

No. 67873-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY SAWYER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY¹

Mr. Sawyer must be resentenced because his offender score included an Illinois theft conviction that is not comparable to a Washington felony.

The trial court incorrectly included a 2004 Illinois theft conviction in Gary Sawyer's offender score, resulting in the incorrect standard sentence range. This Court should reject the State's arguments that Mr. Sawyer waived his challenge to the out-of-state conviction and that the evidence presented by the State shows that the crime was factually comparable to Washington's first degree theft statute. The case must therefore be remanded to correct Mr. Sawyer's offender score and sentence.

a. Mr. Sawyer's lawyer did not waive his right to challenge the Illinois conviction on appeal. It is the State's burden to prove the existence and nature of any prior offenses included in a defendant's SRA offender score by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). The defendant may waive the inclusion of a conviction in his offenders score by

¹ Mr. Sawyer raises three challenges to his conviction and sentence for bail jumping. Brief of Appellant at 1-3, 2-25. He relies upon the argument in the appellant's opening brief for the two issues not addressed in this reply.

“affirmative acknowledgement;” failure to object is not enough. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); Ford, 137 Wn.2d at 483-85.

Mr. Sawyer consistently told the court that his prior Illinois theft conviction should not be included in his offender score because it was not a felony. 2/7/11RP 7-8, 12; 9/12/11RP 2, 6-9; 9/26/11 RP 25-26, 29-30; 10/6/11RP 44-45. Defense counsel John Hicks prepared a sentencing memorandum that did not address the theft conviction. CP 175-77. At sentencing the sentencing hearing, Mr. Hicks initially agreed the Illinois conviction was comparable to a Washington felony but explained his Mr. Sawyer did not agree. 10/6/11RP 30-31, 41-42. Mr. Hicks incorrectly reasoned that the Illinois statute required taking money from the “person himself” and was thus comparable to Washington’s first degree theft. 10/6/11RP 41-42. But Mr. Hicks left open the possibility that he might be wrong in which case an appellate lawyer could raise the issue and the mistake would be corrected. 10/6/11RP 42. No one corrected Mr. Hicks’ misunderstanding. Id.

Mr. Sawyer’s clear belief that his Illinois theft conviction was not comparable to a Washington felony and his lawyer’s statement that the issue could be litigated on appeal despite his “concession” do not

constitute the “affirmative acknowledgment” required by Ross. The Washington Supreme Court’s decision in Smith is helpful in analyzing Mr. Sawyer’s case.

In Smith, the defendant pled guilty to possession of cocaine after losing a pre-trial motion to suppress evidence; the guilty plea statement informed the defendant that he was waiving his right to appeal. State v. Smith, 134 Wn.2d 849, 852-82, 953 P.2d 810 (1998). At the plea hearing, however, Smith’s lawyer stated Smith was reserving the right to appeal from the pre-trial ruling. Smith, 134 Wn.2d at 852. Neither the court nor the prosecutor corrected defense counsel’s error. Id. The Smith Court concluded that Smith had not waived his right to appeal in these circumstances despite the clear waiver in the guilty plea statement:

In this instance, however, defense counsel in open court expressed an erroneous legal interpretation of the plea statement which is at odds with a valid waiver. Counsel stated that, by pleading guilty, Smith was waiving certain rights on appeal, but was retaining the right to appeal the trial court’s suppression ruling. Because this statement went uncorrected by opposing counsel or the court itself, it seems apparent that Smith and everyone else in the courtroom had the same understanding, even if this understanding is inconsistent with the language of the plea statement saying Smith waived his right to appeal a determination of guilt after a trial. Under these circumstances, it is clear that Smith voluntarily relinquished certain rights, but it is not clear that he

knowingly, intelligently, and voluntarily relinquished the right to appeal the suppression ruling.

Id. at 853. The court therefore remanded the case to the trial court to permit Smith to withdraw his plea in favor of a stipulated facts trial and appeal from the unfavorable pretrial ruling. Id.

Mr. Sawyer's case is analogous to Smith. Mr. Sawyer's attorney stated that Mr. Sawyer could challenge the Illinois conviction on appeal despite counsel's concession that it was comparable to a Washington's first degree theft statute. This erroneous statement was not corrected by the State or the court. 10/6/11RP 41-42. Thus, as in Smith, defense counsel, the prosecutor and the court all led Mr. Sawyer to believe he could challenge the Illinois conviction on appeal. This Court must therefore address Mr. Sawyer's challenge to the Illinois theft conviction.

b. Mr. Sawyer's Illinois theft conviction is not comparable to a Washington felony. This Court reviews a challenge to an SRA offender score de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The State concedes that Illinois's first degree theft statute is not legally comparable of Washington's first degree theft because the Illinois crime is broader, but argues the Illinois indictment

proves the offenses were comparable. Brief of Respondent at 13-15 (hereafter BOR).

Without authority, the State claims that, because Mr. Sawyer pled guilty, “the allegations contained in the indictment constitute the facts of the crime.” BOR at 14 (citing only CP 144). This is incorrect. In reviewing out-of-state convictions to determine comparability, the court may only base its decision upon facts “that are admitted, stipulated to, or proved beyond a reasonable doubt.” State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The State can offer no Illinois authority to show that a grand jury indictment is a finding of guilt. See ILCS § 102-11 (defining indictment as a written statement presented by the grand jury which “charges the commission of a crime”). Only Mr. Sawyer’s guilty plea statement or a transcript of the plea hearing would show what facts he admitted or stipulated to – the State did not provide either.²

The State next argues that Illinois crime is comparable to Washington’s first degree theft statute because the indictment alleged

² The State also claims that altered language in the indictment demonstrates that Mr. Sawyer was charged only with theft from the person. BOR at 14 (citing CP 144). The changes, however, simply show the grand jury was returning an indictment for theft and not robbery. CP 144.

that Mr. Sawyer “knowingly took property, being United States currency, from the person of Pedro Velasco, not exceeding \$300 in value.” BOR at 14 (quoting CP 144). In Illinois, however, taking property “from the person” of another does not mean what it does in Washington. BOA at 14-15. In Washington, the relevant alternative means of committing first degree theft requires the taking of property directly from another’s person, not property that is simply under the victim’s control. RCW 9A.56.030(1)(b); State v Nam, 136 Wn. App. 698, 705, 150 P.3d 617 (2007). In Illinois, theft of property from the person includes taking property that is on the person and property that is within the person’s control or protection. People v. Pierce, 226 Ill.2d 470, 877 N.E.2d 408, 411, 414, 315 Ill.Dec. 656 (2007). The State provides no Illinois authority to the contrary and in fact concedes the Illinois statute is “conceivably broader” than Washington’s. BOR at 13-15.

c. The remedy is remand to sentence Mr. Sawyer without the Illinois conviction. Mr. Sawyer’s Illinois theft conviction is not comparable to a Washington felony offense, and this Court must therefore vacate Mr. Sawyer’s sentence and remand for sentencing within the correct standard sentence range. Lavery, 154 Wn.2d at 261.

At resentencing the State should be held to the current record. State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009). This Court should reject the State's argument that, should this Court agree with Mr. Sawyer, it should be permitted another opportunity to prove the comparability of the Illinois theft conviction because defense counsel conceded to the inclusion of the conviction in Mr. Sawyer's offense score. BOR at 15.

The State's reliance upon Bergstrom to advance this argument is ill advised. The Bergstrom Court found the State had correctly relied upon defense counsel's concession that none of the defendant's prior convictions constituted the same criminal conduct because the defendant did not make his pro se argument until after the concession at the sentencing hearing at which his offender score was determined. Bergstrom, 162 Wn.2d at 90, 95-96. In Mr. Sawyer's case, however, Mr. Sawyer's objection to the inclusion of the Illinois conviction were made before the sentencing hearing and before his lawyer conceded the issue at the sentencing hearing. Up until the time, the prosecutor knew he had the burden of proving the existence and comparability of the Illinois conviction. The State therefore did provide information about that conviction to the sentencing court, it simply was not sufficient to

prove the theft conviction was comparable to a Washington felony.

See Brief of Appellant at 11-18.

Mr. Sawyer put the State on notice that he was contesting the inclusion of the Illinois theft conviction in his offender score, and the State therefore presented the sentencing court with legal argument as to why the Illinois theft conviction was comparable to Washington's first degree theft and provided certified copies of portions of the court record for that and other prior convictions. CP 88-89, 93-161; see BOR at 14. It is thus equitable to remand the case without providing the State with an additional opportunity to present evidence. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002).

B. CONCLUSION

Gary Sawyer asks that his conviction for bail jumping be reversed and dismissed or, in the alternative, reversed and remanded for a new trial as argued in the Brief of Appellant. In the alternative, his case must be remanded for sentencing with an offender score that does not include the 2004 Illinois theft conviction because it was not comparable to a Washington felony at the time of its commission.

DATED this 4th day of March 2013.

Respectfully submitted,



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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
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SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF MARCH, 2013.

X _____ 

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