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FILED



DEC 01 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

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

22868-7

In re Personal Restraint)	NO. 272770
Petition of:)	
VINCENT ADOLPH,)	PERSONAL RESTRAINT
)	PETITION-REPLY BRIEF
Petitioner.)	RAP 16

I. Identity of Petitioner.

Vincent Adolph, petitioner, pro se.

II. Decision.

The decision at issue is whether this Court should grant relief to Petitioner's PRP from the trial court's imposition of a sentencing enhancement to the defendant's conviction for vehicular homicide, based on the defendant's prior conviction for DUI in Lincoln County.

III. Statement of the Case.

a. Relevant Procedural Facts.

On June 3, 2005, an Okanogan County jury found Mr. Adolph guilty of Vehicular Homicide and Vehicular Assault. He was sentenced on September 19, 2005. The sentence included three enhancements pursuant to RCW 46.61.520 for the defendant's prior DUI convictions, including a conviction for

1 DUI in Lincoln County.

2 At sentencing, to prove the Lincoln County DUI, the
3 State offered a driving abstract and a "DCH" printout from
4 the prosecutor's office. See Sentencing Transcripts at 23-28.
5 Defense Counsel then immediately objected to those items
6 being used to prove that prior conviction - "I would argue
7 to the Court that in regards to the conviction from Lincoln
8 County, that the record is insufficient. I don't believe
9 that the materials provided sufficiently set forth that con-
10 viction." See Sentencing Transcripts at 31-32. The court
11 then asked the prosecutor:

12 Well do you have an answer to the statement
13 from [Defense Counsel] that the evidence is
14 insufficient to establish the Lincoln County
15 DUI based solely on an abstract of Driving
16 record? Shouldn't we have some kind of
17 docket--...--ticket or something here.

18 Sentencing Transcripts at 54.

19 The prosecutor then replied:

20 It requires--the State's required to prove
21 that by a preponderance. We attached a
22 certified copy of the Department of
23 Licensing abstract, which shows conviction
24 in Lincoln County. There's also a copy,
25 though not certified but its also
26 accessible to the Court in its own system,
27 criminal history which also shows the
28 conviction and corroborates that abstract.
The defendant was convicted of DUI in
that county and that's what it's showing.

29 Sentencing Transcripts at 54-55.

30 The prosecutor also further explained that the driving
31 abstract is maintained by the "Department of Licensing" and
32 the DCH is maintained by the "office administrator of the
33

1 court system." Id.

2 After taking the arguments into account, the court
3 ultimately found that the state adequately proved the prior
4 Lincoln County DUI with the DCH and the driving abstract.
5 See Sentencing Transcripts at 59-61. Significantly, the two
6 other DUI convictions were proved by using court certified
7 docket sheets. Id. And the record is silent on why the State
8 chose not to use a court certified docket sheet or judgment
9 order to prove the Lincoln County DUI.

10 After careful consideration of relevant mitigating
11 factors, the court gave Mr. Adolph a mitigated sentence of
12 96 months in prison, which comprised of 24 months for the
13 base offense and 24 months for each prior DUI conviction
14 ran consecutively to one another. Sentencing Transcripts
15 at 75 ff.

16 After Mr. Adolph's judgment was pronounced and he was
17 sentenced, the prosecutor sought to introduce more documents
18 to prove the Lincoln County DUI. Sentencing Transcripts at
19 87-89. Those documents were a copy of the citation and a
20 certified docket sheet. Id. While the judge explained that
21 he did not use the newly offered documents in making his
22 decision on the Lincoln County DUI, he allowed the documents
23 to become part of the record. Id.

24 IV. Law & Argument.

25 A. WAS THE EVIDENCE SUFFICIENT TO PROVE
26 THE LINCOLN COUNTY DUI?

27 Due process requires the State to prove the existence
28

1 of a prior conviction by a preponderance of the evidence.
2 State v. Rivers, 130 Wn. App. 689, 698-705, review denied,
3 158 Wn.2d 1008 (2006); Jackson v. Virginia, 443 US 307 (1979);
4 US Const. Amend 14; Wash. Const. Art. I, sec. 3 (due process).
5 To establish the existence of a conviction, a certified copy
6 of the judgment and sentence is the best evidence. Rivers,
7 130 Wn. App. at 698-705. The State may introduce other
8 comparable evidence only if it shows the best evidence is
9 unavailable for some reason other than the serious fault
10 of the proponent. Id. In that case, comparable documents
11 of record or trial transcripts may suffice. Id. Furthermore,
12 a prior conviction set forth in a certified judgment and
13 sentence of some other offense is insufficient to prove the
14 existence of the prior conviction. Id.

15 If a defendant does not object to the sufficiency of
16 the evidence on a prior conviction then the case may be
17 remanded for an evidentiary hearing where the State may
18 introduce additional evidence. Rivers, 130 Wn. App. at 698-
19 705. However, "if the defendant has objected, and the disputed
20 issues have been fully argued at sentencing, the State will
21 be held to the existing record." Id. at 706-07. Simply put,
22 if a defendant objects to the sufficiency of an alleged prior
23 conviction then the State must rely on the evidence presented
24 and cannot add more evidence after the judgment & sentence
25 has been pronounced. Rivers, 130 Wn. App. at 698-707.

26 Here, in this case, the alleged Lincoln County DUI
27 was proved by a driving abstract from the department of
28

1 licensing and a non-court certified "DCH" printout from the
2 prosecutor's office. Mr. Adolph asserts that those two docu-
3 ments are insufficient to prove the existence of the alleged
4 Lincoln County DUI, and that the supplement documents the
5 prosecutor introduced after Mr. Adolph was sentenced were
6 inadmissible.

- 7
8 1. Were the supplement documents the prosecutor
9 added to the record, after Mr. Adolph was
10 sentenced, correctly admitted?

11 After the court made its ruling on the Lincoln County
12 DUI and after Mr. Adolph was sentenced, the prosecutor intro-
13 duced a copy of the Lincoln County DUI citation and a certi-
14 fied docket sheet. The court allowed these documents to become
15 part of the record. These documents were inadmissible because
16 they were introduced in an unauthorized de facto evidentiary
17 hearing.

- 18 a. Were the supplement documents included into
19 the record in an unauthorized de facto
20 evidentiary hearing?

21 In this case, the court ruled on the Lincoln County
22 DUI and sentenced Mr. Adolph. After that point any inclusion
23 of any evidence into the record could only come in the way
24 of an evidentiary hearing. Rivers, 130 Wn. App. at 698-707.
25 "An evidentiary hearing is appropriate only when the defendant
26 has failed to specifically object to the State's evidence
27 of the existence or classification of a prior conviction."
28 Id. at 706 (quoting Ford, 147 Wn.2d at 523). Thus, the added
documents (the citation & docket sheet) were inadmissible

1 because they were included after the judge had already made
2 his ruling on the Lincoln County DUI and because Mr. Adolph
3 did specifically object on the grounds of sufficiency. Rivers,
4 130 Wn. App. at 698-707. Thus, under Rivers and the cases
5 contained therein, the trial court erred by allowing the
6 inclusion of the copy of the citation and docket sheet related
7 to the Lincoln County DUI. Id. Furthermore, because those
8 documents were erroneously introduced in an unauthorized
9 de facto evidentiary hearing, this court cannot rely on them
10 in deciding whether the State met its burden of proving the
11 existence of the Lincoln County DUI. Id.

12 2. What would be the "best evidence" to
13 prove the alleged Lincoln County
14 DUI?

15 To establish the existence of a prior conviction, a
16 certified copy of the judgment & sentence is the best evi-
17 dence. Rivers, 130 Wn. App. at 698-707. The State may intro-
18 duce other court certified evidence only if it shows the
19 best evidence is unavailable for some reason other than the
20 serious fault of the proponent. Id. In this case, the best
21 evidence to prove the existence of the alleged Lincoln County
22 DUI would be a court certified copy of the DUI citation
23 because the judgment is shown at the bottom of the ticket
24 or a court certified copy of the docket sheet related to
25 that conviction. Id.

26 Significantly, to prove the existence of the other
27 two DUI convictions, the state introduced the court docket
28 sheets related to those convictions.

1
2 a. Did the State adequately explain why
3 it chose to rely on a driving abstract
4 and "DCH" printout to prove the Lincoln
5 County DUI instead of using the best
6 evidence?

7 The answer to this question is simply "no." A careful
8 review of the record shows that the State completely failed
9 to explain why it chose to use a driving abstract and a "DCH"
10 printout instead of using the 120 days between the verdict
11 and sentencing day to obtain the best evidence, i.e., copies
12 of either the citation or docket sheets, to prove the Lincoln
13 County DUI. Thus, under Rivers and the cases contained
14 therein, the driving abstract and the "DCH" cannot be used
15 to prove the existence of the Lincoln County DUI. Rivers,
16 130 Wn. App. at 698-707.

17 3. Was the driving abstract coupled with
18 the "DCH" sufficient to establish the
19 Lincoln County DUI?

20 Even if the driving abstract and the DCH can be used
21 to prove the existence of the Lincoln County DUI, they are
22 still insufficient to prove the existence of that crime.
23 Rivers, 130 Wn. App. at 698-707 (and cases contained therein).

24 In Rivers, the court found that a court certified
25 judgment and sentence that showed a prior conviction cannot
26 be used to prove that prior conviction. Id. It would be
27 unreasonable to find that a driving abstract and a non-court
28 certified "DCH" printout is better evidence to prove a prior
conviction than a court certified judgment & sentence that
showed a prior conviction. Thus, under Rivers and the cases

1 contained therein, the driving abstract coupled with the
2 DCH printout is insufficient to prove the Lincoln County
3 DUI. Id. In addition, the DCH printout was not certified,
4 therefore it cannot be used in determining the existence
5 of the Lincoln County DUI. Id.; See Also: Lopez, 147 Wn.2d
6 at 518-19.

7 Thus, under Rivers and the cases contained therein,
8 the state failed to meet its burden of proving the existence
9 of proving the Lincoln County DUI. Therefore, this court
10 should remand this matter back to the trial court with orders
11 to remove the 24 month enhancement Mr. Adolph recieved from
12 the Lincoln County DUI. Rivers, 130 Wn. App. at 698-707.

13 B. Is this PRP properly before this court?

14 The answer to this question is "yes." Mr. Adolph is
15 not time barred because his direct appeal was not finalized
16 until April 30, 2008, and he has one year past that point
17 to file collateral attacks. See RCW 10.73.090.

18 Additionally, there was no allegation by the State
19 of an 'abuse of the writ.' Therefore, that doctrine does
20 not apply. Pers. Restraint of Turay, 153 Wn.2d at 48-49.

21 Furthermore, an imposition of a sentence enhancement
22 when the evidence does not support it, is a violation of
23 due process and can be corrected in a collateral attack.
24 RAP 16.4; RCW 10.73.090-.100.

25 V. Conclusion.

26 There was insufficient admissible evidence to establish
27 the existence of the Lincoln County DUI therefore this court
28

1 should reverse this matter with orders to the trial court
2 to exclude the sentence enhancement associated with the
3 Lincoln County DUI. Rivers 130 Wn. App. at 698-707 (and the
4 cases contained therein).

5
6 Dated this 24th day of November, 2008.

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10 Respectfully
11 Submitted,

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15 Vincent Adolph

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18 Vincent Adolph #887962
19 Airway Heights Correction Center
20 MSU: Unit C-4, A-7.
21 PO Box 2048
22 Airway Heights, WA
23 99001
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF Spokane

In-re Personal Restraint of:
Vincent Adolph)
petitioner)
v.)
)
)
)
)

No: 272770

DECLARATION OF SERVICE
BY MAILING

I, Vincent Adolph, pro-se, in the above entitled cause, do hereby declare that I have served the following documents;

Personal Restraint Petition - Reply Brief.

Upon: Court of Appeals Div. III
Renee Townsley/Clerk
500 N. Cedar St.
Spokane, WA 99201

Karl F Sloan
Okanagon County Prosecuting Atty
P.O. Box 1130
OKANAGON, WA 98840-1130

I deposited with the A-Unit Officer Station, by processing as Legal Mail, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2048, Airway Heights, WA 99001-2048.

On this 25th day of October, 2008.

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,
Vincent Adolph
Petitioner