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COURT OF APPEALS

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STATE OF WASHINGTON

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Clerk

NO. 34031-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

LAURENTIU G. MIHALACHE,

Appellant.

BRIEF OF APPELLANT

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PM 5-22-06

TABLE OF CONTENTS

Page

I. ASSIGNMENT OF ERROR..... 1

1. THE TRIAL COURT ERRED IN CONCLUDING THAT FOR SCORING PURPOSES, AN OREGON ATTEMPTED ASSAULT IN THE SECOND DEGREE CONVICTION IS COMPARABLE TO A WASHINGTON ATTEMPTED ASSAULT IN THE SECOND DEGREE. 1

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

1. WHEN CALCULATING A FELONY OFFENDER SCORE, OUT-OF-STATE CONVICTIONS CAN BE USED IN THE CALCULATION IF THE OFFENSE IS LEGALLY AND FACTUALLY COMPARABLE TO A WASHINGTON OFFENSE. IN 2002, LAURENTIU MIHALACHE WAS CONVICTED IN OREGON FOR AN ASSAULT IN THE SECOND DEGREE WITH A DEADLY WEAPON THAT HAD EITHER A “KNOWING” OR AN “INTENTIONAL” MENS REA. WASHINGTON’S FELONY ASSAULT WITH A DEADLY WEAPON REQUIRES AN INTENTIONAL ASSAULT. WERE THE OREGON AND WASHINGTON ASSAULTS COMPARABLE WHEN THERE WAS NO EVIDENCE AT SENTENCING THAT THE OREGON ASSAULT WAS AN INTENTIONAL ACT? 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 4

I. LAURENTIU MIHALACHE’S OREGON ATTEMPTED ASSAULT IN THE SECOND DEGREE IS NOT COMPARABLE TO A WASHINGTON ATTEMPTED ASSAULT IN THE SECOND DEGREE. 4

V. CONCLUSION 9

TABLE OF AUTHORITIES

	Page
Cases	
<u>State v. Brown</u> , 94 Wn. App. 327, 972 P.2d 112 (1999).....	7
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	9
<u>State v. J.R.</u> , 127 Wn. App. 293, 298, ___ P.3d ___ (2005).....	7
<u>State v. Jackson</u> , 129 Wn. App. 95, 117 P.3d 1182 (2005).....	5
<u>State v. King</u> , 84 Or. App. 165, 733 P.2d 472 (1987).....	8
<u>State v. Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005).....	4, 5, 8
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	5
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	8
<u>State of Washington v. Laurentiu Giovanni Mihalache-</u> (slip op. 29700-1-II)	2
<u>State v. Wiley</u> , 124 Wn.2d 679, 880 P.2d 983 (1994).....	4
Statutes	
RCW 9.94A.....	4
RCW 9.94A.525(3).....	4
RCW 9A.04.110(6).....	7
RCW 9A.28.020(1).....	6
RCW 9A.36.021(1)(c).....	7

Other Authorities

Oregon Revised Statute (ORS) 163.175(1)	5
ORS 161.015(1)&(2).....	7
ORS 161.175 (1)(b)	6, 7
Sentencing Reform Act of 1981 (SRA).....	4

I. ASSIGNMENT OF ERROR

1. THE TRIAL COURT ERRED IN CONCLUDING THAT FOR SCORING PURPOSES, AN OREGON ATTEMPTED ASSAULT IN THE SECOND DEGREE CONVICTION IS COMPARABLE TO A WASHINGTON ATTEMPTED ASSAULT IN THE SECOND DEGREE.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. WHEN CALCULATING A FELONY OFFENDER SCORE, OUT-OF-STATE CONVICTIONS CAN BE USED IN THE CALCULATION IF THE OFFENSE IS LEGALLY AND FACTUALLY COMPARABLE TO A WASHINGTON OFFENSE. IN 2002, LAURENTIU MIHALACHE WAS CONVICTED IN OREGON FOR AN ASSAULT IN THE SECOND DEGREE WITH A DEADLY WEAPON THAT HAD EITHER A "KNOWING" OR AN "INTENTIONAL" MENS REA. WASHINGTON'S FELONY ASSAULT WITH A DEADLY WEAPON REQUIRES AN INTENTIONAL ASSAULT. WERE THE OREGON AND WASHINGTON ASSAULTS COMPARABLE WHEN THERE WAS NO EVIDENCE AT SENTENCING THAT THE OREGON ASSAULT WAS AN INTENTIONAL ACT?

III. STATEMENT OF THE CASE

On September 22, 2005, defendant Laurentiu Mihalache entered an Alford plea to a felony violation of a domestic violence court order before Judge John Wulle. CP 1-2, 3-11 RP¹ 8-16. When the plea was taken, Mihalache and the State disagreed on Mihalache's offender score. CP 4; RP 7. Mihalache believed he scored as having one point while the State believed he had three

¹ "RP" refers to the three consecutively-numbered volumes of verbatim prepared for this appeal.

points. CP 4; RP 7. After the plea was accepted, the court set an October 19 sentencing hearing. RP 18.

On October 19, the State was not ready to proceed so sentencing was continued. RP 22-31. At the November 2 sentencing, Mihalache argued that the court was collaterally estopped from considering an Oregon attempted assault in the second degree conviction in his offender score calculation. CP 13-35; RP 37-41, Mihalache had previously been successful on an appeal of a Clark County felony eluding conviction where the trial court included the Oregon attempted assault in the scoring calculation even though there had been neither an element comparison nor an agreement by Mihalache to its felony comparability in Washington. See CP 19-22 (slip op. 29700-1-II, State of Washington v. Laurentiu Giovanni Mihalache). In its opinion, this Court did not address the comparability but instead remanded Mihalache's felony eluding conviction to the trial court for a comparability analysis. CP 21-22. At the November 2 sentencing, the State explained that when Mihalache appeared for re-sentencing on the felony eluding, an agreement was reached; the State would not pursue the Oregon attempted assault point and Mihalache would not appeal a certain misdemeanor conviction.

RP 38-39. After reading the slip opinion and hearing the State's explanation, Judge Wulle ruled that collateral estoppel did not apply. RP 39-41.

The State then made its comparability analysis by reciting the text of certain Oregon statutes and comparing them to their Washington counterparts. RP 41-46. The State also offered two exhibits: the Oregon indictment and the Oregon judgment of conviction and sentence. CP 39-43. Mihalache disagreed with the comparability explanation but seemingly agreed that the conviction was his. RP 46. The trial court ultimately found that the Oregon attempted assault in the second degree was comparable to a Washington attempted assault in the second degree. RP 46-47. With that, the court scored and sentenced Mihalache using an offender score of two.² RP 48; CP 44-57.

Mihalache made a timely appeal of each and every part of his judgment and sentence. CP 58.

² No criminal history appears on the judgment and sentence. Likely, the score of two was reached by factoring in the eluding and the Oregon attempted assault in the second degree.

IV. ARGUMENT

I. LAURENTIU MIHALACHE'S OREGON ATTEMPTED ASSAULT IN THE SECOND DEGREE IS NOT COMPARABLE TO A WASHINGTON ATTEMPTED ASSAULT IN THE SECOND DEGREE.

The Sentencing Reform Act of 1981 (SRA), RCW 9.94A, creates a grid of standard sentencing ranges based on the defendant's offender score and the seriousness level of the current offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The trial court calculates a defendant's offender score by totaling the defendant's prior convictions for felonies and certain juvenile offenses. Id. at 683. To count in scoring, out-of-state ("foreign") convictions must be classified according to the comparable offense definitions and sentences provided by Washington law. Id.; see also RCW 9.94A.525(3).

There is a two-part test to determine whether foreign convictions are comparable to Washington offenses. State v. Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court must compare the elements of the crime. Id. This is the "legal" test. Id. More specifically, the elements of the foreign crime must be compared to the elements of a Washington criminal statute in

effect when the foreign crime was committed. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements of the foreign conviction are comparable to the elements of a Washington offense on its face, the foreign crime counts toward the offender score as if it were the comparable Washington offense. Id. If the legal comparison does not establish comparability, the second “factual” test is applied. Lavery, 154 Wn.2d at 255. If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the trial court must review the record of the foreign conviction to determine whether the defendant’s conduct would have violated the comparable Washington offense. State v. Jackson, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005).

The comparability analysis in Mihalache’s case fails both the legal and the factual tests of comparability as it pertains to his Oregon attempted assault in the second degree. Mihalache was charged by indictment in Oregon with assault in the second degree in violation of Oregon Revised Statute (ORS) 163.175(1). CP 39. However, he entered a no contest plea to the lesser included offense of attempted assault in the second degree.

Admittedly, the Oregon and Washington definition of criminal attempt is comparable:

Under ORS 161.405(1),

A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.

Compare RCW 9A.28.020(1),

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does an act which is a substantial step toward the commission of that crime.

Where the comparability fails is with the element comparison of the specific Oregon assault in the second degree charged in Mihalache's indictment and the Washington assault in the second degree options. Mihalache's indictment is as follows:

The defendant, on or about September 13, 2001, in the County of Multnomah, State of Oregon, did unlawfully and intentionally and knowingly cause physical injury to CLARITZA DELEON-LOPEZ by means of a dangerous weapon, to wit: a cane, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

CP 39.

Under ORS 161.175 (1)(b),

A person commits the crime of assault in the second degree if the person: (b) intentionally or knowingly causes physical injury to another by means of a deadly weapon or a dangerous weapon.

By comparison, RCW 9A.36.021(1)(c), the Washington crime that the trial court found comparable at Mihalache's sentencing, reads:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... assaults another with a deadly weapon.³

An essential difference – and in this case a fatal difference – between the Washington and Oregon statutes is the mens rea. Under ORS 161.175 (1)(b), the mens rea for assault is intentionally or knowingly. Under RCW 9A.36.021(1)(c), the mens rea is only intentionally. The mens rea of assault in Washington is the intent to commit a battery or to create an apprehension of harm. State v. Brown, 94 Wn. App. 327, 342, 972 P.2d 112 (1999).

The State may argue that Oregon's lesser mens rea of a "knowing" assault is inconsequential as the indictment specifies that Mihalache's assault was both intentional and knowing. However, as to the legal comparability test, the point of comparison is to the elements of the statutes as written. "Where the statutory elements of a foreign conviction are broader than this under a similar

³ The Oregon and Washington definitions of deadly weapon and dangerous weapon are comparable to each other. Compare ORS 161.015(1)&(2) to RCW 9A.04.110(6) & State v. J.R., 127 Wn. App. 293, 298, ___ P.3d ___ (2005) (deadly weapon is synonymous with dangerous weapon in Washington)

Washington statute, the foreign conviction cannot truly be said to be comparable.” Lavery, 154 Wn. At 258. As to factual comparability, it is unclear on the record produced by the State what Mihalache actually pled to. Oregon can plead in the conjunctive but plead in the disjunctive. State v. King, 84 Or. App. 165, 172, 733 P.2d 472 (1987). Under the record before the trial court, Mihalache could very well have pled to a “knowing” assault allowed by Oregon rather than an “intentional” assault as required by Washington.

To establish criminal history for sentencing purposes, the State must prove the defendant’s prior conviction by a preponderance of the evidence. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Challenges to the classification of an out-of-state conviction is reviewed de novo. Jackson, 129 Wn. App. at 106. Under our facts, the State failed to prove the comparability between the Oregon conviction and the Washington law. Where the disputed issues have been fully argued to the lower court at sentencing, the State is held to the existing record and remand for re-sentencing without allowing further evidence to be adduced is

appropriate. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). Mihalache should be remanded to the trial court for re-sentencing.

V. CONCLUSION

Laurentiu Mihalache is entitled to a re-sentencing hearing excluding the use of the Oregon attempted assault in the second degree.

Respectfully submitted this 22nd day of May, 2006.



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Attorney for Appellant

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

STATE OF WASHINGTON,)	Clark County No. 04-1-02223-1
)	Court of Appeals No. 34031-3-II
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
LAURENTIU GIOVANI MIHALACHE,)	
)	
Appellant.)	
)	

LISA E. TABBUT, being sworn on oath, states that on the 22nd day of May 2006,
affiant deposited in the mails of the United States of America, a properly stamped envelope
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Michael C. Kinnie
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And

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4716 NE 39th Street
Vancouver, WA 98665

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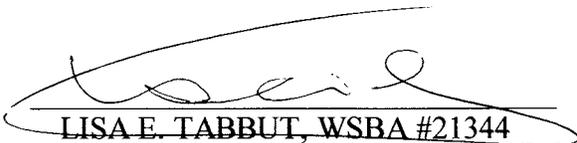
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11 Attorney for Appellant

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My commission expires 06/10/07

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