

NO. 44171-3-II

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

STATE OF WASHINGTON, Respondent

v.

SANDRA JOAN GATTEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01677-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. GATTEN HAS NOT DEMONSTRATED THAT HER PRIOR CONVICTIONS FOR WELFARE FRAUD ARE CONSTITUTIONALLY INVALID ON THEIR FACE.
- II. GATTEN CANNOT CHALLENGE THE CONSTITUTIONALITY OF HER PRIOR CONVICTIONS IN THIS APPEAL.
- III. THE TRIAL COURT IMPROPERLY TREATED GATTEN'S PRIOR FIRST DEGREE THEFT CONVICTION AS SEPARATE CONDUCT FROM HER PRIOR WELFARE FRAUD CONVICTIONS.

B. STATEMENT OF THE CASE

Sandra Gatten pleaded guilty in 2005 to one count of theft in the first degree and seven counts of false verification for welfare. Supp. CP. 64-71. The seven instances of false verification occurred on seven different dates, encompassing seven different verifications. Id. During sentencing, Gatten argued that the trial court should “vacate” six of her seven prior convictions for false verification because they violated double jeopardy. See Supp. CP 34-78. She did not, however, bring a proper collateral attack on those convictions. She did not complain about any technical defects in her plea form to those charges. Report of Proceedings. The trial court erroneously scored her prior theft in the first degree conviction as separate conduct from her false verification convictions. CP 4.

C. ARGUMENT

I. GATTEN HAS NOT DEMONSTRATED THAT HER PRIOR CONVICTIONS FOR WELFARE FRAUD ARE CONSTITUTIONALLY INVALID ON THEIR FACE.

Gatten claims that her prior convictions for theft in the first degree and welfare fraud under cause number 05-1-01529-2 should not have been counted in her offender score in the current case because the convictions were constitutionally invalid on their face. This is so, she claims, because of a technical defect on her plea form. Gatten's complaint is meritless.

Gatten's specific complaint is that there is a portion of her plea form that the judge forgot to fill out. On the final page of the plea form there is a portion where the judge is asked to indicate whether the defendant has read the plea form, has had the plea form read to her, or had an interpreter read the form, and whether she understood the form. See Supp. CP 71. None of the boxes are marked. *Id.*

The State has the burden of proving the existence of prior convictions that will be used to calculate an offender score, but is not required to prove the underlying constitutional validity of those convictions. *State v. Thompson*, 143 Wn.App. 861, 866, 181 P.3d 858 (2008); citing *State v. Mendoza*, 139 Wn.App. 693, 698-99, 162 P.3d 439 (2007); *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 796 (1986). The constitutionality of prior convictions cannot generally be challenged in

sentencing proceedings on subsequent cases. “Otherwise, sentencing proceedings for the current conviction would become an appellate forum for prior convictions.” *Thompson*, supra, at 866. Defendants have more appropriate means to collaterally attack prior convictions. *Ammons*, supra, at 188.

An exception to this rule exists where the prior the prior conviction is constitutionally invalid on its face. *Ammons*, supra, at 187-88. A conviction is unconstitutionally invalid on its face where it evinces, “without further elaboration...infirmities of a constitutional magnitude.” “To determine facial invalidity of a prior conviction, the sentencing court may review the judgment and sentence and any other document that qualifies as ‘the face of the conviction.’” *Thompson* at 866, quoting *State v. Gimarelli*, 105 Wn.App. 370, 377, 20 P.3d 430, review denied, 144 Wn.2d 1014 (2001). In this context, the “face of the conviction” includes “those documents signed as part of a plea agreement.” *Thompson* at 867, citing *State v. Phillips*, 94 Wn.App. 313, 317, 974 P.2d 1245 (1999). The burden of demonstrating that a prior conviction is constitutionally invalid on its face is on the defendant, not the State. *In re Personal Restraint of Williams*, 111 Wn.2d 353, 368, 759 P.2d 436 (1988); *State v. Lewis*, 141 Wn.App. 367, 396, 166 P.3d 786 (2007).

Here, Gatten complains of a technical defect in her plea form. “When challenging a guilty plea to be used at a later sentencing, the defendant must not only show that the plea forms were deficient but he must also show that the sentencing court deprived him of constitutional safeguards.” *Lewis* at 397; *Gimarelli* at 376. Where a clear determination of constitutional invalidity cannot be made, the deficiency is charged to the defendant and the conviction is *not* facially invalid. *Thompson* at 867; *Ammons* at 189. “The conviction need not show that a defendant’s rights were *not* violated; rather, for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant’s rights *were violated*.” *Gimarelli* at 375 (emphasis added). Thus, if the trial court would have to go behind the verdict, judgment and sentence to determine facial invalidity, the conviction is not facially invalid. *Ammons* at 189.

Gatten has not met her burden of demonstrating that her prior convictions are constitutionally invalid on their face. It is worth noting that Gatten makes this argument for the first time on appeal, but has not demonstrated a manifest error affecting a constitutional right. See RAP 2.5 (a). “Characterizing an alleged error as a violation of a constitutional right, however, does not automatically meet the RAP 2.5(a)(3) threshold for our reviewing even a constitutional error raised for the first time on appeal.”

State v. Knutz, 161 Wn.App. 395, 406-07, 253 P.3d 437 (2011). To capitalize on this exception, the appellant must show that the error implicated a constitutional interest and that the error was manifest. *Id.* Manifest error is error that has “practical and identifiable consequences at trial.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Because Gatten cannot affirmatively show that she was deprived of constitutional safeguards at her prior sentencing, she cannot show that this “error” had practical and identifiable consequences on the outcome of her sentencing on the current charge. This Court should decline to review this claimed error for the first time on appeal.

Gatten has not affirmatively shown that she was deprived of constitutional safeguards at her prior sentencing. In *Ammons*, *supra*, one of the appellants argued that his prior conviction was constitutionally invalid on its face because his plea form failed to reflect that he was aware of his right to remain silent, failed to set forth the elements of burglary, failed to set forth the consequences of pleading guilty and failed to include a sufficient factual basis for the plea. The Supreme Court rejected these claims, stating “[a] determination as to the validity of these issues cannot be made from the face of the guilty plea form. [Appellant] must pursue the usual channels for relief.” *Ammons* at 189. Likewise, another appellant in *Ammons* who complained, as Gatten does, that his prior guilty plea did not

reflect that constitutional safeguards were provided could not obtain relief because he couldn't show that the safeguards were *not* provided. *Id.*

In *Thompson*, *supra*, the appellant's guilty plea form reflected an incorrect maximum sentence for each crime. He argued the convictions were facially invalid as a result. The Court of Appeals held that he had not met his burden of demonstrating the prior convictions were facially invalid:

From review of the face of these documents alone, we do not know whether Thompson was informed of the correct maximum possible sentence on each crime. We concede that given the discrepancy between the forms, Thompson's convictions may be unconstitutional. Like *Ammons* though, because a determination **cannot be made from review of the forms alone, Thompson's claim fails.** With the burden of proof on Thompson to establish the unconstitutionality of the pleas, his recourse is to "pursue the usual channels provided for post-conviction relief, and, if successful, request resentencing."

Thompson at 867-68 (emphasis added).

Gatten has not affirmatively shown that she was deprived of the constitutional safeguards she complains of, as is her burden. This assignment of error is meritless.

II. GATTEN CANNOT CHALLENGE THE CONSTITUTIONALITY OF HER PRIOR CONVICTIONS IN THIS APPEAL.

Gatten's second complaint is that all but one of her prior convictions for welfare fraud are unconstitutional because they violate double jeopardy. But this complaint is that the prior convictions are unconstitutional, not that they're facially invalid. This is an important distinction. As noted in Part I, above, the constitutionality of prior convictions cannot be challenged at a later sentencing hearing. An exception to this rule is where a prior conviction is "[c]onstitutionally invalid on its face." *Thompson*, supra, at 866, citing *Ammons*, supra, at 187-88. A claim that prior convictions violate double jeopardy is a claim that they are unconstitutional, not that they are constitutionally invalid on their face. Gatten assumes, without citation to authority or argument, that any constitutional infirmity equates to facial invalidity. Indeed, the legislature has determined that double jeopardy claims do not go to facial validity. See RCW 10.73.090 and .100 (RCW 10.73.090 addresses facial invalidity of a judgment and sentence whereas 10.73.100 enumerates six exceptions that do not speak to facial invalidity but will nevertheless excuse compliance with the one-year time bar for collaterally attacking a conviction. Double jeopardy is one of these exceptions).

The exception to this is where the double jeopardy violation is evident on the face of the judgment and sentence. See *In re Personal Restraint of Strandy*, 171 Wn.2d 817, 820, 256 P.3d 1159 (2011). In

Strandy, when the judgment and sentence was read in conjunction with the information it was clear that the defendant was convicted twice for each homicide (murder and felony murder). *Id.* In *Strandy*, however, the court was not required to go behind the judgment and sentence to see the obvious double jeopardy violation. As noted in Part I, above, the court is neither required nor permitted to “go behind the verdict and sentence and judgment” to make a facial invalidity determination. *Ammons*, supra, at 189; *Thompson* at 867. If the trial court would have to go behind the verdict, judgment and sentence to determine facial invalidity, the conviction is not facially invalid. *Ammons* at 189.

Here, Gatten’s entire argument is premised on the assertion that her seven convictions for welfare fraud were based on a “single falsehood.” See Brief of Appellant at 9-12. She claims that the “single falsehood” was her claim that her son was living with her when he was not, and that she re-affirmed this lie seven times. *Id.* The problem with this argument is that this information is contained in documents that cannot be considered by the court in determining facial validity. The documents from which this information was taken are three letters, dated the same day (August 31, 2004) to Gatten from DSHS identifying 35 different overpayments she received from DSHS because John Heiser, her son, was not living with her as of 1/1/03. Supp. CP. 61-63. These documents were

attached to defense counsel's Motion to Clarify Criminal History. Supp. CP 34-78. These documents are not the "judgment and sentence and any other document that qualifies as 'the face of the conviction.'" *Thompson*, supra at 866; quoting *Gimarelli*, supra, at 377. These letters are not a "document signed as part of the plea agreement. *Thompson*, supra, at 867, citing *Phillips*, supra, at 317.

Gatten's assertion that her convictions arise from a "single falsehood" is not apparent from the judgment and sentence, the plea form, or the information. The factual basis on the statement of defendant on plea of guilty merely says:

I did in Clark County, State of Washington on the following dates (each being a separate count of the information) to wit: March 10, 2003, April 10, 2003, June 17, 2003, October 27, 2003, November 10, 2003, March 30, 2004 did willfully make and subscribe an application, statement or paper containing or verified by a written declaration that it was made under the penalties of perjury to wit: application for benefits to which I did not believe to be true and correct as to every material matter.

Supp. CP 71. This statement makes no reference to a single falsehood or to any facts which would support the conclusion that she was admitting to a single falsehood.¹ Likewise, the Information makes no such reference

¹ The State, it must be emphasized, is not agreeing that Gatten's prior convictions violate double jeopardy even if they were based on a "single falsehood." RCW 74.08.055 (2) states: "Any applicant for or recipient of public assistance who willfully makes and signs any application, statement, other paper, or electronic record which contains or is verified by a written declaration that it is made under the penalties of perjury and which he or she

either. See Supp. CP. 76-78. Thus, Gatten's claim of double jeopardy cannot be determined by looking to the face of the judgment and sentence or documents signed as part of the plea and she cannot demonstrate facial invalidity. The question of whether her prior convictions are merely unconstitutional, as opposed to facially invalid, cannot be raised in this appeal. *Thompson* at 866. Gatten has other proper avenues to challenge those prior convictions. This claim of error fails.

III. THE TRIAL COURT IMPROPERLY TREATED GATTEN'S PRIOR FIRST DEGREE THEFT CONVICTION AS SEPARATE CONDUCT FROM HER PRIOR WELFARE FRAUD CONVICTIONS.

Gatten complains that the trial court scored her prior theft conviction separately from her prior welfare fraud convictions in spite of the fact that the original trial court where these sentences originated treated the theft conviction as same criminal conduct. Gatten argues that

does not believe to be true and correct as to every material matter is guilty of a class B felony punishable according to chapter 9A.20 RCW."

The plain language of the statute shows that the unit of prosecution, as intended by the legislature, is each instance of making and signing the false application. The language is not concerned with the underlying subject matter of the false declaration. The gravamen of the offense is the making and signing of a false application, which Gatten did on seven separate and distinct occasions. Because the language of the statute makes clear what the unit of prosecution is, there is no ambiguity and no need to discuss the rule of lenity. Moreover, Gatten's argument that she committed a "single course of conduct" fails because the legislature has not expressly stated that this is a continuing offense. See *State v. Green*, 150 Wn.2d 740, 742-43, 82 P.3d 239 (2004): "[T]he doctrine of continuing offenses should be employed sparingly, and only when the legislature *expressly states* the offense leads to a reasonable conclusion that the legislature so intended." (Emphasis added).

RCW 9.94A.525 (5) (a) (i) binds the later sentencing court to the prior court's same criminal conduct determination. The State agrees and concedes that Gatten must be resentenced and the trial court should be instructed to score her prior theft in the first degree conviction as same criminal conduct with her welfare fraud convictions.

D. CONCLUSION

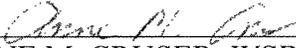
This Court should remand Ms. Gatten's case for resentencing where the trial court must count her prior conviction for theft in the first degree as same criminal conduct as her false verification convictions. This will result in one point being removed from her score. This Court should affirm her sentence in all other respects and reject her assignments of error.

DATED this 10th day of July, 2013.

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