohio Rev. Code § 2907.01(B). *In re Matter of Grigson*, 1991 WL 62177 at *3 (Ohio Ct. App.). In 1992, the Ohio Supreme Court decided whether evidence was sufficient to prove the element of *purpose*, specifically whether the defendant engaged in "innocent contact" with his daughter or his contact was "for the purpose of sexual arousal and gratification." *Ohio v. Schaim*, 65 Ohio St. 3d 51, 57, 600 N.E.2d 661 (1992). In 1994, the Second District interpreted the definition of "sexual contact" under former 29 Ohio Rev. Code § 2907.01 and held that a culpable mental state is required for a gross sexual imposition conviction. *Ohio v. Mundy*, 99 Ohio App. 3d 275, 288, 650 N.E.2d 502 (1994). The *Mundy* court held that in order to convict the defendant of the offense, the state must prove beyond a reasonable doubt that "the defendant's subjective purpose or specific intention" in touching the victim was sexual arousal or gratification. *Id*.

***5** Here, the mens rea element of the Ohio offense is substantially similar to the elements of the Washington offense. At the time of the conviction in Ohio, "sexual contact" was defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, *for the purpose* of sexually arousing or gratifying either person." Former OHIO REV. CODE § 2907.01(B) (emphasis added). Washington defined "sexual contact" as "any touching of the sexual or other intimate parts of a person done

for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2) (emphasis added). Both offenses require the offender touch the victim for a sexual purpose or intent. Without this element, nothing would distinguish sexual imposition or child molestation from ordinary assault and from noncriminal touching.

Because the facts in the indictment were conceded in the guilty plea, *Bunting*, 115 Wn. App. at 143, and both offenses contain the element of touching of the sexual or other intimate parts of another "for the purpose of gratifying sexual desire of either party," the 1991 Ohio conviction is factually comparable to the Washington crime of second degree child molestation at the time the crime took place. RCW 9A.44.010(2), .086(1); former OHIO REV. CODE § 2907.05.

II. OFFENDER SCORE

The trial court determined that McLaughlin's offender score was 4. The parties agree that the court used the 1991 Ohio conviction as a multiplier of his possession of a controlled substance conviction. However, the court did not count McLaughlin's 1991 Ohio conviction as a point in his offender score. The parties concede that if McLaughlin's 1991 Ohio conviction is factually comparable, as we determined above, the sentencing court erred when it failed to include the 1991 Ohio conviction as a point in McLaughlin's offender score. The State argues that the offender score error is harmless. We disagree.

Under the Sentencing Reform Act of 1981, ch. 9.94A RCW, a sentencing court is required to properly calculate the offender score before imposing a sentence. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). "A sentencing court acts without statutory authority ... when it imposes a sentence based on a miscalculated offender score." *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

The parties concede that the sentencing court erroneously excluded McLaughlin's Ohio conviction from his offender score, thereby finding his offender score was a 4 with a standard range of 20 to 60 months. Under RCW 9.94A.517, McLaughlin's standard range remains 20+ to 60 months whether his offender score is a 4 or a 5. RCW 9.94A.517(1). The State argues that because the standard range would not have changed, any error in calculating McLaughlin's offender score was harmless. RCW 9.94A.517(1).

We hold that McLaughlin's correct offender score is a 5; however, we cannot conclude this error was harmless. We cannot know that the sentencing court would impose the same sentence using the correct offender score, and we are required to remand for the sentencing court to recalculate his offender score because the sentencing court acted without statutory authority when it imposed a sentence based on a miscalculated offender score. [3] *Johnson*, 131 Wn.2d at 568.

3 We do not suggest by this opinion that the trial court is foreclosed from imposing the same sentence. We remand because the sentence must be predicated on an accurate offender score.

III. LEGAL FINANCIAL OBLIGATIONS

McLaughlin challenges the sentencing court's imposition of the criminal filing fee, the DNA collection fee, the crime laboratory fee, and crime victim penalty assessment. We remand to the trial court to strike the criminal filing fee, consider whether the State has previously collected McLaughlin's DNA, and, upon submission of a verified petition of indigence, consider McLaughlin's ability to pay the crime laboratory fee. However, we affirm the crime victim penalty assessment.

A. CRIMINAL FILING FEE

***6** Recent legislation prohibits the imposition of certain LFOs, including the criminal filing fee, on a defendant who is indigent under RCW 10.101.010(3)(a)-(c). RCW 36.18.020(h); *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018). These statutory amendments apply prospectively to cases pending on appeal. *Ramirez*, 191 Wn.2d at 747.

A person is indigent under RCW 10.101.010(3)(a) if he or she receives public assistance, including disabled assistance benefits, at any stage of the court proceeding. At sentencing, the court found McLaughlin was indigent under RCW 10.101.010(3)(a) because McLaughlin receives disabled assistance benefits. Therefore, the trial court's imposition of the criminal filing fee on McLaughlin is prohibited.

B. DNA COLLECTION FEE

The legislature recently amended RCW 43.43.7541 and established that the DNA collection fee is no longer mandatory if the offender's DNA has been previously collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18. RCW 43.43.7541 requires the collection of a DNA sample from every adult or juvenile convicted of a felony. McLaughlin has two prior felony convictions in Washington, but the record on appeal is silent as to whether the State previously collected his DNA. If such collection occurred, the trial court's imposition of the DNA collection fee was improper.

On remand, the trial court must determine whether McLaughlin previously had a DNA sample collected. The burden is on the State to show that McLaughlin has not previously provided a DNA sample before the court may impose a DNA collection fee. *See State v. Houck*, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019).

C. CRIME LABORATORY ANALYSIS FEE

The sentencing court ordered McLaughlin to pay a crime laboratory fee. RCW 43.43.690 governs the mandatory imposition of the crime laboratory fee. RCW 43.43.690(1) states,

> When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted.

However, "[u]pon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee." RCW 43.43.690(1). Here, the record is silent as to whether McLaughlin has petitioned the trial court to suspend the crime laboratory fee. On remand, if McLaughlin submits a verified petition, the trial court shall determine whether to impose the crime laboratory fee.

D. CRIME VICTIM PENALTY ASSESSMENT

The sentencing court also ordered McLaughlin to pay a crime victim penalty assessment. Indigency as defined in RCW 10.101.010(3)(a) through (c), is not grounds for failing to impose the crime victim penalty assessment under RCW 7.68.035. RCW 9.94A.760(1). Therefore, the victim penalty assessment remains a mandatory LFO. *State v. Catling*, 193 Wn.2d 252, 259, 438 P.3d 1174 (2019).

Additionally, receipt of disabled assistance benefits also does not relieve a defendant from the imposition of the crime victim penalty assessment. *Id.* at 264. However, the Social Security Act's antiattachment provision states that social security moneys cannot be reached to satisfy a debt. *Catling*, 193 Wn.2d at 264; 42 U.S.C. § 407(a). Therefore, the crime victim penalty assessment cannot be satisfied by funds subject to 42 U.S.C. § 407(a). *Catling*, 193 Wn.2d at 264-65. Accordingly, we remand to the trial court to amend the judgment and sentence to reflect that the crime victim penalty assessment cannot be satisfied out of funds subject to 42 U.S.C. § 407(a).

CONCLUSION

***7** We affirm the sentencing court's determination that McLaughlin's 1991 Ohio conviction of gross sexual imposition is factually comparable to the Washington crime of second degree child molestation. However, we reverse his sentence, and remand for resentencing using the correct offender score. On remand, we instruct the trial court to strike the criminal filing fee and amend McLaughlin's judgment and sentence to reflect that the victim penalty assessment cannot be satisfied from funds that are subject to 42 U.S.C. § 407(a). We further instruct the court to determine whether the State has already collected McLaughlin's DNA and if he submits a verified petition, to make an individualized inquiry into McLaughlin's ability to pay the crime laboratory fee. However, we affirm the crime victim penalty assessment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

WORSWICK, J.

LEE, A.C.J.

All Citations

Not Reported in Pac. Rptr., 2019 WL 6716307

End of Document

SUPERIOR COURT OF WASHINGTON FOR SKAMANIA COUNTY

State of Washington,
Petitioner,
vs.
Richard S. McLaughlin,
Respondent/Appellant.

No. 16-1-00060-4

COA No. 51026-0-II

Second Suppl
INDEX TO EXHIBIT'S

EXHIBIT #	DESCRIPTION OF EXHIBIT

McLaughlin

AFTAB PUREVAL
HAMILTON COUNTY CLERK OF COURTS

COMMON PLEAS
HAMILTON COUNTY COURTHOUSE
1000 MAIN STREET
CRIMINAL DIVISION, ROOM 315
CINCINNATI, OHIO 45202
PHONE: (513) 946-5672
FAX: (513) 946-5670
www.courtclerk.org

FAX TRANSMITTAL

DATE: 10/05/2017

TO: Skamania Co. Prosecutor

ATTN: Linda

FAX#: (509) 427-3798

FROM: Hamilton Co Clerk

TOTAL PAGES (including cover sheet): 7

COMMENTS:

Certified copies will follow via U.S. mail.

~~DROPBOX~~ + By Hand

Date 10/10/17

Attorney TP

0-000000001

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

State of Ohio

Plaintiff

-vs-

Case No. B914528

Richard S. McLaughlin

Defendant

PROSECUTING ATTORNEY'S REQUEST

FOR ISSUANCE OF WARRANT

UPON INDICTMENT

TO THE CLERK OF THE COURT OF COMMON PLEAS:

Richard S. McLaughlin
has been named a defendant in an indictment returned by the Grand Jury.

Pursuant to Rule 9, Ohio Rules of Criminal Procedure, the undersigned requests that you or a Deputy Clerk forthwith issue a warrant to an appropriate officer and direct him to execute it upon the above-named defendant at the following address: Hamilton County Justice Center, or at any place within this State.

Arthur M. Ney, Jr.
Prosecuting Attorney
Hamilton County, Ohio

By: Pam K. McMahon
Assistant Prosecuting Attorney

A TRUE COPY OF THE ORIGINAL
ENTERED 07/12/1991
ATTEST AFTAB PUREVAL
CLERK.
BY _____
DATE 10/05/2017

0-000000002

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

THE STATE OF OHIO

HAMILTON COUNTY, ss:

Case No. B9[illegible]28

INDICTMENT FOR: Felonious Sexual Penteration 2907.12 R.C. and Gross Sexual Imposition 2907.05 R.C. With Specification

In the Court of Common Pleas, Hamilton County, Ohio, of the Grand Jury Term Nineteen Hundred and Ninety-One.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that Richard S. McLaughlin, on or about the 3rd day of July in the year Nineteen Hundred and Ninety-One at the County of Hamilton and State of Ohio aforesaid, without privilege to do so, inserted an instrument, apparatus, any part of the body, or other object into the vaginal cavity of Deana L. Burton, and the said Richard S. McLaughlin was not the spouse of Deana L. Burton, or the said Richard S. McLaughlin was the spouse of the said Deana L. Burton but was living separate and apart from the said Richard S. McLaughlin and the said Deana L. Burton was less than thirteen years of age, and the said Richard S. McLaughlin purposely compelled Deana L. Burton to submit by force or threat of force, in violation of Section 2907.12 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SECOND COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that Richard S. McLaughlin, on or about the 3rd day of July in the year Nineteen Hundred and Ninety-One at the County of Hamilton and

State of Ohio aforesaid, had sexual contact with Deana L. Burton, a person who was not Richard S. McLaughlin's spouse at the time, and the said Deana L. Burton was less than thirteen years of age, in violation of Section 2907.05 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

SPECIFICATION

The Grand Jurors further find and specify that the said Richard S. McLaughlin at the time of the offense alleged in count two, had previously been convicted of an offense of violence, to wit: Attempt (Carrying Concealed Weapons), in the Hamilton County, Ohio Municipal Court, Case No. 87CRB18098, on the 18th day of December, in the year Nineteen Hundred and Eighty-Seven.

Arthur M. Ney, Jr.

Prosecuting Attorney
Hamilton County, Ohio

By: _____
Assistant Prosecuting Attorney

Reported and filed this
12th day of
July A.D. 19 91
by _____
Clerk of Hamilton County
Common Pleas

By: _____
Deputy

A TRUE BILL

By: Dennis M Kenger
Foreperson, Grand Jury

BA 91-04528
RICHARD S MCLAUGHLIN

ARRAIGNMENT 7-19-91
Plea of not Guilty Entered

Aug 28, 1991
Plead guilty the reduced charge of GSI 2907.05 RC (F-3) cnt1, GSI 2907.05 RC (F-3) cnt 2. Sentenced: DOC 1 yr cnt 1, 2-10 yrs cnt 2 concurrent w/ credit for time served, pay costs.

Winkler

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

RALPH WINKLER, Jr.

ENTERED
AUG 28 1991
IMAGE 215

THE STATE OF OHIO :

-vs- :

RICHARD S. McLAUGHLIN :
Defendant

CASE NO. B 914528 AUG 28 1991

ENTRY WITHDRAWING PLEA OF NOT GUILTY AND ENTERING PLEA OF GUILTY

I, RICHARD S. McLAUGHLIN, Defendant in the above cause, hereby freely and voluntarily retract and withdraw my Plea of Not Guilty to the charge(s) in the Indictment entered herein on a former day of this Court and offer a Plea of Guilty to the following with the indicated maximum penalties:

		*DEFINITE TERM			INDETERMINATE TERM		
COUNT	CHARGE(S) & DEGREE				MINIMUM TERM	MAXIMUM TERM	MAXIMUM FINE
1	GROSS SEXUAL IMPOSITION F/3	1	1½	2			$ 5000
2	GROSS SEXUAL IMPOSITION WITH SPECIFICATION F/3 w/SPEC				2, 2½, 3, 4	10	$ 5000
							$

I understand the nature of the charge(s) to which I plead Guilty, and whether or not I will be eligible for probation. I have been informed and understand the following: That my Plea of Guilty is a complete admission of my guilt of said charge(s) and a Waiver of any and all constitutional, statutory and factual defenses to such charges in this case; that upon acceptance of the Plea, the Judge may proceed with judgment and sentence; that I am waiving my constitutional rights to Jury trial, to confront witnesses against me, to have compulsory process for obtaining witnesses in my favor and to require the State to prove my guilt beyond a reasonable doubt at a trial at which I cannot be compelled to testify against myself.

Are you a citizen of the United States of America? RM (Yes) ____ No (Initial)
If you are not a citizen of the United States, you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

I have not been forced or threatened in any way to cause me to sign and offer this Plea. I offer this Plea knowingly, intelligently and voluntarily. I have consulted with my Attorney and have his/her advice and counsel. I am satisfied with the legal representation and advice I have received from my Attorney.

Richard McLaughlin
Defendant

I have explained to the Defendant prior to his/her signing this plea, the charge(s) in the information, the penalties therefore and his/her constitutional rights in this case. I represent that, in my opinion, the Defendant is competent to enter his/her Plea, and now does so knowingly, intelligently and voluntarily.

Eric C. Hagenbuch
Attorney for Defendant

Violation of Revised Code 2907.05

Dismiss Counts N/A

* If Applicable

Revised (2 Oct. 1989)

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0-000000006

date: 08/28/91
code: GJEI
judge: 031
form: B

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

* * * * * * * * * * *
* ENTERED *
* DATE : 8-28-91 *
* IMAGE: 232 *
* * * * * * * * * * *

Judge: RALPH WINKLER

NO. B 914528

THE STATE OF OHIO
VS.

JUDGMENT ENTRY : SENTENCE:

INCARCERATION

RICHARD S MCLAUGHLIN

Defendant was present in open Court with Counsel ERIC C. HAGERSTRAND on the 28th day of August 1991 for sentence.
The court informed the defendant that, as the defendant well knew, after the defendant had pleaded guilty and was found guilty of the offense(s) of THE REDUCED CHARGE OF GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) IN COUNT 1; AND GROSS SEXUAL IMPOSITION 2907.05 R.C. (F-3) WITH SPECIFICATION IN COUNT 2.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Department of Corrections for a period of ONE (1) YEAR ON COUNT 1; AND TWO (2) TO TEN (10) YEARS ON COUNT 2 CONCURRENT TO COUNT 1. DEFENDANT IS TO BE CREDITED WITH ANY TIME SERVED TO WHICH HE MAY BE ENTITLED UNDER THE LAW. PAY COSTS.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

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BY
DATE 10/05/2017

RUSSELL SELK LAW OFFICE

January 09, 2020 - 4:28 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Richard S. McLaughlin, Appellant
Superior Court Case Number:	16-1-00060-4

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