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No. 65943-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH VINCENT,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Elijah Vincent of failure to register as a sex offender.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Where a defendant is convicted of a sex offense in another state, he must register as a sex offender in Washington if the conviction is comparable to a sex offense requiring registration in Washington. The State bears the burden of proving the comparability of an out-of-state conviction beyond a reasonable doubt. Here, the State presented evidence of a Hawaii conviction, but the Hawaii statute is broader than any corresponding Washington statute, and the State did not present sufficient evidence that Mr. Vincent admitted the necessary facts or that those facts were proved to a fact-finder beyond a reasonable doubt. Was there sufficient evidence to convict Mr. Vincent of the failing to register offense?

C. STATEMENT OF THE CASE

When Elijah Vincent moved to Washington in July 2008, he registered as a convicted sex offender, based on a prior juvenile court finding in Hawaii of sexual assault in the first degree. CP 6,

42. On January 16, 2009, Mr. Vincent moved to the home of his stepfather in Everett and promptly registered the change of address with the Snohomish County Sheriff's Office. Id. During the following ten months, Mr. Vincent changed addresses four times, and re-registered each of those times. Id. The last time Mr. Vincent registered was November 5, 2009, to the address of his stepfather in Everett. Id.

On December 14, 2009, Mr. Vincent's stepfather filed a report with the Snohomish County Sheriff's Department, stating that Mr. Vincent no longer lived in his home and had failed to re-register. CP 5. Mr. Vincent was charged with failure to register as a sex offender. CP 110-11.

In his defense, Mr. Vincent argued that Hawaii statute Haw. Rev. Stat. § 707-730, under which he had apparently been convicted, is broader than Washington's rape statute, and that the State had not presented any evidence of factual comparability. RP 6-9.

The State argued that although Mr. Vincent was convicted of first degree sexual assault in Hawaii, the comparable crime in Washington would be first- or second-degree rape. RP 3. The State did not, however, offer any plea paperwork showing that Mr.

Vincent admitted to any factual allegations alleged in the Hawaii petitions, nor that he received a trial. The documents relating to the Hawaii findings were admitted by stipulation and Mr. Vincent was convicted following a “stipulated trial.” RP 11-13; CP 26.

D. ARGUMENT

1. THE STATE FAILED TO MEET ITS BURDEN OF PROOF, BECAUSE THE STATE PRODUCED INSUFFICIENT EVIDENCE OF LEGAL COMPARABILITY.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant’s fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A person who has been previously convicted of certain sex offenses is required to register with the local sheriff’s department as a sex offender. RCW 9A.44.130. The crime of failure to register as a sex offender includes the knowing failure to register, or changing residences without notifying authorities of the address change. Id. Where prior convictions are from other jurisdictions, the State must show the comparability of the offenses, and that registration as a sex offender in Washington is required. State v. Howe, 151 Wn. App. 338, 351-53, 212 P.3d 565 (2009).

b. The State produced insufficient evidence to prove beyond a reasonable doubt that Mr. Vincent’s prior Hawaii offense was comparable to a Washington conviction. In this case, the State failed to prove the comparability of the Hawaii conviction beyond a reasonable doubt. The Hawaii sexual assault statute is broader than Washington’s, and is therefore not legally comparable. Accordingly, the State was required to prove factual comparability, but it did not present sufficient evidence to do so. The State presented evidence of the facts that were alleged, but no evidence

that Mr. Vincent admitted to the alleged facts when pleading guilty. In fact, the State presented no evidence as to whether Mr. Vincent pled guilty at all, whether a trial was conducted, or what transpired in Hawaii. RP 9.¹ Accordingly, the State failed to prove Mr. Vincent's prior sex offense, and the instant conviction for failure to register must be reversed. Howe, 151 Wn. App. at 351-52 (reversing and remanding for dismissal due to State's failure to show comparability of California sex offense).

It is the State's burden to show that any out-of-state convictions are comparable to Washington convictions. Washington courts apply a two-part test to determine whether the State has satisfied its burden of showing comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); Howe, 151 Wn. App. at 351-52.

First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

¹ Notably, in addition to the lack of a plea form, the stipulated documents included no signed affidavit from the complainant. The only account of the accusation against Mr. Vincent was the typed complaint of a police officer. CP 55.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, would violate the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

In this case, the Hawaii and Washington statutes regarding sexual assault and rape are not legally comparable. Under Washington law:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to uses a deadly weapon or what appears to be a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or

(d) feloniously enters into the building or vehicle where the victim is situated.

RCW 9A.44.040 (emphasis added). "Sexual intercourse" includes any act of penetration. RCW 9A.44.010; State v. Cain, 28 Wn. App. 462, 465, 624 P.2d 732 (1981).

Although the State alleged that the Hawaii sexual assault in the first degree statute was comparable to "in Washington, a sex crime of either rape two or rape one," the deputy prosecutor's own uncertainty is instructive here. It is completely unclear to which elements of Washington's second degree rape statute the State was referring.²

Under Hawaii law, in contrast:

(1) A person commits the offense of sexual assault in the first degree if:

(a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion;

(b) The person knowingly engages in sexual penetration with another person who is less than fourteen years old; or

(c) The person knowingly engages in sexual penetration with a person who is at least fourteen

² Because the State made no factual allegations, as noted supra, it is impossible to know whether the complainant in Hawaii was somehow incapable of consent.

years old but less than sixteen years old; provided that:

- i. The person is not less than five years older than the minor; and
- ii. The person is not legally married to the minor.

Haw. Rev. Stat. § 707-730 (emphasis added). Hawaii's statute is broader because it uses the term "strong compulsion," while Washington's statute requires "forcible compulsion." Thus, the State was required to prove factual comparability beyond a reasonable doubt. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606.

The Merriam-Webster Dictionary defines "compulsion" as "an irresistible impulse to perform an act, "an act of compelling," or "a force that compels."³ An example used by Webster's is "We should be able to get them to cooperate without using compulsion." Id. (emphasis original). That the Hawaii first degree sexual assault statute requires only "strong compulsion" makes the Hawaii statute broader than Washington's requirement of "forcible compulsion."

In Washington, "forcible compulsion" has a specific legal meaning, defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death

³ <http://www.merriam-webster.com/dictionary/compulsion>. (last visited 3/3/11).

or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010. Although the State filed copies of certain Hawaii statutes and “case notes,” the State failed to address the fact that the “strong compulsion” language included in Hawaii’s statute is broader, and thus includes other forms of coercion not anticipated by Washington’s “forcible compulsion” language, which requires an element of physical overpowering of resistance. RP 7-10; CP 25-93.

Where crimes are not legally comparable, it is very difficult for the State to prove factual comparability. As the Lavery Court explained, even in a context where the standard of proof is a preponderance of the evidence:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. In Lavery, the Supreme Court held the State failed to prove by a preponderance of the evidence that the defendant’s federal robbery conviction was comparable to a

Washington robbery conviction, because the State did not present evidence that the defendant had admitted or stipulated to the necessary facts, or that those facts had been proved to a jury. Id.

The same is true here. The State did not present evidence that the necessary facts were proved to a jury or judge, or that Mr. Vincent admitted or stipulated to the necessary facts. CP 25-93; RP 1-16. The State only presented evidence that Mr. Vincent was found guilty of sexual assault under Hawaii Haw. Rev. Stat. § 707-730, which is broader than Washington's rape statute. The State presented a juvenile court petition which alleged certain facts, but did not present a guilty plea, trial transcript, or statement of defendant on plea of guilty. If the evidence in Lavery was insufficient to prove comparability by a preponderance of the evidence, then the evidence here was certainly insufficient to prove comparability beyond a reasonable doubt.

Other cases are also instructive. In Thiefault, for example, the Supreme Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in

Washington. State v. Thiefault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007). “[A]lthough the motion for leave to file information and the affidavit both described Thiefault’s conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt.” Id. at 416 n.2.

In Thomas, this Court held the State failed to prove the comparability of two California burglary convictions by a preponderance of the evidence because California’s burglary statute does not require unlawful entry. State v. Thomas, 135 Wn. App. 474, 476-77, 144 P.3d 1178 (2006). The State presented certified copies of charging documents, a judgment on plea of guilty, minutes from a jury trial, and a transcript from the sentencing hearing. This Court held the State failed to prove factual comparability even though the State’s evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85.

In Ortega, this Court held the State failed to prove that a Texas conviction for indecency with a child was comparable to a

Washington conviction for first-degree child molestation. State v. Ortega, 120 Wn. App. 165, 167, 84 P.3d 935 (2004). Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. Id. at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. Id. at 173-74. But this Court held the evidence was insufficient to prove the Texas victim was under 12 years old. Id. at 174. Because the relevant facts were not admitted or proved to a jury beyond a reasonable doubt, the Texas conviction was not comparable to a Washington conviction and could not count as a "strike" for sentencing purposes. Id. at 167.

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Vincent admitted to the necessary facts or that the facts were proved to a judge or jury beyond a reasonable doubt. The State did not present a guilty plea, the statement of defendant on plea of guilty, or transcript showing that Mr. Vincent admitted to the necessary facts to

establish a Washington sex offense. If the failure to present such evidence was fatal in the above cases – where the standard of proof was a mere preponderance – then the failure to do so here certainly is. The State failed to prove beyond a reasonable doubt that Mr. Vincent’s Hawaii first degree sexual assault conviction was comparable to a Washington rape conviction. Accordingly, the State failed to prove Mr. Vincent was subject to the requirement to register, and his conviction must be reversed.

c. Reversal and dismissal is the appropriate remedy.

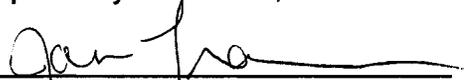
In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Vincent knowingly failed to register (and was legitimately required to), the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)).

E. CONCLUSION

For the reasons above this Court should reverse Mr. Vincent's conviction and dismiss.

DATED this 7th day of March, 2011.

Respectfully submitted,



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