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No. 53214-6

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GAYLON LEE THIEFAULT,

Appellant.

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

The Honorable Ronald L. Castleberry

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing the defendant to a sentence of Life Without Parole under the Persistent Offender Accountability Act (POAA) (“three strikes” provisions) where the defendant’s prior Montana and federal convictions were not facially valid.

2. Due process required the State to prove to a jury, beyond a reasonable doubt, the existence of the defendant’s two prior convictions, and their status as “most serious offenses” for purposes of the three strikes statute.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the defendant’s prior Montana conviction by plea was facially valid where the face of the judgment document reflecting the imposition of sentence failed to show that the defendant was represented by counsel who was present at the sentencing hearing.

2. Whether the defendant’s prior federal conviction by plea was facially valid where the face of the judgment document, which reflects the taking of a plea and the imposition of sentence, failed to show that the defendant was represented by counsel who was present at the plea and sentencing hearing.

3. Whether the State was required as a matter of due process to prove to a jury, beyond a reasonable doubt, the existence of the defendant's alleged two prior convictions, and their status as "most serious offenses."

C. STATEMENT OF THE CASE

Appellant Mr. Gaylon Lee Thieffault, age 42, was sentenced to a term of incarceration of Life Without Possibility of Parole, pursuant to the Persistent Offender Accountability Act ("Three Strikes" provisions), RCW 9.94A.120, following his current conviction for attempted second degree rape and the trial court's own finding by a preponderance of the evidence that the defendant was also guilty of two prior "most serious offenses." CP 17-28; RP 44-46.¹

In pre-sentencing briefing, the State offered as exhibits the following documentary evidence of the alleged prior convictions, attached in appendices to the State's sentencing brief originally filed August 10, 2001:

¹The defendant's sentencing on September 30, 2003 was on remand from a decision of the Court of Appeals reversing the defendant's original "two-strikes" sentence imposed August 10, 2001, for error of the trial court in counting the defendant's prior convictions based on comparability analysis to Washington convictions, which was not permissible until later amendment of the two-strikes statute. Supp. CP ___, Sub # 98.

Montana Attempted Robbery Conviction by Plea

◆ “Motion for Leave to File Information” for ATTEMPT (Robbery) committed 12/13/83.

◆ “Judgment” dated 4/5/84 imposing a suspended 5 year sentence, signed by the court and filed 4/12/84 for ATTEMPT (Robbery) stating defendant pled guilty on 3/14/84 and appeared at sentencing on 4/5/84.

◆ “Judgment” finding violation of probation and revoking suspended sentence, following defendant’s 3/11/87 admission of violation, dated, signed and filed 4/8/1987.

Federal Rape Conviction by Plea

◆ “Indictment” for sexual act by use of force committed 9/28/91.

◆ “Plea Agreement” for sexual intercourse through use of force, dated, signed and filed 7/12/93.

◆ “Judgment in a Criminal Case” reflecting plea of guilty to and sentence for Rape (Aggravated Sexual Assault), dated 7/12/93 and signed and filed 7/15/93.

Supp. CP ____, Sub # 71 (State’s Sentencing Brief, Appendices A and C; see also State’s Sentencing Exhibit A (Supp. CP ____, Sub # 111, Exhibit list, 9/30/03) (the sole sentencing exhibit (exhibit A) offered at the September 30, 2003 hearing, included only the two judgments from the above cases). The trial court appeared to rely at the September 30, 2003 re-sentencing on the sentencing exhibits filed the date of that hearing. 9/30/03 at 41-42.

At the sentencing hearing, the trial court ruled that the Montana attempted robbery conviction and the federal rape

(aggravated sexual assault) conviction were facially valid and constituted two strike offenses, along with the defendant's current "strike" conviction. 9/30/03 at 41-42.

In the trial court's judgment and sentence document, the following prior convictions are listed as the defendant's two previous "strike" offenses:

- ◆ Armed Robbery in Montana sentenced 4/5/84.
- ◆ Rape (federal) sentenced 4/3/92.

CP 17 (Judgment and sentence). The current "three-strikes" judgment and sentence incorrectly states the Montana offense as "armed robbery," rather than the correct offense, attempted robbery, and the sentencing date of the federal crime is incorrectly stated (the correct date is 7/15/93). CP 17, Supp. CP ____, Sub # 71.

Gaylon Thieffault appeals the determination of his status as a persistent offender under the POAA based on a facially invalid prior record, and challenges the POAA under federal and state due process protections. CP 3.

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D. ARGUMENT

1. **MR. THIEFAULT'S SENTENCE TO LIFE WITHOUT POSSIBILITY OF PAROLE UNDER THE POAA MUST BE REVERSED BECAUSE THERE WAS AN INADEQUATE SHOWING OF TWO PRIOR CONVICTIONS FOR "MOST SERIOUS OFFENSES."**

- a. **The Defendant Challenged the Facial Validity of His**

Alleged Prior Most Serious Offense Convictions. Mr. Thiefault was sentenced to Life Without Parole based on his current offense, along with the alleged Montana attempted robbery conviction and the federal conviction for rape (aggravated sexual assault). CP 17 (but see Part D.3, infra, regarding scrivener's errors in the Judgment and sentence).

Mr. Thiefault argued at the September 30, 2003 sentencing hearing that both the Montana conviction and the federal conviction were facially invalid. 9/30/03 at 38, 43.

On examination of the documentation of the Montana attempted robbery conviction by plea, the convictions bear the following deficiencies which the defendant argues makes them facially invalid:

◆ The Judgment imposing a suspended sentence at the sentencing hearing held on April 5, 1984, fails to clearly show that the defendant was represented by counsel and in particular fails to

show that defendant's counsel was present at the entry of judgment on April 5, 1984.

◆ The Judgment finding a probation violation and revoking the suspended sentence fails to clearly show that the defendant himself was present, or that he was represented by counsel who was present, at the April 8, 1987, finding of probation violation and entry of judgment of the revoked sentence.

On examination of the documentation of the federal rape conviction by plea, the convictions bear the following deficiencies which the defendant argues makes them facially invalid.

◆ The Judgment in a Criminal Case including a plea of guilty to and sentencing for rape (aggravated sexual assault), dated July 12, 1993 and signed and filed July 15, 1993, fails to clearly show that the defendant was represented by counsel who was present at the plea and sentencing hearing.

Mr. Thieffault did not raise all of these precise arguments of facial invalidity to the sentencing court below, but this does not preclude his assignments of error.²

²Where the State secures a sentencing of the defendant based on convictions which are challenged as facially invalid, the issue is of constitutional magnitude, United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), and may therefore be raised for the first time to the reviewing court. RAP 2.5(a); State v. Marsh, 47 Wn.App. 291, 292 and n. 1, 734 P.2d 545 (1987).

b. Requirements for “Three Strikes” Persistent Offender

Status. Mr. Thieffault was sentenced September 30, 2003 pursuant to the POAA, under which a person convicted of a “most serious offense” with two prior convictions in this State or elsewhere is a “three-strikes” persistent offender subject to a mandatory sentence of incarceration for life without possibility of parole. RCW 9.94A.570; RCW 9.94A.030(32). RCW 9.94A.030(32) defines a persistent offender in this context as follows:

"Persistent offender" is an offender who (a)(i) Has been convicted in this state of any felony considered a most serious offense; and (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(32).

When enhancing a sentence with prior convictions, the State must prove the existence of the prior convictions by a preponderance of the evidence.³ State v. Gimarelli, 105 Wn.App.

³The best evidence of the conviction is the prior judgment and sentence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). But if the judgment and sentence is not available, the State may use comparable documents or transcripts from the prior trial to prove the existence of the conviction. Ford, 137

370, 374, 20 P.3d 430 (citing State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)), review denied, 144 Wn.2d 1014, 31 P.3d 1185 (2001); but see infra (arguing that existence and strike status of prior offenses must be proved to a jury beyond a reasonable doubt).

A prior conviction is presumed constitutional, and a defendant normally may not contest the legality of prior convictions during sentencing proceedings on a current offense. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986); cert. denied, 479 U.S. 930 (1986).

However, a conviction that is constitutionally invalid on its face (“facially invalid”) may not be considered as part of criminal history when sentencing under the SRA. State v. Ammons, 105 Wn.2d at 187-88; accord, State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 473 (1996). The face of the conviction includes any plea agreement, but it excludes other items such as jury instructions. Thompson, 141 Wn.2d at 718, 10 P.3d 380 (citing Ammons, 105 Wn.2d at 189).

c. Prior Convictions Used At SRA Sentencing Are

Facially Invalid If They Fail To Evince The Representation and

Wn.2d at 480. A plea agreement is a sufficient substitute document. See In re Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

Presence of Defense Counsel At Sentencing. A prior conviction is “constitutionally invalid on its face” if, without further elaboration, the judgment and sentence manifests infirmities of a constitutional magnitude. State v. Ammons, 105 Wn.2d at 188.

For example, the Court of Appeals has 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 Marsh analysis “[t]o the extent that [it] holds or suggests that the State must prove the constitutional validity of prior convictions at a sentencing hearing”).

The judgments and sentences offered to establish Mr. Thiefault’s two convictions indicated neither the presence of an attorney representing Marsh nor his waiver of counsel. State v. Marsh, 47 Wn.App. at 292. Under this analysis, the defendant’s prior convictions for attempted robbery and rape (sexual assault) are facially invalid.

The Judgment imposing a suspended sentence at the sentencing hearing held on April 5, 1984, fails to show that the defendant was represented by counsel and in particular fails to show that defendant’s counsel was present at the entry of

judgment on April 5, 1984. While the document states that Mr. Thieffault was arraigned and “thereafter represented:” by an attorney, the document subsequently states, with regard to the April 5, 1984 sentencing hearing, only that the “[d]efendant appeared”. The judgment does not state that defense counsel appeared at sentencing. Supp. CP ____, Sub # 71 (State’s Sentencing Brief, Appendix A; see also State’s Sentencing Exhibit A (Supp. CP ____, Sub # 111, Exhibit list, 9/30/03).

In addition, the judgment finding a probation violation and revoking the suspended sentence, fails to clearly show that the defendant himself was present, or that he was represented by counsel who was present, at the April 8, 1987 finding of probation violation and entry of judgment of the revoked sentence. Supp. CP ____, Sub # 71 (State’s Sentencing Brief, Appendix A; see also State’s Sentencing Exhibit A (Supp. CP ____, Sub # 111, Exhibit list, 9/30/03).

Similarly, the Judgment in a Criminal Case which memorializes a federal plea of guilty to and sentencing for rape (aggravated sexual assault), dated July 12, 1993 and signed and filed July 15, 1993, fails to show that defendant was represented by counsel who was present at the sentencing hearing held July 15, 1993. Although the plea agreement signed July 12, 1993 shows

representation of the defendant by counsel at that time, the sentencing hearing, apparently held July 15, 1993, fails to show representation and the presence of counsel on that date. Supp. CP ____, Sub # 71 (State's Sentencing Brief, Appendix C); see also State's Sentencing Exhibit A (Supp. CP ____, Sub # 111, Exhibit list, 9/30/03)

These convictions are therefore facially invalid under federal and state caselaw. The case of Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and subsequent U.S. Supreme Court and Washington caselaw partially modifying the rules in Burgett, illustrate the special significance of the absence of a showing of counsel, in the context of "facial invalidity" doctrine. In Burgett, the Supreme Court had reversed a conviction under a Texas recidivist statute because some of the prior convictions, which constituted a necessary element of the recidivist offense, facially raised a presumption the judgments were entered in the absence of counsel. Burgett v. Texas, 389 U.S. at 261-62. The Washington Court of Appeals described Texas v. Burgett in the case of State v. Marsh:

In Burgett, the court held that a conviction which does not indicate either presence of counsel or waiver [of counsel] 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 that he appeared "in proper person" but did not contain the additional language "without counsel." The trial court did not admit the first version of the conviction, 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 the defendant 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).

State v. Marsh, 47 Wn.App. at 293. Burgett was later abrogated in part by the case of Parke v. Raley, 506 U.S. 20, 20-21, 113 S.Ct. 517, 518-19, 121 L.Ed.2d 391 (1992), wherein the U.S. Supreme Court ruled that, as to prior convictions used at sentencing, that the defendant was required to show facial invalidity, rather than requiring the government to prove the constitutionality of prior convictions ("The presumption of regularity makes it appropriate to assign a proof burden to the defendant even when a collateral attack rests on constitutional grounds"). The Washington case of State v. Marsh, which emphasized that a facial showing of representation and presence of counsel were required for a conviction to be facially valid, also relied on Burgett's statement of the burdens of proof, and the case of In re Williams later modified Marsh just as Parke modified Burgett. In re Petition of Williams,

111 Wn.2d at 368 (rejecting Marsh rule that State must prove constitutional validity of prior convictions). But the holding of the Marsh and Burgett cases, that a conviction which fails to show representation and presence of counsel is facially invalid, is a conclusion that is not changed by the re-ordering of the burdens of production and proof in the State and federal caselaw. See Parke v. Raley, 506 U.S. at 29. This aspect of Burgett v. Texas and the State case of State v. Marsh stands for the proposition that for a judgment of conviction to be facially valid both representation by, and presence of counsel, are required.

While acknowledging that a conviction based on a guilty plea in which the guilty plea form failed to show the elements of the crime charged or that defendant was aware of his right to remain silent may be unconstitutional, the Court in Ammons held that it could be considered for sentencing because "a determination [of unconstitutionality] cannot be made from the face of the guilty plea form." Ammons, 105 Wn.2d at 189, 713 P.2d 719. However, where the judgment and sentence itself does not reflect representation by counsel or waiver, it is deficient on its face. Without more, such a conviction does not meet the State's burden under Ammons. State v. Marsh, 47 Wn. App. at 295, see also 293-94 and n. 2 (noting that "[i]n Burgett, the court held that a conviction which does

not indicate either presence of counsel or waiver may not be used to enhance punishment”). This rule is supported by scholarly commentary:

Of course, as established in United States v. Tucker⁴, a conviction obtained in the absence of counsel or a valid waiver of counsel is "misinformation of constitutional magnitude" which may not be considered in the sentencing process. Such convictions are not "presumptively valid" and their use, in establishing the presumptive sentence range or for any other purpose, is unconstitutional.

(Footnotes omitted.) D. Boerner, Sentencing in Washington § 6.11(b) at 6-20 (1985); see also United States v. Owens, 15 F.3d 995, 1001 (1994) (“Although we decline to articulate what might comprise the full scope of constitutional errors that renders a conviction presumptively void, we note that this category – which includes uncounseled convictions -- encompasses errors of such magnitude as to call into question the fundamental reliability of the conviction”) (citing United States v. Tucker, supra, and Burgett v. Texas, supra).

Because the the judgments offered to establish the defendant’s two prior “strike” convictions in this case indicated neither the presence of an attorney representing Mr. Thiefault nor

⁴United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972).

his waiver of counsel, they are facially invalid and could not properly be used at sentencing. State v. Marsh, 47 Wn.App. at 292. The defendant's sentence to Life Without Possibility of Parole must be reversed. State v. Ammons, 105 Wn.2d at 187-88.

2. THE FEDERAL AND STATE CONSTITUTIONS REQUIRED THE STATE TO CHARGE AND PROVE MR. THIEFAULT'S ALLEGED PERSISTENT OFFENDER STATUS TO A JURY BEYOND A REASONABLE DOUBT.

Mr. Thiefault was sentenced to life without the possibility of parole without notice in the information, and based on the judge's finding that he was a persistent offender, by a mere preponderance of the evidence. This violated the federal constitution and article 1, §22 of the Washington Constitution.

As written, the Persistent Offender Act contains no explicit requirements or procedures for charging the allegation of three strikes status in the information, requiring proof beyond a reasonable doubt, or trial by jury. State v. Thorne, 129 Wn.2d 736, 779-84, 921 P.2d 514 (1996). As a result, a given trial court may impose a life without parole sentence absent formal notice the prosecutor would seek an adjudication of persistent offender status, based on proof which leaves a reasonable doubt, and without affording the accused any opportunity for a jury of his peers

to determine the issue of his or her status as a “persistent offender.” State v. Manussier, 129 Wn.2d 652, 696-97, 921 P.2d 473 (1996) (Madsen, J, dissenting).

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a. Federal due process protections.⁵ “It has been said so often . . . as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.” Morrissey v. Brewer, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). Due process compels notice and an opportunity to be heard where the punishment sought requires an additional finding of fact not present in the underlying offense. Specht v. Patterson, 386 U.S. 605, 609-11, 18 L.Ed.2d 326, 87 S.Ct. 1209 (1967); Almendarez-Torres v. U.S., 523 U.S. 224, 140 L.Ed.2d 350, 118 S.Ct. 1219, 1235-37 (1998) (Scalia, J.,

⁵ The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and be informed of the nature and cause of the accusation. . . .

The Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

dissenting). Such protections include the defendant's rights: to be present with counsel, to have an opportunity to be heard, to be confronted with the witnesses against him, to cross-examine, to offer evidence in his or her own behalf, and to have the court enter findings adequate for meaningful review. Specht, 386 U.S. at 610 (Sex Offenders Act violates due process since the punishment required a new finding of fact not an element of underlying offense, and statute did not provide for notice and a full hearing).

Mr. Thieffault contends the increase in his punishment to mandatory life imprisonment without the possibility of parole requires the full panoply of aforementioned procedural due process protections on the persistent offender charge. Cf. In re Winship, 397 U.S. 358, 368, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) (setting forth procedural due process requirements in criminal trials).

b. Proof beyond a reasonable doubt and right to jury.

Cases involving increases in the maximum permissible punishment uniformly require a jury find proof beyond a reasonable doubt to establish the facts, which, if proved, will increase a defendant's penalty. See Mullaney v. Wilbur, 421 U.S. 684, 697-98, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); see also Specht, supra; cf. McMillan v. Pennsylvania, 477 U.S. 79, 87-88, 91 L.Ed.2d 67, 106 S.Ct. 2411 (1986). Under this rationale, the prosecution is required to

prove beyond a reasonable doubt persistent offender allegations which enhance an offender's sentence beyond the otherwise applicable statutory maximum for the crime. Previously, the U.S. Supreme Court has concluded that where a prior conviction enhances a sentence the existence of the prior conviction was not an element of the crime. See United States v. Jones, 526 U.S. 227, 248-50, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); Almendarez-Torres v. United States, 523 U.S. at 230. In both Jones and Almendarez-Torres, the Court reasoned recidivism was not an element of the crime which it enhanced because recidivism was a "traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" and because it did not relate to the commission of the crime. See Almendarez-Torres, 523 U.S. at 230, 244-45.

However, in its opinion in Almendarez-Torres, the 5-4 majority actually stated:

[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence. Cf. United States v. Watts, 519 U.S. ___, ___ and n.2, 117 S.Ct. 633, 637-638 and n. 2, 136 L.Ed.2d 554 (1997) (per curiam) (acknowledging but not resolving, "divergence of opinion among the Circuits" as to proper standard for determining the existence of "relevant conduct" that would lead to an increase in sentence).

Almendarez-Torres, 118 S.Ct. at 1233. Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, argued in dissent in the case that

it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one.

Id. at 1234. Scalia asserted that the Court's jurisprudence was open to the argument "that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime". Id. at 1237. Justice Scalia also noted that many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their state constitutions or as a matter of common law. (Citations omitted.) Id. at 1237. Although the majority in Almendarez-Torres found recidivism need not be proved to a jury beyond a reasonable doubt because it "goes to punishment only," Justice Scalia pointed out that this was indeed contrary to common law.⁶ Almendarez-Torres, 118 S.Ct. at 1238.

⁶At common law in Washington, the fact that the defendant had prior convictions had to be charged in the indictment charging the underlying crime and submitted to the jury for determination along with the underlying crime. Spencer v. Texas, 385 U.S. 554, 566, 87 S.Ct. 648, 654-55, 17 L.Ed.2d 606 (1967); Massey v. United States, 281 F. 293, 297 (C.A.8 1922); Singer v. United States,

Recently, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362, 147 L.Ed. 2d. 435 (2000), the Court abandoned the legal reasoning which it relied upon in Jones and Almendarez-Torres. Instead, the Court concluded an “enhancement” is in fact an element which must be proved beyond a reasonable doubt to the trier of fact if it “increase[s] the prescribed range of penalties to which a criminal defendant is exposed.” Apprendi, 120 S.Ct. at 2363. In doing so the plurality declined to expressly overrule Almendarez-Torres “[e]ven though it is arguable Almendarez-Torres was incorrectly decided and that a logical application of our

278 F. 415, 420 (C.A.3 1922). Although some States later altered the procedure by allowing for a separate determination proceedings for prior convictions, most retain a defendant’s right to a jury determination. Almendarez-Torres, 118 S.Ct. at 1239 (citing Note, Recidivist Procedures, 40 N.Y.U.L.Rev. 332, 333-34 (1965)). At common law in the State of Washington, the State Supreme Court held that the information must include grounds for a sentence enhancement and the right to a jury determination based on proof beyond a reasonable doubt as guaranteed by the Washington State Constitution. State v. Manussier, 129 Wn.2d at 685 (Madsen, J., dissenting); State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). The Court ruled, “On a charge of a second or subsequent offense, the question of a prior conviction is an issue of fact to be determined by the jury.” State v. Furth, 5 Wn.2d at 19. In 1980, the Court stated that sentencing enhancement statutes to be constitutional must “uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant’s penalty.” State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

As recently as 1986, in the seminal case on the SRA, State v. Ammons, the Supreme Court recognized these rights must be imposed when sentence to be imposed exceeds the statutory maximum. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). While the preponderance standard meets constitutional requirements when a sentence is imposed within the statutory maximum, the standard does not suffice when the sentencing enhancement results in a sentence which exceeds the statutory maximum available for the crime. Ammons, 105 Wn.2d at 185-86.

reasoning today should apply if the recidivist issue were contested.” (Footnote omitted.) Apprendi, 120 S.Ct. at 2362.

The concurring opinions of Justices Thomas and Scalia went even further. Justice Thomas, who was among the five-Justice majority in Almendarez-Torres, stated that the attempt in Almendarez-Torres to distinguish between traditional and nontraditional enhancements was erroneous, and instead the proper test is “[i]f a fact is by law the basis for imposing or increasing punishment . . . it is an element.” Apprendi, 120 S.Ct. at 2379. “[F]rom this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.” Id. Thus, five Justices on the Court are of the belief that applying the holding of Apprendi, recidivism is an element of a crime if the prior conviction will increase the sentence imposed. Justices Thomas and Scalia were ready to reach such a conclusion in Apprendi, and the remaining three are simply waiting for the case to be presented to the Court.

Mr. Thiefault’s’ due process argument was further strengthened by the Supreme Court’s holding in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), that under the Sixth Amendment a state’s aggravating factors necessary for imposition of the death penalty must be found by a jury rather than a

sentencing judge. Ring v. Arizona, 122 S.Ct. at 2443. In so holding, the Supreme Court noted that the aggravating factors were the "functional equivalent" of elements of the charged offense. Prior to Ring the Supreme Court's Apprendi ruling was that due process under the Fourteenth Amendment and the Sixth Amendment jury trial guarantee requires any fact, other than a prior conviction, that increases a sentence beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt. Ring v. Arizona appears to hold that any facts which increase a defendant's maximum penalty are elements of a greater offense which must be proved to a jury beyond a reasonable doubt.

A sentence of life imprisonment without possibility of parole "increases the maximum penalty to which a criminal defendant is subject." Almendarez-Torres, 118 S.Ct. at 1234. Because the sentencing procedure violated due process as argued above, this Court should reverse the sentence. Specht, 386 U.S. at 611; Winship, 397 U.S. 368; Ring v. Arizona, 122 S.Ct. at 2443.

c. The Washington State Constitution requires that the stated due process protections be afforded the three strikes defendant. The Washington Supreme Court long ago recognized that the right to an information alleging grounds for sentence

enhancement, and the right to a jury determination based on proof beyond a reasonable doubt of those allegations, are guaranteed by the Washington State Constitution. State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940). As recently as 1986, the Court recognized the existence of these rights when the sentence to be imposed exceeds the statutory maximum. State v. Ammons, supra. This Court should reject State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), as wrongly decided, because there, instead of following long established precedent, the majority of the Court treated sentencing of a persistent offender as a new concept and views a sentence of Life Without Possibility of Parole as just another line of the Sentencing Reform Act of 1981 (SRA) grid, despite the fact that such a sentence exceeds the statutory maximum available for any class C or B felony. In reaching its result, the majority failed to acknowledge that the Court had previously found that the right to a jury trial under the Washington State Constitution is not coextensive with the federal right, State v. Hobble, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995), and failed to acknowledge, distinguish or specifically overrule the Furth decision which specifically addressed the right to an information and a jury trial before a court could impose an enhanced sentence based on prior convictions. The Washington State Constitution requires that

the due process protections of proof beyond a reasonable doubt to a jury be afforded the three strikes defendant.

3. REMAND IS REQUIRED FOR CORRECTION OF THE JUDGMENT AND SENTENCE.

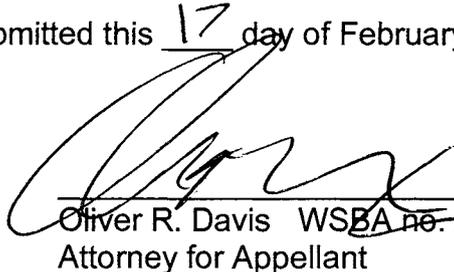
The current case “three-strikes” judgment and sentence incorrectly states the Montana offense as “armed robbery,” rather than the correct offense, attempted robbery, and the sentencing date of the federal crime is incorrectly stated (the correct date is 7/15/93). CP 17, Supp. CP ____, Sub # 71.

This scrivener's error in the judgment and sentence and requires is not prejudicial as to the imposition of the present sentence. See State v. Moten, 95 Wn.App. 927, 928-29, 934-35, 976 P.2d 1286 (1999) (incorrect statutory citation of conviction in judgment and sentence not reversible error where record showed that defendant was convicted of proper charge and no prejudice occurred). However, although there is no prejudice, the error requires remand to be corrected. State v. Moten, 95 Wn.App. at 935 (proper remedy in such circumstance is “remand to correct the scrivener's error on the judgment and sentence form”); see also CrR 7.8(a) (speaking of correction by trial court of clerical mistakes in judgments).

E. CONCLUSION

Based on the foregoing, Mr. Thieffault respectfully requests that this Court reverse the trial court's POAA "three strikes" sentence to Life Without Possibility of Parole.

Respectfully submitted this 17 day of February, 2004.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
V.) COA NO. 53214-6
)
GAYLON THIEFAULT,)
)
APPELLANT.)

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 17TH DAY OF FEBRUARY, 2004, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY
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EVERETT, WA 98201-4046

[X] GAYLON THIEFAULT
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CLALLAM BAY, WA 98326

2004 FEB 17 PM 4:54
MARIA ARRANZA RILEY

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF FEBRUARY, 2004.

X _____ *maria*