

63434-8

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NO. 63434-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARIN JEROME GATSON

Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION I

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I. ISSUES

1. Where an out-of-state conviction was, for unknown reasons, not included in defendant's offender score at a prior sentencing, are courts subsequently precluded, on the theory of collateral estoppel, from incorporating the out-of-state conviction into defendant's offender score at all subsequent, separate felony sentencings where the SRA specifically states the courts are not bound by the previous non-inclusion?

2. Is Washington's robbery statute legally comparable to New York's where one cannot commit a robbery under the elements of New York's robbery statute without necessarily having committed a robbery under the Washington statute?

3. Is defendant's prior New York offense factually comparable to the Washington offense where defendant's actions, had they been committed here, would constitute a robbery under Washington law?

4. If resentencing is warranted, should the State be limited to only that evidence previously presented, where the SRA specifically holds all parties may present relevant evidence of criminal history not previously presented?

II. STATEMENT OF THE CASE

On March 19, 2009, defendant pleaded guilty to Possession of a Stolen Vehicle in the Snohomish County Superior Court. 1CP 70-88. Appendix A to the plea agreement detailed the State's understanding of defendant's prior criminal history. It included six prior felonies, the earliest a 1992 'third degree robbery' conviction from Monroe County, New York. 1CP 84.

Defendant indicated in the plea agreement that it believed the New York offense should not be included in his criminal history. 1CP 79. This objection was noted orally as well:

[DEFENSE COUNSEL]: Just for the record, Your Honor, for Mr. Gatson's purposes, we are contesting criminal history.

THE COURT: Oh, okay.

[DEFENSE COUNSEL]: There's a conviction out of New York that, in his previous sentencing, was not counted toward his criminal history. We don't believe it will count for this criminal history, and I've convinced Mr. Gatson that's a sentencing issue, not a plea issue. So the State's offer is the high end of whichever range he is in what they're recommending.

2RP 4.¹

The previous sentencing alluded to was actually two separate convictions, one for Third Degree Assault, the other for

¹ The report of proceedings for the March 19, 2009, guilty plea hearing is referred to herein as 2RP. The April 7, 2009, sentencing is designated 4RP.

Second Degree Theft, both entered December, 2006, before the Honorable J. Thorpe of the Snohomish County Court. 1CP 65, 67. The Judgment and Sentence for both convictions initially lists the New York offense amongst defendant's priors. In each, however, a line had been drawn through that conviction, striking it. 1CP 65, 67.

At sentencing for the present offense, the reason the previous court did not include the New York conviction was discussed. The State indicated this was likely because the State did not have the relevant documentation to prove the New York offense at the time. 4RP 1-2, 4, 7. Defense argued the possibility the previous sentencing judge found the New York offense had "washed out." This was also defense's present basis for objecting to its inclusion:

[DEFENSE COUNSEL]: [O]ur objection really was based on we thought it washed out. And I-- I thought that was the reason why Judge Thorpe didn't count it. I still believe it washes out and should not count.

4RP 2.

The State handed forward documentation underlying the prior New York conviction. 4RP 2; 1CP 20-69. The Court thereafter engaged in a "washout" examination of the New York

robbery questioning how long defendant would have gone crime-free after release for it to wash out.

THE COURT: The equivalent would be a Class B felony, so it would have to be ten years, correct?

[PROSECUTOR]: Correct.

THE COURT: It indicates here that he was paroled in July of '94, so he would have to have gone crime free until July of 2004 for it to wash; is that correct?

[DEFENSE COUNSEL]: That's correct under the washout provision if, in fact, it is equivalent to our second degree robbery.

THE DEFENDANT: It's not.

THE COURT: Based on what was submitted here, it would certainly appear to be factually equivalent to our second degree robbery.

* * * *

THE COURT: I would find that the 1992 conviction out of New York, the County of Monroe, is an offense that is equivalent to a robbery in the second degree in Washington and was at that time, and that the defendant did not stay crime free for a period of ten years after that conviction. So it does not wash.

4RP 3-4.

The prior offense was included in defendant's criminal history by the court resulting in a standard sentencing range of 22 – 29 months confinement. 1CP 9. Defendant ultimately received 26 months. 1CP 12.

III. ARGUMENT

In Washington, a defendant's post-conviction standard sentencing range is determined by statute. The statutory range employed by the sentencing court is determined, in part, by the number of previous convictions the defendant has amassed – their "offender score" as determined by the court. RCW 9.94A.525, 530.

A defendant's challenge to the court's offender score calculation is reviewed de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

A. DE NOVO REVIEW REVEALS THE PRIOR CONVICTION WAS PROPERLY INCLUDED IN DEFENDANT'S OFFENDER SCORE.

1. The Sentencing Court Was Not Bound By The Fact A Prior Court Did Not Include The New York Conviction In A Previous Offender Score Calculation.

Defendant points to the fact that a previous court, sentencing defendant on a separate, previous felony, was aware of the existence of defendant's New York conviction, but did not there include it in its calculation of defendant's offender score. As a result, defendant argues, collateral estoppel precludes the *present* sentencing court from including the out-of-state conviction in the offender score calculation on defendant's *current* felony.

Defendant is mistaken. The legislature has clearly determined that a sentencing court is not to be bound by a prior court's determinations in this area:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history of offender score for the current offense.

RCW 9.94A.525 (21).

Collateral estoppel is a judicially created doctrine. State v. Barnes, 85 Wn. App. 638, 652, 932 P.3d 669 (1997). Such should not stand to contravene the clear will of the legislature, especially in the area of sentencing.

The Supreme Court [has] noted that the Legislature, not the judiciary, has the authority to determine the sentencing process and that the fixing of legal punishment in sentencing is a legislative function. 'The trial court's discretion in sentencing is that which is given by the legislature.'

State v. Randle, 47 Wn. App. 232, 239, 734 P.2d 51 (1987) quoting State v. Ammons, 105 Wn.2d 175, 181, 713 P.2d 719 (1986).

Also, even absent the statute above, collateral estoppel would not work to bind the sentencing court here. In determining whether the doctrine should be applied, four criteria must be met:

(1) the issue decided in the prior adjudication is identical with the one presented in the second action;

(2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

State v. Failey, 144 Wn. App. 132, 142-43, 181 P.3d 875 (2008).

Here, most obviously, there is no showing as to that the prior sentencing court having reached a decision on the *merits* – i.e. determined that defendant’s New York conviction was not comparable or otherwise washed out. It is equally likely that the offense was not included because the State simply did not have the relevant documentation at the time of sentencing.

Defendant argues that the fact the State did *not prove* at the present sentencing that the previous court did not have the documentation before it means the doctrine should be employed – the State apparently having the burden of showing why the doctrine should *not* be employed. This claim is based on an incorrect understanding of who carries the burden of proof, however. “Before the doctrine of collateral estoppels may be applied, *the party asserting the doctrine* must prove [the four prongs above].” Id. at 142 (emphasis added); see also State Farm Mut. Ins. Co. v. Avery, 114 Wn. App. 299, 57 P.3d 300 (2002).

Further, allowing the doctrine to control in such circumstances would work an injustice. If a court erred in finding a prior offense was *not* properly included, and such was not timely appealed, collateral estoppel would work to prevent defendant from ever bearing responsibility for that prior offense in all subsequent sentencings. The converse, however, would not occur. It is hard to imagine an appellate court ruling that collateral estoppel mandates the erroneous *inclusion* of a prior felony in a defendant's offender score because a previous sentencing court made such an error.

Thus, a single court's error would be visited upon all subsequent courts, and only to the effect of incorrectly holding defendants less accountable for their previous crimes. Such a result runs directly counter to justice and the SRA's overall goal of "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense *and the offender's criminal history.*" RCW 9.94A.110(1) (emphasis added).

2. The Sentencing Court Erred In Determining The New York Robbery Conviction Was Comparable To The Washington Offense Of Robbery In The Second Degree.

Both in-state and out-of-state prior convictions count toward a defendant's offender score. Because proper scoring of the prior offense depends upon its "felony class" *under Washington law*, a

difficulty arises in determining an out-of-state conviction's felony class. RCW 9.94A.525(2). This question is resolved by engaging in a "comparability analysis." RCW 9.94A.525(3) ("Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.") Where there is no comparable Washington offense, the prior cannot be included in the offender score. State v. Cabrera, 73 Wn. App. 165, 168, 868 P.2d 179 (1994).

The legislature has provided little substantive guidance as to how to determine whether an out-of-state offense has a sufficiently comparable Washington counterpart. Case law has filled the void with a two part examination: First, the sentencing court is to examine the "legal comparability" of the out-of-state conviction statute with its closest Washington counterpart. If the statutes are not *legally* comparable, the prior offense may still be counted in the offender score if it is "factually comparable" to the Washington offense. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Crawford, 150 Wn. App. 787, 794-98, 209 P.3d 507 (2009).

De novo review reveals the conviction is comparable to the Washington offense of robbery in the second degree.

a. The offenses are legally comparable.

In determining whether an out of state conviction is 'legally comparable' to a Washington offense:

[t]he sentencing court must... look to the elements of the crime. More specifically, the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. If the elements of the foreign crime are comparable to the elements of a Washington... offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.

In re Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005).

The examination here is whether it would be hypothetically *possible* to commit the elements of the out of state offense without *necessarily* having committed the Washington crime. In other words, "legal comparability" exists where the elements of the out of state offense are identical to, or narrower than, the elements of the Washington offense. Id. at 256-57.

Defendant was convicted of robbery in the third degree in New York on June 13, 1993. The pertinent WA statutes were, and are, as follows:

Robbery in the second degree

(1) A person is guilty of robbery in the second degree if he commits robbery. ...

RCW 9A.56.210

Robbery--Definition

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190

The relevant New York statutes then in effect:

Robbery in the third degree

A person is guilty of robbery in the third degree when he forcibly steals property.

N.Y. Penal Law § 160.05 (McKinney 2003)

Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00 (McKinney 2003)

As an initial matter, the New York definition of robbery is a near verbatim duplicate of Oregon's statute which was found to be legally comparable to Washington's in State v. McIntyre, 112 Wn. App. 478, 49 P.3d 151 (2002) and, more recently, State v. Johnson, 150 Wn. App. 663, 208 P.3d 1265 (2009).²

The only difference between the New York statute and the Oregon statute is that New York, instead of using the word "theft," speaks of "larceny." This, however, would not distinguish New York's statute from Washington's (or Oregon's per 'theft' as defined in ORS 164.015) under a legal comparability review because all the methods of committing 'larceny' would constitute "unlawful" takings

² In Oregon robbery is committed:

if in the course of committing or attempting to commit theft the person uses or threatens the immediate use of physical force upon another person with the intent of:

(a) Preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or

(b) Compelling the owner of such property or another person to engage in other conduct which might aid in the commission of the theft.

ORS 164.395; McIntyre, 112 Wn. App at 480; Johnson, 150 Wn. App. at 677.

in WA (“unlawful taking” being the relevant counterpart from the WA robbery statute).³

Further, the specific legal comparability objections raised by defendant do not stand up to analysis. Defendant claims, “New York requires the taking be from the person while Washington requires taking from the person ‘or in his presence’” and “New York requires the force to be used against a person while Washington allows the force to be directed at either the person or the property.” Br. of Appellant, pp. 10-11. The fact that Washington’s law is *broader* than New York’s, however, is irrelevant. Lavery, 154 Wn.2d at 256-57. The inverse, whether New York’s is broader, is the question.

Defendant further claims, “[r]obbery in New York requires the forcible taking of property, while Washington does not.” Br. of Appellant, p. 10. Again, even if New York’s statute was narrower, this is irrelevant. Moreover, the underlying claim seems obviously wrong. Washington’s robbery statute *does* require the forcible taking of property, criminalizing the taking of property through the “use or threatened use of force, violence or fear of injury.” RCW 9A.56.190.

³ N.Y. Penal Law § 155.05 (McKinney 2003) defining larceny has been included as ‘Attachment A.’

Finally, defendant points to the fact that New York also criminalizes, as robbery, forcibly compelling another “to engage in any other conduct that aids in the commission of larceny.” The portion of this language criminalizing forcibly compelling another “*to engage in conduct that aids in the commission of*” does not distinguish the statutes. Washington equally criminalizes such activity as robbery in that the robbery definition here includes “the use or threatened use of [force] to ... the person of ... *anyone* ... [where such is] used to obtain or retain possession of the property...” RCW 9A.56.190 (emphasis added). Using force to ‘compel another to aid in the commission of a taking’ is merely a subset or one particular way of using force against ‘anyone to obtain possession of property.’ Moreover, the same language exists in ORS 164.395, found to be legally comparable. See McIntyre, Johnson.

Additionally, as noted above, the fact that New York refers to ‘larceny’ while WA refers to ‘unlawful taking’ does not distinguish the offenses. Again, a review of the pertinent larceny statute reveals that a taking of property conducted in any of the manners listed therein would necessarily constitute an “unlawful” taking in Washington. The offenses are legally comparable.

b. The offenses are factual comparable.

Where two offenses are not legally comparable, the out-of-state offense may still be included in the defendant's offender score where the offense is found to be factually comparable - where a review of the defendant's *actions* reveals they would have violated the Washington statute.

If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable-that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute...

State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

The key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington.

State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Here, the offenses pass a legal comparability examination. There is no need to engage in factual comparability review. Defendant nonetheless claims that he did not commit acts that would be a crime arguing from State v. Johnson, 155 Wn.2d 609, 610, 121 P.3d 91 (2005). Br. of Appellant, pp. 12-13. In Johnson, the defendant did not commit a robbery, crucially, because he had affirmatively abandoned the goods when he used force. He used

force *solely* to escape. Id. at 610-11. In other words, force was never used to acquire or retain possession of the stolen goods. In the present matter, defendant's claim would rest on the factual assertion he only used force to escape the store.

As an initial matter, if defendant's factual claims were true, given that he was convicted of robbery in New York, such presupposes that New York criminalizes, as robbery, takings where the force was used solely to escape (unlike Washington per Johnson). Seeing this, it becomes obvious that defendant's argument is actually grounded in a claim that New York's law is not *legally comparable* to Washington's – not because of the statutory differences, but because of claimed case law differences. Defendant presents no evidence, however, that New York case law does not similarly limit robbery. In fact, it does:

The general rule, consistent with the New York Penal Law, is that although the use of force to effect an escape does not constitute robbery, force to retain possession of stolen property makes out a robbery.

People v. Rudelt, 6 A.D.2d 640, 642, 179 N.Y.S.2d 916, 919 (1958); also, People v. Nixon, 548 N.Y.S.2d 194, 195 (1989).

Even, however, supposing the law of the states were different in this regard, and defendant's argument were viewed as a

proper attempt to distinguish the crimes under a *factual comparability* review, such an attempt would fail. This is because the facts in question do not show what defendant claims. Here, defendant used force to escape *with the stolen goods*. 1CP 56. Compare Johnson, 155 Wn.2d at 610-11. Such actions are encompassed within “robbery” as defined under Washington law as force was used “to retain possession of the property, or to prevent or overcome resistance to the taking[.]” RCW 9A.56.210.

As a result, factual comparability analysis supports the trial court’s conclusion. Defendant, had he committed the same acts in Washington, would have committed the offense of robbery in the second degree, a class B felony.

B. EVEN IF RESENTENCING IS NECESSARY, THE STATE MAY PRESENT ADDITIONAL EVIDENCE.

Defendant specifically raised a ‘wash-out’ objection to his New York conviction. ‘Wash-out’ objections to out-of-state convictions necessarily entail classification and comparability determinations. They are thus considered a “specific objection” to comparability. State v. McCorkle, 137 Wn.2d 490, 496, 973 P.2d 461 (1999).

Given this objection, previous case law would have limited the State, at a resentencing, to the record presented to the sentencing court originally. State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).

In 2008, however, the legislature amended RCW 9.94A.530(2), to include the following:

On remand for resentencing ... the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, *including criminal history not previously presented*.

(Emphasis added). In doing so, it stated:

It is the legislature's intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act's goals of:

(1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

* * * *

Given the decisions in In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005); State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999); and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether

imposed at sentencing or upon resentencing. These amendments are consistent with the United States Supreme Court holding in Monge v. California, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.

WA LEGIS 231 (2008)

This amendment must be considered, again, in light of the fact that

the Legislature, not the judiciary, has the authority to determine the sentencing process and that the fixing of legal punishment in sentencing is a legislative function.

Randle, 47 Wn. App.at 239.

Thus, if there is a resentencing, the State may present criminal history of defendant not previously presented.

IV. CONCLUSION

For the foregoing reasons, defendant's appeal should be denied.

Respectfully submitted on December 15, 2009.

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**MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
PENAL LAW
CHAPTER 40 OF THE CONSOLIDATED LAWS
PART THREE--SPECIFIC OFFENSES
TITLE J--OFFENSES INVOLVING THEFT
ARTICLE 155--LARCENY**

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§ 155.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

(b) By acquiring lost property.

A person acquires lost property when he exercises control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or the nature or amount of the property, without taking reasonable measures to return such property to the owner;

(c) By committing the crime of issuing a bad check, as defined in section 190.05;

(d) By false promise.

A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed. Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed;

(e) By extortion.

A person obtains property by extortion when he compels or induces another person to deliver such property to

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APPENDIX A

himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

- (i) Cause physical injury to some person in the future; or
- (ii) Cause damage to property; or
- (iii) Engage in other conduct constituting a crime; or
- (iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (vi) Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (vii) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (viii) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (ix) Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

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(L.1965, c. 1030.)