

No. 274896

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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

STEPHEN ANTHONY BAILEY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE MICHAEL E. SCHWAB, JUDGE

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SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii
I. <u>INTRODUCTION</u> .....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT</u> .....	2
1. <b><u>Bailey expressly waived his right to a declination hearing and juvenile court jurisdiction which was intelligently made after being fully informed of the rights he waived. Additionally, the sentencing court made a finding that the agreement was in the interest of justice. The requirements of Saenz were satisfied</u></b> .....	2
IV. <u>CONCLUSION</u> .....	7

TABLE OF AUTHORITIES

PAGE

**Cases**

State v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (2009)..... 2, 3, 7

State v. Saenz, 175 Wn.2d 167, 283 P.3d 1094 (2012) ..... 1, 3, 4, 5, 7

**Statutes and Rules**

RCW 9.94A.030(33) ..... 2

RCW 9.94A.110(1) ..... 2

RCW 9.94A.140.140(9)..... 2

RCW 9.94A.570 ..... 2

RCW 13.04.030 ..... 3

RCW 13.40.030 ..... 2

RCW 13.40.110 ..... 3, 6

RCW 13.40.110(2) ..... 2

RCW 13.40.140(9) ..... 7

RAP 10.3(b) ..... 1

## I. INTRODUCTION

Appellant Stephen Anthony Bailey timely appealed his convictions for first degree assault and intimidating a witness. Included in his assignments of error, he challenged his persistent offender status. In an unpublished opinion, this court affirmed the convictions, as well as the persistent offender sentence. No. 27489-6-III, August 5, 2010.

Bailey petitioned for review of the decision in the Washington Supreme Court. In an order dated January 8, 2013, under cause number 85087-9, the Supreme Court granted review and remanded this matter back to the Court of Appeals for reconsideration in light of the recent decision in State v. Saenz, 175 Wn.2d 167, 283 P.3d 1094 (2012).

The court has requested supplemental briefing as to the impact of the Saenz decision on Mr. Bailey's persistent offender status.

## II. STATEMENT OF THE CASE

The factual statements contained in the parties' briefs are incorporated herein. RAP 10.3(b)

### III. ARGUMENT.

1. **Bailey expressly waived his right to a declination hearing and juvenile court jurisdiction which was intelligently made after being fully informed of the rights he waived. Additionally, the sentencing court made a finding that the agreement was in the interest of justice. The requirements of Saenz were satisfied..**

It is well-established that the State bears the burden of proving by a preponderance of the evidence that a conviction constitutes a prior “strike” under the Persistent Offender Accountability Act. RCW 9.94A.030(33); RCW 9.94A.570. State v. Knippling, 166 Wn.2d 93, 98, 206 P.3d 332 (2009).

A juvenile’s prior conviction in adult court may only be used as a prior strike under the POAA if the State can demonstrate that transfer to adult court was proper, and the prior offense was therefore committed by an “offender”, as defined by the statute. Knippling, 166 Wn.2d 101-02. A juvenile is an “offender” only if the prior case was in adult court pursuant to the so-called “auto remand” provision of RCW 13.40.030 or the case has been transferred after a declination hearing conducted pursuant to RCW 13.40.110(2).

A juvenile may waive his or her right to a declination hearing, if the waiver is intelligently made, after the juvenile has been fully informed of the right being waived. RCW 9.94A.110(1); RCW 9.94A.140(9).

In Knippling, the State relied upon a juvenile's prior conviction in adult court in seeking a Persistent Offender sentence. The juvenile had been charged with first degree robbery, which was automatically filed in adult court under RCW 13.04.030, but entered a plea to the lesser charge of second degree robbery, over which the juvenile court had jurisdiction unless there was a declination determination. The Supreme Court held that the prior conviction could not be a strike, as the juvenile court failed to follow the statutory transfer procedure, or show that there was a valid waiver of the right to that proceeding. Knippling, 166 Wn.2d at 101-02.

In State v. Saenz, the Court reached a similar result. In that case, the defendant entered a plea, as a 15-year old, to a charge of assault in adult court. There was no declination hearing in the juvenile court, and there was no express waiver of his right to a declination hearing or to have his case adjudicated in juvenile court. Indeed, the only discussion concerning his waiver was his attorney's representation that "I believe that he understands what the implications are of having this moved to adult court, but that is his desire at this time." Saenz, 175 Wn.2d at 171.

Significantly, the juvenile court commissioner entered no findings to the effect that the transfer to adult court would be in the best interests of either the juvenile or the public as required by RCW 13.40.110. Id.

On these facts, the Supreme Court determined that there was “no way” of knowing whether Saenz’ waiver of the declination hearing and juvenile jurisdiction was knowingly and intelligently made, as the waiver was based only upon extrajudicial conversations with counsel. Accordingly, the Court could not conclude that the waiver was made intelligently. Saenz, 175 Wn.2d at 178.

The Court went further, and held that the Juvenile Justice Act “explicitly” requires juvenile courts to enter written findings before declining juvenile jurisdiction:

These requirements are mandatory. A transfer of juvenile jurisdiction to adult court is not valid until the juvenile court has fulfilled its solemn responsibility to independently determine that a decline of jurisdiction is in the best interest of the juvenile or the public and entered written findings to that effect before transferring the case. Former RCW 13.40.110(2), (3).

Even where the parties stipulate to decline juvenile jurisdiction, the statute still requires the court to enter findings, and the court cannot transfer a case to adult court until it has done so. If transfer is not in the best interest of the juvenile or the public, the juvenile cannot be transferred, despite any agreement among the parties.

Saenz, 175 Wn.2d at 179.

In light of the deficiencies noted in the juvenile court process, the Court held that the transfer of the prior case to adult court was itself was defective, and could not be used as a strike. Id., at 181.

The State would submit that the facts surrounding Mr. Bailey's prior conviction for second degree robbery, entered when he was sixteen years old, are quite different from those at issue in Saenz.

First, as this court noted in its opinion, while there was no declination hearing, there was an extensive colloquy between Bailey and the court about what a declination hearing was, and that he agreed with adult jurisdiction of his second degree robbery plea and sentence:

THE COURT: All right. Do you know what declination is?

THE DEFENDANT: Going to prison.

THE COURT: I'm sorry?

THE DEFENDANT: Getting sent to prison.

THE COURT: Well, it means-you're 16 now, is that right?

THE DEFENDANT: Yeah.

THE COURT: Juvenile court has jurisdiction over you.

You are in adult court right now because you were originally charged with a Class A felony, first-degree robbery. The State is reducing the charge to second-degree robbery.

So, technically, you could go back to juvenile court. But part of the agreement is that you won't go back, and you are going to be treated as an adult here. And you are giving up the right to have a hearing to determine whether you should remain in juvenile court. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Are you sure?

THE DEFENDANT: Yes.

THE COURT: Are you agreeing to that?

THE DEFENDANT: Yes.

**(Ex. E at 1-2)**

THE COURT: Do you understand it doesn't matter how you entered this plea, once you enter it and I find you guilty, you're convicted, it goes on your record?

THE DEFENDANT: Yes.

THE COURT: It is a very serious offense, do you understand that?

THE DEFENDANT: That means I'll have a felony, one strike.

THE COURT: It is a strike, you bet it is.

THE DEFENDANT: Yeah.

THE COURT: So it's very serious. You're 16. You will have a strike on your record already.

**(Ex. E at 6)**

Mr. Bailey also acknowledged written notification in his plea statement that the crime of second degree robbery was a "most serious offense", and that two more convictions for most serious offenses would result in a mandatory life sentence without possibility of release. **(Ex. F at 2)**

Beyond the colloquy with the court and written notification, Mr. Bailey also signed a written agreement with the State which waived "any and all rights under RCW 13.40.110 (or any other applicable statute) to declination hearing." **(Ex. B)**

It also cannot be emphasized enough that, far from being a potted palm in the process of accepting Mr. Bailey's waiver and plea, the court here also independently entered findings as to the waiver and transfer:

“The court finds that the agreement of the parties is consistent with the interest of justice.” (Ex. B)

The record here is clear that Mr. Bailey’s 1998 waiver of declination and juvenile jurisdiction was intelligently made after he was informed of the rights being waived. This complies with RCW 13.40.140(9), Knippling and Saenz.

The court’s independent finding conforms with the additional requirement now dictated by Saenz. The transfer of jurisdiction was not defective, and the sentencing court in the instant case did not err in imposing a persistent offender life sentence.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the persistent offender life sentence.

Respectfully submitted this 21<sup>st</sup> day of February, 2013.

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***Certificate of Service***

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 21st day of February, 2013.

/s/ Kevin G. Eilmes