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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 39415-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PEDRO GARCIA MORALES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRAYS HARBOR COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT ERRED IN CONCLUDING MR. MORALES'S CALIFORNIA CONVICTION OF ASSAULT WAS A MOST SERIOUS OFFENSE.

Mr. Morales has argued his prior California conviction of assault with a deadly weapon is not legally comparable to most serious offense. Moreover, he has argued the State did not present any evidence from which the trial court could find the offense was factually comparable.

Recently, addressing precisely the same argument, this Court agreed that because a California assault conviction does not require a specific intent element it is not legally comparable to a Washington assault. In re the Personal Restraint Petition of Carter, 154 Wn.App. 907, --- P.3d ----, 2010 WL 774967, 9¹ Moreover, the Court concluded that because Carter entered the equivalent of a Newton plea in which he did not admit any facts it could not find the California offense factually comparable. Id. at 7, 9.

In its response, the State urges this Court to ignore this recent decision, contending that whether the California offense required proof of a specific intent is irrelevant. The State contends

¹ Only Westlaw page citations are available.

“an assault in California, as in Washington, is an intentional act done with intent to commit a battery.” Brief of Respondent at 5-6.² While that statement is superficially accurate, it fails to account for the fact that that proof of attempted battery in Washington requires proof of a specific intent to harm while the California offense does not. Compare, State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (specific intent to harm is element of assault by attempted batter); People v. Rocha, 3 Cal.3d 893, 899, 479 P.2d 372 (1971) (proof of specific intent to cause harm is not an element of assault). That distinction cannot, as the State suggest, be ignored.

Based upon Mr. Morales’s prior briefing and this Court’s decision in Carter, the court must conclude Mr. Morales California conviction is not legally comparable to a Washington moist serious offense.

Nor has the State established the offense was factually comparable. To support its argument of the factual comparability of the California offense, the State on Appeal, as at sentencing, points to a probation report prepared after Mr. Morales pleaded guilty.

Brief of Respondent at 8.

² It should be noted, the State’s argument on appeal that these offense are legally ignores its concession at trial that the offense are not legally comparable. 2RP 148.

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.

In re the Personal Restraint Petition of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005), see also, Shepard v. United States, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Sixth Amendment concerns require a similar limitation of federal court's ability to examine facts of prior conviction). Thus, in assessing the factual comparability of Mr. Morales's California offense, this Court is limited to consideration of the facts specifically agreed to in Mr. Morales's guilty plea. State v. Freeburg, 120 Wn.App. 192, 198-99, 84 P.2d 292 (2004); State v. Bunting, 115 Wn.App. 135, 141, 61 P.3d 375 (2003).

The State has never established that the facts contained in the probation report were proved beyond reasonable doubt or admitted to by Mr. Morales in his plea. Yet the State baldly claims he did. Brief of Respondent at 9. The fact that the probation report was prepared **after** Mr. Morales entered his plea establishes he did not and could have agreed to its accuracy. Beyond that, his guilty

plea references only the In his guilty plea Mr. Morales stipulated that the “preliminary hearing transcript supports a factual basis” for the plea and described his acts. Those are the only facts which this Court may consider, and the State has never provided them.

This Court must reverse Mr. Morales’s sentence and remand for imposition of a standard range sentence calculated without the California offense.

2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR SENTENCING FACTOR,” RATHER THAN AS AN “ELEMENT,” DEPRIVES MR. MORALES OF THE EQUAL PROTECTION OF THE LAW.

With respect to this claim, Mr. Morales relies primarily on his prior briefing. However, since he filed his initial brief the Court of Appeals in Division One issued an opinion concluding there is no equal protection violation where the Legislature elects to treat recidivism as an element in one case and as merely a sentencing factor in another. State v. Langstead, __ Wn.App. __, 228 P.3d 799 (2010).⁴ However, Langstead was wrongly decided.

Langstead acknowledged that in State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008), the Court held certain offenders

⁴ Only Westlaw citation is currently available.

are entitled to have prior convictions proven to a jury beyond a reasonable doubt because in some instances, prior convictions are labeled “elements.” Yet, in the circumstance of persistent offender sentencing, prior convictions are considered “aggravators” and the State must prove their existence merely by a preponderance of the evidence. The court concluded, however, that “recidivists like Langstead are not situated similarly to recidivists like Roswell” because “[t]he recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense.” Langstead at 6

The distinction drawn by Langstead is both false and irrelevant. There is no constitutionally meaningful distinction that flows from labeling a person a “felon” as opposed to a “misdemeanant.” What drives the constitutional analysis is the difference in punishment that flows from one or the other. There is no reason why those offenders should be afforded greater due process than offenders such as Mr. Langstead and Mr. Morales.

But, assuming for the sake of argument the “comparison group” consists of offenders prosecuted for unlawful possession of a firearm in the first degree (“UPFA 1”), these recidivists too “necessarily must have prior felony convictions before they commit

the current offense.” See RCW 9.41.040(1) (elevating crime of unlawful possession of firearm based upon prior conviction for a “serious offense”). According to RCW 9.41.010(16), a host of felonies constitute a “serious offense.”

Thus, Langstead’s ultimate conclusion – that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense” – is based on a false premise.

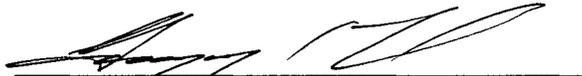
Langstead at 7. Recidivists prosecuted for UPFA 1 have engaged in conduct that is “inherently culpable enough to incur a felony sanction.” But these individuals are entitled to have their prior convictions proven to a jury.

And Langstead concedes that in each instance in which recidivism elevates the offense, legislative purpose for doing so is precisely the same as in persistent offender cases – to subject recidivists to harsher penalties. Langstead, at 6. In light of that common purpose, there is no rational basis upon which to base the disparate constitutional protections that flow from the arbitrary distinction that exists.

B. CONCLUSION

For the reasons above, and those in Mr. Morales prior brief, the Court must reverse Mr. Morales's conviction of second degree assault. Alternatively, the court must reverse Mr. Morales's sentence and remand for imposition of a standard range sentence.

Respectfully submitted this 14th day of May, 2010.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF MAY, 2010 I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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