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Court of Appeals
Division I
State of Washington

NO. 74035-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GWEN LYNN ARDREY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
a. Facts Of The Crime	2
b. Substantive Procedural Facts	3
C. <u>ARGUMENT</u>	7
THE STATE PROVED THE EXISTENCE OF THE PRIOR CONVICTION; ARDREY CANNOT SHOW FACIAL INVALIDITY	7
1. The State Amply Met Its Burden Of Proving The Existence Of The Reckless Driving Conviction	8
2. Ardrey Fails To Show Facial Invalidity So Her Collateral Attack Of The Reckless Driving Conviction Is Impermissible	11
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Adolph, 170 Wn.2d 556,
243 P.3d 540 (2010)..... 8, 9

State v. Ammons, 105 Wn.2d 175,
713 P.2d 719 (1986) (as amended by
718 P.2d 796 (1986))..... 11, 12, 13, 14, 16, 17, 18

State v. Bembry, 46 Wn. App. 288,
730 P.2d 115 (1986)..... 11, 14

State v. Binder, 106 Wn.2d 417,
721 P.2d 967 (1986)..... 13

State v. Drum, 168 Wn.2d 23,
225 P.3d 237 (2010)..... 17

State v. Ford, 137 Wn.2d 472,
973 P.2d 452 (1999)..... 9

State v. Hunley, 175 Wn.2d 901,
287 P.3d 584 (2012)..... 9

State v. Inocencio, 187 Wn. App. 765,
351 P.3d 183 (2015)..... 14

State v. Irish, 173 Wn.2d 787,
272 P.3d 207 (2012)..... 14

State v. Jones, 110 Wn.2d 74,
750 P.2d 620 (1988)..... 11

State v. Kelley, 64 Wn. App. 755,
828 P.2d 1106 (1992)..... 10

State v. Langstead, 155 Wn. App. 448,
228 P.3d 799 (2010)..... 14

<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	10
<u>State v. Ortega</u> , 120 Wn. App. 165, 84 P.3d 935 (2004).....	9
<u>State v. Thompson</u> , 143 Wn. App. 861, 181 P.3d 858 (2008).....	11, 12, 14
<u>State v. Webb</u> , 183 Wn. App. 242, 333 P.3d 470 (2014).....	12

Statutes

Washington State:

RCW 10.73.090.....	15
RCW 10.73.100.....	15
RCW 10.73.130.....	15
RCW 10.73.140.....	15
RCW 46.61.5055.....	3, 8
RCW 46.61.520.....	3, 8

Rules and Regulations

Washington State:

CrRLJ 7.8.....	15
PAMCLR 1.4 – 6.2.....	17
RAP 2.5.....	10

Other Authorities

32 Wash. Prac., Wash. DUI Practice Manual
§ 2:13 (2015-16 ed.) 6

Sentencing Reform Act of 1981 8

A. ISSUES PRESENTED

At sentencing, the State must prove the existence of a prior conviction by a preponderance of the evidence, a light burden that does not require proving the constitutional validity of the prior conviction. The defendant may not contest the prior conviction unless it is constitutionally invalid on its face, meaning the infirmities are evident without any further elaboration. After Ardrey pleaded guilty to vehicular homicide, the State presented certified court dockets and state driving records that stated that Ardrey previously had been convicted of alcohol-related reckless driving. Ardrey presented a hearing transcript and emails from a court clerk to contend that the conviction was constitutionally defective. Did the State prove the existence of the prior conviction by a preponderance of the evidence, and did Ardrey fail to show facial invalidity?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Gwen Lynn Ardrey was charged by information in King County Superior Court with Vehicular Homicide (Driving Under the Influence), alleged to have occurred on or about June 8, 2014. CP 1. Ardrey pleaded guilty as charged on April 22, 2015.

CP 9-21. On September 10, 2015, the sentencing court imposed a low-end standard-range sentence of 102 total months in prison, which included a mandatory 24-month enhancement based on the court's finding of a prior alcohol-related reckless driving conviction. CP 59-63. Ardrey timely appealed. CP 68-69.

2. SUBSTANTIVE FACTS

a. Facts Of The Crime.

A few minutes after two in the morning on June 8, 2014, police in Auburn, King County, found a red Mazda that had struck a power pole. CP 26.¹ Ardrey, also known as Gutierrez,² was in the driver's seat, semiconscious and badly injured. CP 26-27. The lifeless body of Josh Colson was in the passenger seat, emanating the smell of alcohol. Id. A video from a neighboring business showed that the Mazda had hopped a curb onto the sidewalk and crashed headlong into the pole. CP 27.

A hospital blood test showed Ardrey had a blood-alcohol content equivalent to 0.168g/100ml, about twice the legal per se limit. CP 27. Ardrey told police that she and Colson had been at a

¹ Because the case was resolved by guilty plea, the facts are drawn from the certification for determination of probable cause, to which Ardrey stipulated in her plea agreement. CP 29.

² The defendant's true name is Gwen Gutierrez (Ardrey is a former married name), but the State is adhering to Ardrey to remain consistent with the case title here and below and thus avoid confusion.

birthday party at a bar, where Ardrey had downed more shots of liquor than she could remember. Id.

b. Substantive Procedural Facts.

For sentencing, the State proffered that Ardrey had been previously convicted of reckless driving, reduced from a 2008 charge of driving under the influence (DUI), in 2010 in Pacific Municipal Court after a diversionary two-year stipulated order of continuance (SOC). CP 30. The existence of that prior conviction would result in a mandatory 24-month enhancement to Ardrey's offender score at sentencing for vehicular homicide. See CP 70; RCW 46.61.520(2); RCW 46.61.5055(14)(a)(xii).

In her plea agreement, Ardrey stipulated that the reckless-driving charge was alcohol-related. CP 29. But she did not agree that the conviction actually existed, claiming a "constitutional defect" in that Ardrey "was not present and did not waive and no record of waiving presence when J&S entered on SOC." Id.

To prove the existence of the conviction, the State presented two certified documents: Ardrey's state driver's licensing record and the Pacific Municipal Court docket for Ardrey's case. CP 76-84. The driving record showed a "conviction" for reckless driving in 2010 in Pacific Municipal Court stemming from a 2008

violation. CP 78. The record said the reckless driving conviction was "reduced," and also indicated that in 2008 Ardrey had refused a breath or blood test. Id.

The court docket showed the following relevant events:

- **July 3, 2008:** Ardrey had been booked into the King County Jail on probable cause of DUI following an accident involving a "vehicle linked to Gutierrez, Gwen Lynn." CP 81. She was released on standard DUI-related conditions. Id.
- **July 16, 2008:** Ardrey, with her attorney present, was arraigned and pleaded not guilty to a DUI charge before Judge Rochon. CP 82.
- **October 1, 2008:** Ardrey and her attorney appeared before Judge Rochon for an "agreed SOC with conditions signed and filed." CP 82. The docket stated that "if conditions are met, charge to be amended to reckless driving." Id. It also said that Judge Rochon "imposed sentence," which included two years of DUI-related restrictions and penalties such as alcohol-information school and victim panel. CP 82-83. A review of the SOC was set for October 1, 2010. CP 83.
- **October 1, 2010:** The DUI charge was amended to Reckless Driving. CP 83. A "Finding/Judgment of Guilty" was entered for that charge. Id. The case was heard before Judge Rochon. Id. The review was cancelled. Id. The docket stated that Ardrey had complied with all her DUI-related conditions, and "defendant complied with Stipulated Order of Continuance." Id. The case was closed. Id.
- **2013:** According to a handwritten notation on the docket, the case records were "destroyed" in 2013. Id.

Ardrey moved to exclude the reckless-driving conviction from the sentencing calculation, contending that the State had not met its burden of proving the existence of the reckless driving conviction because the "State cannot establish that the charge was actually reduced to a conviction." CP 35. Ardrey contended that the conviction was invalid because "Ms. Ardrey was not present for the stipulated facts trial necessary to enter a finding of guilt to reckless driving." CP 36. Also, Ardrey contended that the State failed to prove the conviction because "none of the court documents survive," including the "SOC agreement" and the "stipulated facts."³ CP 37.

Ardrey's written arguments were based on printouts of email exchanges with the Pacific court clerk confirming that the paperwork was destroyed and discussing court procedures for SOC's generally, including the likelihood that Ardrey was not present on October 1, 2010. CP 47-49. Ardrey also submitted a transcript of her October 1, 2008, hearing in which she entered into the SOC agreement. CP 51-57.

³ Ardrey also challenged at sentencing whether the State had proved that the Pacific conviction involved alcohol, but is not raising that issue on appeal because she had stipulated to that fact in her plea agreement. See Brief of Appellant (BOA) at 3 fn. 4.

In court at sentencing on September 4, 2015, Ardrey argued that the Pacific conviction was not “constitutionally valid” because her right to be present allegedly was violated. 1RP 31.⁴ Ardrey’s attorney noted that this information was learned from emailing the court clerk. Id. The lawyer also spoke about her professional experience with “slow reckless” cases in courts of limited jurisdiction, how Ardrey’s municipal-court case “should have happened,” and remarked that, “I can’t tell you how many stipulated facts trials I’ve had under these circumstances” where the facts are insufficient.⁵ 1RP 29-32.

Ardrey further argued that because the SOC agreement “isn’t in existence anymore,” then “[w]e don’t know if she waived her presence at the stipulated facts trial, we don’t know any of that.” 1RP 30. Thus, she argued, “[t]he State can’t prove any of that.” Id. Ardrey’s attorney also contended that the audio recording of the

⁴ The verbatim report of proceedings is divided into two individually numbered volumes referred to here as 1RP (April 22, 2015 and September 4, 2015) and 2RP (September 10, 2015).

⁵ The term “slow reckless” is not used in any published (or unpublished) case that the State was able to find, but apparently it is jargon for a certain type of pretrial diversions or SOC’s in Washington municipal courts. See 32 Wash. Prac., Wash. DUI Practice Manual § 2:13 (2015-16 ed.) (“[t]hese dispositions are known by a variety of names across jurisdictions. The most common are: Pretrial Diversion Agreement (PDA), Stipulated Order of Continuance (SOC), Continuance Without Finding (CWOFF), ‘Slow Reckless,’ ‘Slow Negligent.’”).

2008 SOC hearing proved that there had “never been any findings to support a conviction.” 1RP 33.

The State countered that Ardrey was not permitted to make a collateral attack on the constitutionality of the Pacific conviction. 1RP 34. “If they wanted to go to Pacific County [sic] and collaterally attack this conviction, then they needed to do it after she was convicted of the reckless driving,” the prosecutor said.

After setting over sentencing to review briefing, the sentencing court ruled that the prior reckless-driving conviction was proved by a preponderance of the evidence, noting that the certified docket indicated a “finding judgment of guilty” for the reckless driving charge. 2RP 5. The court also found that Ardrey had not shown any facial unconstitutionality. Id.

C. ARGUMENT

THE STATE PROVED THE EXISTENCE OF THE PRIOR CONVICTION; ARDREY CANNOT SHOW FACIAL INVALIDITY.

As she did at her sentencing, Ardrey is mounting an impermissible collateral attack on the validity of her prior conviction under the color of a challenge to the sufficiency of the State’s evidence. Ardrey does not contest that the State’s documents are of the kind that are legally sufficient to establish a conviction.

Instead, she incorrectly claims the conviction is facially unconstitutional. Her arguments fail because all of them require going behind the face of the conviction records to make assumptions and suppositions about the proceedings, e.g., speculating about the actual terms of Ardrey's written SOC agreement and attempting to infer facts from extrinsic sources. The State met its low burden of proving this prior conviction, and Ardrey's challenge to the prior conviction was, and is, impermissible.

1. The State Amply Met Its Burden Of Proving The Existence Of The Reckless Driving Conviction.

Under RCW 46.61.520(2), if a defendant is convicted of vehicular homicide, the defendant shall receive a two-year sentence enhancement for any prior offense as described in RCW 46.61.5055. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 565, 243 P.3d 540 (2010). A conviction for reckless driving, when amended from DUI, qualifies as a prior offense for this enhancement. RCW 46.61.5055(14)(a)(xii).

Under the Sentencing Reform Act of 1981, the State must prove the existence of prior convictions used to calculate the offender score by a preponderance of the evidence. In re Adolph,

170 Wn.2d at 569. That burden is “not overly difficult to meet” and may be satisfied by evidence that bears some “minimum indicia of reliability.” Id. (quoting State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999)).

While the best evidence of a prior conviction is a certified copy of the judgment, the State may rely on other comparable records to establish criminal history. State v. Hunley, 175 Wn.2d 901, 910-11, 287 P.3d 584 (2012). This may include, as here, Department of Licensing driving record abstracts combined with defendant case history from the District and Municipal Court Information System (DISCIS). In re Adolph, 170 Wn.2d at 570. When relying on evidence other than a certified judgment, the State does not need to show that the judgment was unavailable. Id. at 566-67.

The existence of a prior conviction is a question of fact. Id. at 566. When calculating an offender score, the trial court must determine by a preponderance of the evidence whether the defendant’s prior convictions exist, and then establish the defendant’s offender score as a matter of law. State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004). Appellate courts review the trial court’s factual determination for an abuse of discretion and

review the trial court's offender score calculation de novo. Id. at 171. A trial court abuses its discretion if its decision is manifestly unreasonable or rests on facts unsupported in the record or was reached by applying the wrong legal standard. State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). An appellate court may affirm a trial court on any basis supported by the record and the law, and is not limited to the reasons articulated by the trial court. State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992); see also RAP 2.5(a).

Here, the State amply cleared the low hurdle of proving the existence of Ardrey's reckless-driving conviction in Pacific Municipal Court. The documents establishing the conviction plainly stated that:

- Ardrey, aka Gutierrez, was initially charged with DUI.
- Ardrey was represented by counsel.
- Ardrey, with counsel, agreed to an SOC with conditions related to a DUI conviction, and a judge "imposed sentence."
- The charge was subsequently amended to Reckless Driving and a "Finding/Judgment of Guilty" was entered for that crime in a hearing before a judge.
- The Department of Licensing abstract also stated that Ardrey was convicted of reckless driving.

Thus, the preponderance standard was met. Simply put, these legally sufficient documents state that Ardrey was adjudged

guilty of reckless driving, amended from DUI. None of Ardrey's arguments to the contrary are based on the legitimacy, form or quantum of the State's evidence, or complaints about the accuracy of the documents. Instead, they are an impermissible and wholly speculative constitutional challenge based on extrinsic evidence and unsupported assumptions.

2. Ardrey Fails To Show Facial Invalidity So Her Collateral Attack Of The Reckless Driving Conviction Is Impermissible.

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719 (1986) (as amended by 718 P.2d 796 (1986)). Accordingly, "the constitutional validity of the prior convictions is generally not subject to challenge in sentencing proceedings." State v. Jones, 110 Wn.2d 74, 77, 750 P.2d 620 (1988). Our supreme court in Ammons "severely restricted a defendant's ability to mount a collateral attack on a prior conviction at a sentencing hearing." State v. Bemby, 46 Wn. App. 288, 289, 730 P.2d 115 (1986).

That is because if such challenges were permitted, sentencing proceedings for the current conviction "would become an appellate forum for prior convictions." State v. Thompson, 143

Wn. App. 861, 866, 181 P.3d 858 (2008). Allowing defendants to attack prior convictions at a subsequent sentencing “would unduly and unjustifiably overburden the sentencing court.” Ammons, 105 Wn.2d at 188. Defendants should use “more appropriate arenas” and “established avenues of challenge provided for post-conviction relief.” Id. “A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.” Id.

One narrow exception allows that a prior conviction that is “constitutionally invalid on its face” may not be considered in the offender score. Id. at 187-88. That means a conviction that “*without further elaboration* evidences infirmities of a constitutional magnitude.” Id. at 188 (italics added). For example, a conviction that cites a statute that was plainly expired at the time of the offense is invalid on its face because no further inquiry is needed to see the constitutional infirmity. State v. Webb, 183 Wn. App. 242, 250-51, 333 P.3d 470 (2014) (date of crime was listed as 1992 but cited statute expired in 1987).

But if the “trial court would have to go behind the verdict and sentence and judgment” to make a determination on constitutional invalidity, the conviction is not facially invalid. Ammons, 105 Wn.2d

at 189. In other words, *where a clear determination of constitutional invalidity cannot be made from the conviction documents alone, the conviction is not facially invalid.* Id.

For example, in Ammons, one of the defendants claimed facial invalidity of a prior conviction because the plea form failed to show that he had been informed of certain rights and consequences. Id. But even though the prior conviction *could* have been unconstitutional, the challenge failed because “a determination as to the validity of these issues *cannot be made from the face of the guilty plea form.*” Id. (as amended, 718 P.2d 796) (italics added). Because “the plea on its face does not show the constitutional safeguards were *not* provided,” the defendant’s recourse was the “usual channels of relief,” not a collateral attack at his sentencing for a subsequent crime. Id. (as amended, 718 P.2d 796) (italics in original).

Consequently, our courts strictly preclude challenges to prior convictions, such as here, that require extrinsic evidence to resolve or that shift the burden of proof by claiming the documents do not affirmatively check off every constitutional right. See State v. Binder, 106 Wn.2d 417, 418, 721 P.2d 967 (1986) (court properly rejected defendant’s claim that prior pleas lacked rights

advisements); Bembry, 46 Wn. App. at 290 (because “guilty plea order does not show on its face that constitutional safeguards were not provided,” claims in that regard are “irrelevant” because proper recourse is “established avenues of post-conviction relief”); Thompson, 143 Wn. App. at 867-68 (discrepancies in documents about maximum sentence do not prove defendant was not actually informed of correct maximum); State v. Langstead, 155 Wn. App. 448, 457, 228 P.3d 799 (2010) (no facial invalidity because guilty plea form does not prove defendant “was not otherwise informed that an unlawful taking of property was an element of the offense”); State v. Inocencio, 187 Wn. App. 765, 770, 777-78, 351 P.3d 183 (2015) (prior conviction not facially invalid for not showing express waiver of juvenile jurisdiction).

Our supreme court recently reiterated its firm stance on the Ammons rule in State v. Irish, rejecting a defendant’s attempt to collaterally attack two prior convictions on double-jeopardy grounds at his sentencing for a new crime. 173 Wn.2d 787, 789-90, 272 P.3d 207 (2012). The per curiam opinion of Washington’s high court stated curtly that “[i]t is well settled that the State is not required to prove the constitutional validity of prior convictions used to calculate a defendant’s offender score on a current conviction.”

Id. at 789. “If Irish wishes to challenge the validity of his 1998 convictions, he should file a personal restraint petition attacking those convictions.” Id. at 790.

So it is with Ardrey’s arguments. Her proper recourse was a timely pursuit of post-conviction relief from the reckless-driving conviction, not a collateral attack at sentencing for a subsequent vehicular homicide.⁶ Ardrey’s arguments fail from the start because they depend on extrinsic evidence and speculation outside the face of the conviction documents, meaning the conviction is not facially invalid. Ardrey’s most basic premise, that she may not have been present in a Pacific courtroom in October 2010, entirely depends on speculation from extrinsic evidence. Even when Ardrey delves behind the conviction, she finds no clear determination of constitutional invalidity because of one inescapable fact: the Pacific Municipal Court SOC agreement no longer exists.

There is no definitive record of the agreements Ardrey made, the waivers she made or did not make, the advisements she received, and the rights she was afforded or denied. None of Ardrey’s complaints about her SOC and the reckless-driving conviction are proven — or disproven — from the face of the

⁶ See CrRLJ 7.8; RCW 10.73.090, .100, .130, .140.

conviction documents. Thus, under Ammons, Ardrey's challenge was impermissible and her argument fails here.

To try to counter this, Ardrey offers that the evidence of her conviction "plainly" shows a violation of her right to be present, and she improperly puts the burden on the State to "prove otherwise." BOA 16-17. But the conviction documents do not say what advisements Ardrey got or what waivers she made — or even that she was not present in court. So they do not "plainly" say anything — except that there was a "Finding/Judgment of Guilty" for reckless driving, reduced from DUI. The procedural "taint" that Ardrey contends is "plain" from the documents must be divined from assumption, speculation, analogy, and extrinsic evidence. Essentially, she is mounting a full-blown appeal of her reckless-driving conviction.

More specifically, Ardrey asks this Court to make several absolute pronouncements about her reckless driving conviction, including (1) she was not told she was giving up the right to trial; (2) she did not waive her right to a trial; (3) she was not informed that the municipal court found her guilty beyond a reasonable doubt; (4) the constitutional requirements of a guilty plea were not

followed; and (5) her right to be present at the entry of the conviction was violated.

None of these conclusions can be reached without the SOC agreement. For example, Ardrey may have waived her rights to a trial and to be present on October 1, 2010, when the judgment was entered. We simply do not know. But Ardrey asks this Court to draw a conclusion anyway, by scripting a speculative re-enactment of her SOC procedure based on the local court rules of an entirely different jurisdiction — King County District Court.⁷ She dissects the transcript of the 2008 hearing. And she offers emails from the court clerk. Not only is all of this inherently “further elaboration” and going behind the conviction, but none of it actually proves any of her contentions. The face of the conviction documents does not say that these alleged errors occurred, so under Ammons, the conviction is not facially invalid.

Ardrey’s lengthy comparison to State v. Drum,⁸ which was a direct appeal of a felony drug conviction, is similarly useless here because it attacks a straw man — the imaginary procedure Ardrey

⁷ Pacific Municipal Court has no local court rules pertaining to stipulated orders of continuance, nor has it adopted the local rules of King County District Court. See PAMCLR 1.4 – 6.2. And even if it had such rules, they would not establish positively that those rules were followed in Ardrey’s case.

⁸ 168 Wn.2d 23, 225 P.3d 237 (2010).

conjures from the King County District Court rules. It is impossible to determine without the SOC agreement what actually occurred in Ardrey's case, so it is impossible to compare Ardrey's case to Drum. And even if it were not, making such a comparison is yet more of the "further elaboration" that Ammons disallows.

The heart of the matter is this: The Pacific Municipal Court's SOC procedure that resulted in Ardrey's reckless-driving conviction may have been constitutionally defective. Then again, maybe it was not. That is beside the point. If Ardrey wanted to challenge that conviction, her recourse was the "established avenues ... for post-conviction relief." The sentencing court in Ardrey's vehicular-homicide case did not abuse its discretion when it found by a preponderance of the evidence that the prior reckless-driving conviction existed. Its calculation of Ardrey's sentencing range was proper. Her claim to the contrary fails.

D. **CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm Ardrey's sentence.

DATED this 6th day of April, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Gwen Lynn Ardrey, Cause No. 74035-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 6th day of April, 2016.

W. Brame

Name:

Done in Seattle, Washington