

No. 34790-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GLENN,
Appellant.

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

FILED
COURT OF APPEALS
DIVISION TWO
OCT 11 PM 1:16
STATE OF WASHINGTON
KIMMY

APPELLANT'S OPENING BRIEF

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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 OCT -9 PM 4:54

90-01-01 wd
pm 10-10-06

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A. SUMMARY OF APPEAL.

On appeal, Mr. Glenn contends this Court must reverse his sentence and remand to the trial court for sentencing with an offender score of 6 because the sentencing court erroneously included previous convictions that had “washed out” in Mr. Glenn’s offender score. The sentencing court relied on court dockets which did not indicate Mr. Glenn was represented by counsel to determine Mr. Glenn committed criminal offenses during the “wash out” period.

B. ASSIGNMENT OF ERROR.

The trial court erroneously calculated Mr. Glenn’s offender score by including previous convictions that had “washed out.”

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Constitutional due process and the Sentencing Reform Act require that the State prove by a preponderance of the evidence the existence of prior convictions before they may be included in a defendant’s offender score. A prior conviction which is invalid on its face may not be included in a defendant’s offender score. Here, the sentencing court relied on court dockets that indicate Mr. Glenn

was not represented by counsel nor waived his right to counsel when convicted. Did the court improperly rely on a facially invalid conviction to determine Mr. Glenn's offender score?

D. STATEMENT OF THE CASE.

Mr. Glenn was convicted of three counts of vehicular assault and one count of bail jumping. The sentencing court, over Mr. Glenn's objection, calculated his offender score based in part on three prior felony convictions. The sentencing court imposed a standard range sentence based on its calculation of Mr. Glenn's offender score. CP 99. This appeal timely follows. CP 107. The pertinent facts are discussed in detail in the relevant Argument sections below.

E. ARGUMENT

MR. GLENN IS ENTITLED TO BE RESENTENCED ON AN OFFENDER SCORE OF 6 BECAUSE THE SENTENCING COURT ERRONEOUSLY INCLUDED PRIOR CONVICTIONS THAT HAD WASHED OUT.

1. The sentencing court must determine the defendant's criminal history and offender score. The sentencing court's calculation of a defendant's standard range is determined by the

“seriousness” level of the offense and the defendant’s “offender score.” RCW 9.94A.530(1). The offender score is determined by the defendant’s criminal history. Prior convictions may be included in the offender score only if the court determines the convictions have not “washed out.” RCW 9.94A.525(2).

In Mr. Glenn’s case, the sentencing court included three prior second degree theft convictions, class C felonies, in Mr. Glenn’s offender score. Class C felonies wash out of a defendant’s offender score if the offender spends five consecutive years in the community without committing any offenses that result in a conviction. RCW 9.94A.525. The State argued at sentencing that Mr. Glenn’s prior second degree theft convictions did not wash out because he was convicted of three misdemeanors during the wash out period.

While a defendant normally cannot challenge a presumptive standard range sentence, the defendant can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). A trial court’s calculation of an offender score is reviewed de novo. State v. Watkins, 86 Wn.App 852, 854, 939 P.2d 1243 (1997).

2. The State did not prove by a preponderance of the evidence Mr. Glenn's prior misdemeanor convictions during the wash out period.

a. An uncertified copy of a court docket is insufficient evidence to prove the existence of Mr. Glenn's prior misdemeanor convictions. The State has the burden of proving by a preponderance of the evidence the existence of a prior conviction before it may be included in a defendant's offender score. State v. Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). The State has the burden "because it is 'inconsistent with the principles underlying our systems of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" Cadwallader at 876 (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

A certified copy of the judgment and sentence is the best evidence to establish the existence of a prior conviction. State v Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. Id. at 519. For example, the State may introduce other documents of record or transcripts of prior proceedings to

establish a defendant's criminal history.¹ Typically these are other court-certified records.

In this case, the State fails to satisfy its burden of proving Mr. Glenn's prior misdemeanor convictions. To prove the existence of Mr. Glenn's prior alleged misdemeanor convictions, the State offered photocopies of Kitsap District Court dockets for case numbers 960108310 and 14539108. The State incorrectly asserted the photocopies were court certified. 4/28/06 RP 2. The District Court dockets are not signed nor are the photocopies court certified copies. CP 71-75 (See attached Appendix A) The only court certification in the documents the State offered appears on the last pages of the Judgment and Sentence for prior felony convictions in Kitsap Superior Court. The court certifications apply only to the felony convictions to which they are affixed. The court certifications do not apply to the Kitsap District Court dockets the State admitted which are separate charges from the felonies and originated from different courts.

¹ State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. Vickers, 148 Wn.2d 91, 119-21, 59 P.3d 58 (2002) (signed docket sheet from a Massachusetts court); State v. Aronholt, 99 Wn.App 302, 306-09, 994 P.2d 248 (2000) (certified verdict forms, clerk minute entries and court orders support the existence of prior convictions).

The State could not or chose not to provide certified copies of the judgments for the misdemeanor cases or reasons why they were unavailable. The unsigned photocopy of a court docket is insufficient evidence to prove Mr. Glenn's prior convictions. Therefore, the misdemeanor convictions reflected in the court dockets cannot be used to interrupt Mr. Glenn's wash out period.

b. The unsigned court dockets were facially invalid because it did not indicate either presence of an attorney or waiver of an attorney. The State does not have the affirmative burden of proving the constitutional validity of a prior conviction. State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). But a "prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered." Ammons, at 187-88. "Constitutionally invalid means a conviction without further elaboration evidences infirmities of a constitutionally magnitude." Ammons, at 198. The court dockets the State offered to prove Mr. Glenn's prior misdemeanor convictions are facially invalid because they do not state Mr. Glenn was represented by counsel or waived representation. Burgett v. Texas, 389 U.S. 109, 885 S. Ct. 258, 19

L. Ed. 2d 319 (1967). In both cases, the convictions were obtained in violation of Mr. Glenn's 6th Amendment right to counsel

On May 17, 1996, Mr. Glenn was charged with driving while license suspended second degree and negligent driving on case number 3606492168. On December 6, 2000, Mr. Glenn was arraigned and charged with possession of marijuana on case number 14539108. Both charges were in Kitsap District Court.

The docket for case 960108310 includes the following notes (Appendix A):

05/17/1996 Case Filed on 5/17/1996
DEFT IN [sic] CUSTODY
DEFENDANT STIPULATED TO FACTS
SUFFICIENT TO ENTER A FINDING OF
GUILTY
Case Heard Before Judge WDP
Finding/Judgment of Guilty for Charge 1
Finding/Judgment of Guilty for Charge 2

The docket for case 14539108 includes the following notes (Appendix A):

01/12/2001 DEFENDANT PRESENT
STATE REPRESENTED BY J WALKER
DEFENDANT STIPULATED TO FACT
SUFFICIENT TO ENTER A FINDING OF
GUILTY
Finding/Judgment of Guilty for Charge 1
Case Heard Before Judge RIEHL, JAMES M.

At the sentencing hearing for the case at bar, Mr. Glenn objected to the use of these prior misdemeanor convictions in calculating his offender score. Mr. Glenn filed affidavits stating he was not advised of his right to counsel, was not represented by counsel nor waived his right to be represented by counsel in the prior misdemeanor cases. CP 80-82.

In Burgett v. Texas, 389 U.S. 109, the Supreme Court held a conviction which does not indicate either presence of counsel or waiver may not be used to enhance punishment. Burgett was convicted of assault with intent to murder. The State sought to enhance his sentence based on four prior convictions. There were two copies of one of the prior convictions offered, one of which stated that Burgett appeared “in proper person and without counsel”, the other of which stated he appeared “in proper person” but did not contain the additional language “without counsel.” The trial court did not admit the first version, but allowed the second. The Supreme Court reversed, holding that the conviction must be excluded, as both versions of the judgment and sentence on their face raised a presumption that Burgett had been denied his right to counsel.

Presuming waiver of counsel from a silent record is impermissible. Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70 (1962). In Carnley, the petitioner represented himself and was convicted of various sexual crimes. The record did not show the trial judge offered and the petitioner declined counsel. The Florida Supreme Court imputed to the petitioner waiver of counsel. The U.S. Supreme Court reversed discharge of the petitioner's writ of habeas corpus holding the record must show the petitioner was offered counsel but intelligently waived the offer.

This Court has previously held that "where the judgment and sentence itself does not reflect representation by counsel or waiver, it is deficient on its face." State v. Marsh, 47 Wn. App. 291, 294, 734 P.2d 545 (1987) overruled in part by In Re Petition of Williams, 111 Wn.2d 353, 368, 759 P.2d 436 (1988) (rejecting the Marsh analysis "to the extent that [it] holds or suggests that the State must prove constitutional validity at a sentencing hearing".)

Mr. Glenn's case is wholly distinguished from the facts in Williams. First, unlike the petitioner in Williams, Mr. Glenn did not plead guilty and sign a statement agreeing to the State's understanding of his criminal history and offender score. Specifically, Mr. Glenn objected to the State's use of his prior

misdemeanor convictions at sentencing because he was not represented by counsel or waived his right to representation by counsel in those cases.

Second, in the Williams case, the record was silent as to whether the petitioner was represented by counsel in the prior convictions. In this case, Mr. Glenn filed two affidavits at sentencing stating he was not advised of his right to counsel, was not represented by counsel nor waived his right to counsel when he was convicted of the prior misdemeanors. CP 80-82. The State could not or chose not to provide evidence disputing Mr. Glenn's assertion. The only record of the misdemeanor convictions is the court dockets the State filed. These dockets reflect all the details of the proceedings, including identification of the judges and prosecutor. It did not include whether Mr. Glenn was represented by an attorney or waived representation. Nor does it include Mr. Glenn was advised of his right to an attorney before he stipulated to facts in the cases. Appendix A.

Third, the dockets the State filed to prove Mr. Glenn's misdemeanor convictions violated the rules of CrRLJ 7.3 requiring a judgment of conviction to state "whether the defendant was represented by a lawyer or waived representation by a lawyer..."

CrRLJ 7.3 lists minimum requirements of the judgment and record of the proceedings, which include:

- (f) Representation by or waiver of lawyer, as well as date of lawyer's appearance or waiver;
- (g) The parties present, including but not limited to the judge, attorneys, prosecutor, defense counsel, witnesses;

The misdemeanor convictions were unconstitutionally obtained in violation of Mr. Glenn's 6th Amendment right to counsel. The convictions were facially invalid because they did not state whether Mr. Glenn was represented by an attorney or waived representation. Therefore, it was error for the trial court to use these prior convictions to interrupt Mr. Glenn's "wash out" period. Accordingly, the trial court should have sentenced Mr. Glenn with an offender score of 6.

3. The State is not entitled to an evidentiary hearing upon remand. The State may argue that if Mr. Glenn is entitled to have his sentence remanded, the State is entitled to an evidentiary hearing to provide evidence to prove the validity of the prior misdemeanor convictions. "[R]emand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the state's evidence or the existence or classification of a prior conviction." Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). "If

the defendant has objected, and ‘the disputed issues have been fully argued at sentencing, the state will be held to the existing record, the unlawful portion of the sentence will be excised, and this case will be remanded for resentencing without allowing further evidence to be adduced.’” Lopez, at 520-521 (citing Ford, 137 Wn.2d at 485).

“[T]o uphold procedurally defective sentencing hearings would send the wrong message to the trial courts, criminal defendants, and the public.” Cadwallader, 155 Wn.2d at 878 (quoting Ford, 137 Wn.2d at 484). It would send an equally wrong message to allow the state a second opportunity to prove its allegations of the defendant’s history. Ford at 523.

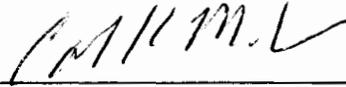
Here, Mr. Glenn objected to the use of his prior Theft 2 convictions as part of his offender score at sentencing. Specifically, Mr. Glenn argued the Theft 2 convictions “washed out” because the State could not prove by a preponderance of the evidence that Mr. Glenn was represented by counsel during the subsequent misdemeanors. Because the issue as to whether Mr. Glenn’s prior misdemeanor convictions should be considered at the sentencing hearing, the State should not be allowed another opportunity to

supplement the record with additional evidence of Mr. Glenn's criminal history.

F. CONCLUSION.

Mr. Glenn's sentence is based on an erroneously calculated offender score. Mr. Glenn respectfully requests this Court to reverse his sentence and remand for a resentencing based on an offender score of 6.

Respectfully submitted this 9th of October 2006.



Carolyn Morikawa (WSBA 24974)
Washington Appellate Project - 91052
Attorney for Appellant

APPENDIX A

DEFENDANT

GLENN, MICHAEL WAYNE
12954 HEMLOCK AVE
POULSBO WA 98370

CASE: 960108310 WSP
Criminal Traffic
Agency No.

Home Phone: 3606492168
Work Phone: 3602390998

AKA No aliases on file.

OFFICER

00834 WSP LATIMER, D

CHARGES

Violation Date:		DV Plea	Finding
05/16/1996			
1 46.20.342.2	DWLS 2ND DEGREE	N	Guilty
2 46.61.525	NEGLIGENT DRIVING	N	Guilty

TEXT

S	05/17/1996	Case Filed on 05/17/1996		EAH
U		DEFT INCUSTODY		VEG
		DEFENDANT STIPULATED TO FACTS SUFFICIENT TO ENTER A FINDING OF GUILTY		
S		Case Heard Before Judge WDP		
		Defendant Arraigned on Charge 1		
		Finding/Judgment of Guilty for Charge 1		
		Total Fine Imposed on Charge 1:	500.00	
		with 250.00 Suspended		
		Court Imposes Jail Time of 365 D on Charge 1 with 364 D Suspended		
		Case Heard Before Judge WDP		
		Defendant Arraigned on Charge 2		
		Finding/Judgment of Guilty for Charge 2		
		Total Fine Imposed on Charge 2:	133.00	
		with 0.00 Suspended		
U		CREDIT FOR ONE DAY SERVED		
S		STI NN: Held		
	05/20/1996	OFF 1 LATIMER, D Added as Participant		EAH
		Charge 1: Def. complied with Jail Sentence		VEG
		Accounts Receivable Created	383.00	
		Case Scheduled on Time Pay Agreement 1 for:	383.00	
U	06/17/1996	DISPOSITION REPORT SENT TO WSID.		RRR
	08/01/1996	DEFT AT COUNTER, REQUESTS HRG TO AMEND PAYMENT PLAN		DMH
S		OTH NN Set for 08/08/1996 03:00 PM		
		in Room 203 with Judge WDP		
U	08/08/1996	DEFENDANT PRESENT		THC
		DEFT TO BRING PROOF OF 10 DAYS/80 HRS CS COMPLETION TO FURTHER REVIEW HEARING & JUDGE WILL REVIEW CREDIT FOR CASES		
		-----WDP		
S		OTH NN Set for 10/15/1996 09:00 AM		DMH
		in Room 203 with Judge WDP		
		OTH NN: Held		THC
	08/14/1996	Case Removed from Time Pay Agreement 401 79920 1		SEM
		Case Removed from Time Pay Agreement 401 79920 1		

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DEFENDANT
GLENN, MICHAEL WAYNE

CASE: 960108310 WSP
Criminal Traffic
Agency No.

TEXT - Continued

S	08/14/1996	FTA Ordered		SEM
		Case Eligible for Collections Notice.		
		Collection Notice prepared for Defendant		TMJ
		FTA Issued, Amount Due	383.00	SYS
	09/16/1996	Case Sent to Collection Agency		VEG
U	10/15/1996	DEFENDANT FAILS TO APPEAR.		THC
		DEFT HAS NOT COMPLIED WITH CS, ACCOUNT TO REMAIN AT ALLIED		
		-----WDP		
S		OTH NN: Held		
	03/06/1997	Case Removed from Collection Process		VEG
		97065100239 Fine Payment Paid in Full	383.00	
		FTA Adjudicated: Case Paid		
		Case Disposition of CL Entered		
	03/07/1997	FTA adjudication automatically sent to DOL		SYS

ACCOUNTING SUMMARY

	Total Due	Paid	Credit	Balance
Timepay: N	383.00	383.00		

ADDITIONAL CASE DATA

Case Disposition
Disposition: Closed Date: 03/06/1997

Personal Description

Sex: M Race: W DOB: 12/24/1971
Dr.Lic.No.: GLENNMW293R4 State: WA Expires: 1999
Employer:
Height: 6 1 Weight: 170 Eyes: BRO Hair: BRO

Hearing Summary

Held	STIPULATION HEARING	ON 05/17/1996 AT 01:30 PM IN ROOM 201 WITH WDP
Held	MISC. HEARING	ON 08/08/1996 AT 03:00 PM IN ROOM 201 WITH WDP
Held	MISC. HEARING	ON 10/15/1996 AT 09:00 AM IN ROOM 203 WITH WDP

End of docket report for this case

DEFENDANT

GLENN, MICHAEL WAYNE
12954 HEMLOCK AVE
POULSBO WA 98370

CASE: 14539108 KPR
Criminal Non-Traffic
Agency No. 351516

Home Phone: 3606492168
Work Phone: 3602390998

AKA No aliases on file.

CHARGES

Violation Date: 10/21/2000	DV Plea	Finding
1 69.50.401E POSS OF MARIJUANA	N Not Guilty	Guilty

TEXT

S 10/31/2000 Case Filed on 10/31/2000 BSW
 ARR NN Set For 11/29/2000 09:00 AM In Room 201
 Case Filing Date Changed from 10/31/2000
 to 10/27/2000

U 11/29/2000 DEFENDANT FAILS TO APPEAR. SME
 STATE REPRESENTED BY LEWIS
 -----MGP/201

S ARR NN: Held
 12/04/2000 BENCH Warrant Ordered
 Print on or after 12/04/2000
 Warrant expires on 12/04/2005

U 12/06/2000 DEFENDANT PRESENT
 S Warrant Order Canceled
 U RESET FOR ARRAIGNMENT, \$50 BW FEE IMPOSED -----MGP/201
 S Accounts Receivable Created 50.00 BSW
 341100073 Fine Payment Paid in Full 50.00
 ARR RESNN Set For 12/14/2000 09:00 AM In Room 201 JRK
 OTH BW: Held SME

U 12/14/2000 DEFENDANT PRESENT TJL
 STATE REPRESENTED BY C LEWIS
 S Defendant Arraigned on Charge 1
 Plea/Response of Not Guilty Entered on Charge 1
 PTR NN Set For 01/12/2001 03:00 PM In Room 201
 ----- TSD / 201

U ARR RESNN: Held
 S DEFENDANT PRESENT BMH
 STATE REPRESENTED BY J WALKER
 DEFENDANT STIPULATED TO FACTS SUFFICIENT
 TO ENTER A FINDING OF GUILTY
 S Finding/Judgment of Guilty for Charge 1
 Case Heard Before Judge RIEHL, JAMES M
 Judge RIEHL, JAMES M Imposed Sentence
 Court Imposes Jail Time of 90 Days on Charge 1
 with 80 Days Suspended, and
 0 Days Credit for time served
 Total Imposed on Charge 1: 1,000.00
 with 525.00 Suspended
 And 0.00 Other Amount Ordered

U ORDER REGARDING SEIZED PROPERTY FILED

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DEFENDANT
GLENN, MICHAEL WAYNE

CASE: 14539108 KPR
Criminal Non-Traffic
Agency No. 351516

TEXT - Continued

S 01/12/2001 PTR NN: Not Held, Hearing Canceled
STI NN: Held T J L

01/16/2001 Accounts Receivable Changed to 475.00 B S W
Authorized by BSW

Case Scheduled on Time Pay Agreement 1 for: 475.00

03/27/2001 Case Removed from Time Pay Agreement 401 79920 1 B M L

03/28/2001 Case Obligation Selected for Collections T R D

03/29/2001 Collections: 1st Notice Prepared

U 04/05/2001 DEFT FAILED TO COMPLETE 10 DAYS JAIL, COURT TO SUMMONS A L S

S OTH COMPY Set For 05/04/2001 10:30 AM In Room 104

04/06/2001 Notice Issued for OTH COMPY on 05/04/2001 10:30 AM D S J

05/02/2001 Case Obligation Assigned to ALLIED CREDIT COMPANIES for Colle TR D
ctions

U 05/04/2001 DEFENDANT PRESENT L D P

DEFT GIVEN NEW COMMITMENT - RECALL FINE FROM ALLIED - DEFT TO
COMPLETE FINE IN CSW/60 DAYS-----S J H / 1 0 4

FINE RECALLED FROM ALLIED/KIM B S W

S Case Obligation Removed from Collections

Case Scheduled on Time Pay Agreement 1 for: 475.00

OTH COMPY: Held D S J

05/30/2001 PCN added to case D J G

07/03/2001 Case Removed from Time Pay Agreement 401 79920 1 D G S

Accounts Receivable Changed to 0.00

Authorized by DGS with Adjustment Code: CS

04/17/2003 Case Disposition of CL Entered J R K

ACCOUNTING SUMMARY

	Total Due	Paid	Credit	Balance
Timepay: N	50.00	50.00		

COLLECTION STATUS

Status Date	Status Description	Cln Amt
05/04/2001	Cleared/Removed by User	475.00

ADDITIONAL CASE DATA

Case Disposition
Disposition: Closed Date: 04/17/2003

Personal Description

Sex: M Race: W DOB: 12/24/1971
Dr.Lic.No.: GLENNMW293R4 State: WA Expires: 1999
Employer:
Height: 6 1 Weight: 170 Eyes: BRO Hair: BRO

Hearing Summary

Held	ARRAIGNMENT	ON 11/29/2000 AT 09:00 AM IN ROOM 201 WITH MGP
Held	BENCH WARRANT HRG	ON 12/06/2000 AT 09:30 AM IN ROOM 201 WITH MGP
Held	ARRAIGNMENT RESET	ON 12/14/2000 AT 09:00 AM IN ROOM 201 WITH TSD
Held		ON 01/12/2001 AT 03:00 PM IN ROOM 201 WITH JMR

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07020SX DGF
04/10/2006 10:40 AM

KITSAP DISTRICT COURT
D O C K E T

PAGE: 3

DEFENDANT
GLENN, MICHAEL WAYNE

CASE: 14539108 KPR
Criminal Non-Traffic
Agency No. 351516

ADDITIONAL CASE DATA - Continued
Hearing Summary

Held COMPLIANCE HRG ON 05/04/2001 AT 10:30 AM IN ROOM 104 WITH SJH

End of docket report for this case

