

FILED
DECEMBER 24, 2015
Court of Appeals
Division III
State of Washington

NO. 33420-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HYRNIAK

Appellant.

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

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erroneously concluded that appellant's 1983 Oregon arson convictions count in his current offender score.

Issue Pertaining to Assignments of Error

At sentencing, the court treated appellant's 1983 Oregon arson convictions as comparable to a Washington felony for purposes of his offender score on his current felony offense. These convictions, however, are not legally comparable to a countable Washington crime. Nor are they factually comparable. Did the court err when it used these convictions to raise appellant's offender score?

B. STATEMENT OF THE CASE

The Klickitat County Prosecutor's Office charged Stephen Hyrniak with (count 1) Assault in the Third Degree and (count 2) Resisting Arrest. CP 1-2. A jury convicted Hyrniak on both counts. CP 45-46.

At sentencing, an issue arose concerning Hyrniak's offender score. Hyrniak has two 1983 convictions for Arson in the First Degree from the state of Oregon. RP 100. The State sought to count one of these convictions in Hyrniak's current offender score for

his assault conviction.¹ RP 100. In support of its position, the State submitted the indictment and “sentencing order” from the 1983 case. CP 65-71.

Defense counsel argued the Oregon convictions should not count in Hyrniak’s offender score because the Oregon arsons were not legally comparable to a class A Washington arson offense and therefore had washed out. RP 101-105. The court found the convictions comparable to Arson in the First Degree in Washington, resulting in an offender score of 1 and a standard range of 3 to 8 months. RP 105; CP 48. The court imposed 8 months, and Hyrniak timely filed his Notice of Appeal. RP 107; CP 49, 55-63.

C. ARGUMENT

HYRNIAK’S 1983 OREGON ARSON CONVICTIONS ARE NOT COMPARABLE TO A COUNTABLE WASHINGTON FELONY

This Court reviews a sentencing court's offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d

¹ Resisting arrest is a misdemeanor. RCW 9A.76.040(2).

456 (2005). The State does not meet its burden through bare assertions. State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999).

Under the Sentencing Reform Act, a foreign conviction is included in a defendant's offender score if it is comparable to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525(3). To determine whether there is comparability, courts engage in a two-part inquiry.

Under the first prong of the test, the court must compare the elements of the crimes to determine if the offenses are legally comparable. In cases where the elements of the foreign offense are not substantially similar to a Washington offense, or the foreign statute prohibits a broader range of conduct, the offenses are not legally comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)); Lavery, 154 Wn.2d at 255-56.

Under the second prong of the test – used when the offenses are not legally comparable – the court determines whether the offenses are factually comparable. The sentencing court may look at the facts underlying the prior foreign conviction to determine if the defendant's conduct would have resulted in a conviction for a

Washington offense. Thiefault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 255-256.

In making a factual comparison, however, the sentencing court may consider only facts that were admitted, stipulated, or proved beyond a reasonable doubt. Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 2288-2289, 186 L. Ed. 2d 438 (2013); State v. Olsen, 180 Wn.2d 468, 473-474, 325 P.3d 187 (2014); Thiefault, 160 Wn.2d at 415; Lavery, 154 Wn.2d at 258. Moreover, where the foreign statute prohibits a broader range of conduct, examining the record for factual comparability may not be possible due to the absence of an incentive for the accused to attempt to prove he did not commit the narrower offense. It was for this reason the Lavery Court concluded that, where the statutory elements of the prior conviction are broader, the prior conviction “cannot truly be said to be comparable.” Id. at 257-58; see also Descamps, 133 S. Ct. at 2289 (“A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense . . .”).

Turning first to the legal prong of the test, Hyrniak was convicted of Arson in the First Degree under ORS 164.325. CP 66. A person is guilty of this offense if, “[b]y starting a fire or causing an explosion, the person intentionally damages . . . protected property

of another.” ORS 164.325(1)(a)(A).² “Protected property” means “any structure, place or thing customarily occupied by people” and includes public buildings and even forestland. ORS 164.305 (1).³

In contrast, under Washington law, “A person is guilty of arson in the first degree if he or she knowingly and maliciously . . . causes a fire or explosion which damages a dwelling.” RCW 9A.48.020(1)(b).⁴ “Maliciously shall import an evil intent, wish, or design to vex, annoy, or injure another person.” RCW 9A.04.110(12). “Dwelling” means “any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7).

As counsel pointed out below, Washington’s statute refers to “dwellings” rather than the broader term “protected property” found under Oregon law. See RP 103-104. Moreover, the Washington statute requires proof of malice, which the Oregon statute does not. See RP 105. Because the elements of the two offenses differ, and the Oregon offense is broader, a conviction under Oregon law is not

² The statute’s requirements were the same in 1983. See former ORS 164.325(1)(a) (1983).

³ This statute was identical in 1983. See former ORS 164.305(1) (1983).

⁴ Other than its use of “he” rather than “he or she,” the statute was identical in 1983. See former RCW 9A.48.020 (1)(b) (1983).

legally comparable to an arson conviction under RCW 9A.48.020(1)(b).

Since the two offenses are not legally comparable, the question becomes, under the second prong of the analysis, whether the offenses are factually comparable.

The Oregon indictment against Hyrniak provides:

COUNT I

The above named defendant is accused by the Grand Jury of Tillamook County, State of Oregon, by this indictment of the crime of ARSON IN THE FIRST DEGREE committed as follows:

The said defendant on or about January 18, 1982 in said county, did unlawfully and intentionally damage protected property, to wit: the dwelling house situated at 434 Dorcas Street, Manzanita, Oregon, the property of Willamette Savings of 815 N.E. Davis, Portland, Oregon, by causing an explosion and starting a fire,

COUNT II

In the alternative, as part of the same act and transaction, the above named defendant is accused of the crime of ARSON IN THE FIRST DEGREE committed as follows:

That said defendant on or about January 18, 1982 in said county, did unlawfully and intentionally damage the dwelling house located at 454 Dorcas street, Manzanita, Oregon, by causing an explosion and starting a fire therein, thereby recklessly placing protected property, to wit: the next adjoining dwelling house situated at 476 Dorcas street, Manzanita,

Oregon in danger of damage

CP 66.

While the indictment makes it clear the Oregon charges involved dwellings, without the actual jury instructions or some other document indicating precisely what jurors were required to find at trial, the State has not established this fact was admitted, stipulated, or proved beyond a reasonable doubt. Typically, only the jury instructions will reveal precisely what was proved at trial. See State v. Hickman, 135 Wn.2d 97, 101-103, 954 P.2d 900 (1998) (“law of the case” found in the jury instructions, which define the State’s proof requirements); State v. Rivas, 49 Wn. App. 677, 683, 746 P.2d 312 (1987) (specific factual assertions included in the information need not be proved unless also included in the jury instructions); but see State v. Irby, 187 Wn. App. 183, 207, 347 P.3d 1103 (2015) (allegation in information deemed proved because verdict found defendant guilty “as charged in the information”). The State did not provide jury instructions from the Oregon case or any other documents establishing proof the damaged property was a dwelling.

Moreover, even if the record were sufficient to show proof of damage to a dwelling, there is no evidence a jury ever found that Hyrniak acted maliciously, since that additional element of proof is

not included in the indictment or anywhere else in the Oregon documents. Indeed, Oregon prosecutors would have had no incentive to prove malice, since Oregon law did not require its proof for conviction.

Unfortunately, Mr. Hyrniak has already served his entire sentence in this case, raising the question whether his appeal is now moot. A case is moot where the reviewing court no longer may grant the appealing party effective relief. Hart v. Dept. of Social and Health Servs., 111 Wn.2d 445, 447, 759 P.2d 1206 (1988); Washington Insurance v. Mullins, 62 Wn. App. 878, 887-88, 815 P.2d 840 (1991).

This Court should decide the matter anyway because the error at issue is "capable of repetition, yet evading review." In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992) (quoting Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 713, 35 L. Ed. 2d 147 (1973)). As this case demonstrates, because Hyrniak has a low offender score, any future conviction may also result in a relatively short sentence that is served, substantially or even entirely, before the issue of his offender score can be corrected on appeal. Determining now whether the Oregon convictions may be counted will prevent history from repeating itself in this regard.

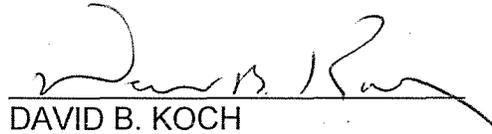
D. CONCLUSION

This Court should find that Hyrniak's Oregon convictions do not count in his Washington offender score.

DATED this 24th day of December, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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State v. Stephen Hyrniak

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Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 24th day of December, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 24th day of December, 2015.

x  _____