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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Case No. 93995-1

On review from:

Court of Appeals No. 33911-4-III

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER JOHN BLAIR, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT4

1. A conviction for a non-existent crime is invalid on its face, even if it is necessary to interpret the statute to determine the elements of the crime5

2. Following Barnes, it is unnecessary to interpret the statute defining a “motor vehicle” to determine that Blair’s convictions are facially invalid12

VI. CONCLUSION.....16

CERTIFICATE OF SERVICE18

AUTHORITIES CITED

Cases

<i>In re Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	7
<i>In re Arnold</i> , __ Wn.2d __, 410 P.3d 1133 (2018).....	10
<i>In re Coats</i> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	7, 9
<i>In re Hinton</i> , 152 Wn.2d 853, 100 P.3d 801 (2004).....	7, 8, 15
<i>In re Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000).....	7, 8
<i>In re Wheeler</i> , 188 Wn. App. 613, 354 P.3d 950 (2015).....	10
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719 (1986).....	6
<i>State v. Barnes</i> , 189 Wn.2d 492, 403 P.3d 72 (2017).....	1, 2, 4, 12, 13, 14
<i>State v. Taylor</i> , 162 Wn. App. 791, 259 P.3d 289 (2011).....	10

Statutes

RCW 9.94A.525(20).....	3
RCW 9A.56.065.....	1, 2, 12, 13, 14, 15, 16
RCW 10.73.090(1).....	6
RCW 46.04.546.....	14

Constitutional Provisions

Wash. Const. article II, section 19.....	14
--	----

I. INTRODUCTION

Christopher Blair was sentenced on charges of theft of a motor vehicle and taking a motor vehicle without permission after he failed to successfully complete drug court. He alleged that two prior convictions for theft of a motor vehicle were facially invalid, and should not be included in his offender score, because they were premised upon the theft of two snowmobiles, which were not “motor vehicles” within the meaning of RCW 9A.56.065. The trial court rejected his argument and the Court of Appeals declined to consider it, holding that Blair could not show facial invalidity because evaluating his claim required the court to construe the statute. This Court stayed consideration of Blair’s petition pending its decision in *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017) and subsequently accepted review of the following issues:

1. Does the criminal prohibition against theft of a motor vehicle apply to a snowmobile, which is not intended to be or capable of being driven on a public highway?
2. Is a prior conviction for theft of a motor vehicle facially invalid when the charging document identifies only a snowmobile as the vehicle taken?

3. Is a conviction precluded from being found facially invalid when its validity turns on the interpretation of statutory term “motor vehicle”?

II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in holding that a prior conviction cannot be facially invalid if the court must interpret the statute defining the crime.
2. The Court of Appeals erred in declining to consider Blair’s challenge to his offender score on the merits in light of the decision in *Barnes*.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the defendant presents proof of the charged facts and the statutory elements of the crimes of conviction to argue the convictions were for non-existent crimes, can the validity of the convictions be determined facially?
2. Does the necessity to construe RCW 9A.56.065 to determine whether a “motor vehicle” includes a snowmobile preclude the court from finding the conviction facially invalid?
3. On the facts presented and in light of *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017), did Blair meet his burden to show that his two

prior convictions for theft of a motor vehicle, which were predicated upon the theft of two snowmobiles, were facially invalid and should not have been included in his offender score?

IV. STATEMENT OF THE CASE

The State alleged that Christopher Blair drove a pickup truck away from a dealership lot, charging him with theft of a motor vehicle and taking a motor vehicle without permission in the second degree. CP 4. Blair entered a drug court agreement, but he was terminated from the program and his case proceeded to sentencing. CP 19, 35-36.

The crimes of second degree taking a motor vehicle without permission and theft of a motor vehicle count prior convictions for theft of a motor vehicle to score as three points each. RCW 9.94A.525(20). The State alleged that Blair's offender score was nine, including the two priors for theft of a motor vehicle. CP 59. Blair argued that those priors were facially invalid because they arose from a charging document alleging that the vehicles taken were two Ski-Doo snowmobiles, and snowmobiles were not "motor vehicles" within the statutory definition. CP 38-39. In support of his argument, he submitted the information and the judgment and sentence containing the two charges, showing that he pleaded guilty to the charges as set forth in the information. CP 42, 43, 56.

The trial court declined to find the convictions facially invalid and sentenced Blair to a drug offender sentence alternative based upon the offender score of nine alleged by the State. RP 31, CP 67, 69. The Court of Appeals affirmed, holding that evaluating Blair’s argument of facial invalidity would require the court to look beyond the judgment and sentence and associated documents to construe the statute defining the crime. *Opinion*, at 5-6. Blair sought review by this Court, and his petition was stayed pending this Court’s determination of *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017), in which it ultimately held that a riding lawnmower did not meet the statutory definition of a “motor vehicle.” *Order*, March 29, 2017. Subsequently, the Court granted Blair’s petition for review. *Order*, February 7, 2018.

V. ARGUMENT

The Court of Appeals’ decision limits the facial invalidity inquiry beyond the requirements established in the case law. Under its interpretation of the rule, a defendant convicted of a non-existent crime cannot show the conviction to be facially invalid if the court needs to interpret the statute to ascertain what conduct it prohibits. Because interpretation requires legal analysis of the judgment and sentence and associated documents, not a factual inquiry into matters appearing outside the limited record of the conviction, it is appropriate in a facial invalidity

determination. Furthermore, in *Barnes*, this Court provided adequate analysis of the statute defining a “motor vehicle” to permit consideration of Blair’s claim on the merits without further elaboration, concluding that the statute under which Blair was convicted applies only to automobiles. Because Blair’s two prior convictions for theft of a motor vehicle were for non-existent crimes when they were predicated upon the theft of two snowmobiles, they should not have been included in his offender score. Reversal and remand for resentencing should be ordered.

1. A conviction for a non-existent crime is invalid on its face, even if it is necessary to interpret the statute to determine the elements of the crime.

The Court of Appeals declined to find Blair’s convictions facially invalid because to do so “would require more than a simple look at the judgment and sentence and associated documents. It would require construing a statute; no prior case law has been cited to us suggesting that the statute does or does not apply to snowmobiles.” *Opinion*, at 5. But interpreting the statute to determine the elements of the crime in order to analyze whether the charged conduct satisfies them is both logically and historically consistent with an analysis of facial invalidity, which evaluates whether the judgment and sentence evidences legal error. Accordingly,

the Court of Appeals' conclusion that the invalidity of Blair's prior convictions could not be facially determined should be reversed.

Prior convictions that are facially invalid may not be included in an offender score. *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). In announcing this rule, the *Ammons* Court clarified that a conviction is constitutionally invalid on its face when, "without further elaboration[, it] evidences infirmities of a constitutional magnitude." *Id.* at 188. Challenges that require the court to "go behind the verdict and sentence and judgment" to make a determination of validity must be brought through ordinary appellate or collateral attack processes. *Id.* at 189. Thus, in *Ammons*, where determining the invalidity of the prior convictions at issue would require factual inquiries into matters beyond the judgment and sentence and associated documents, such as plea colloquies, jury instructions, and similar challenges, the convictions – while potentially unconstitutional – are not invalid facially.

As noted by the Court of Appeals in its opinion, the facial invalidity standard is the same standard applied to personal restraint petitions filed more than one year after the judgment becomes final under RCW 10.73.090(1). *Opinion*, at 4 n.2. This standard has always proven difficult to apply, and it is not readily susceptible to a single unyielding

definition. *In re Coats*, 173 Wn.2d 123, 134, 267 P.3d 324 (2011).

However, certain themes have emerged from the facial invalidity jurisprudence that guide the court's consideration in any individual case: (1) facial invalidity exists when the sentencing court exceeds its statutory authority in entering the judgment or sentence, and (2) the court will only consider documents revealing facts that show the judgment and sentence is invalid due to legal error. *Id.* at 135, 138-39.

The *Coats* Court's exhaustive review of the facial invalidity jurisprudence is instructive here. First, in considering what makes a sentence "invalid," the Court noted that it had previously found convictions for non-existent crimes to be facially invalid. *Id.* at 135. It cited *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004) and *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000) as examples. Both cases are squarely analogous to Blair's.

In *Hinton*, the consolidated petitioners had been convicted of second degree felony murder, predicated upon assaults. 152 Wn.2d at 857. In *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), the Washington Supreme Court held that assault could not serve as a predicate felony to second degree felony murder. The *Hinton* Court held that the petitioners' convictions were facially invalid, stating, "Where a defendant

is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.” *Id.* at 857. Observing that one of the essential elements of second degree murder is the predicate felony, and that no statute permitted conviction for second degree felony murder predicated upon an assault at the time of the crimes, the crimes of which the petitioners were accused and convicted did not exist. *Id.* The *Hinton* Court further observed that the invalidity was demonstrated by the related documents consisting of “charging instruments, statements of guilty pleas, jury instructions, and the judgments and sentences themselves.” *Id.* at 858.

Similarly, in *Thompson*, the petitioner’s conviction for conduct that occurred two years before the statute creating the crime became operative was facially invalid. 141 Wn.2d at 715. There, the Court considered the charging document, which set forth the dates of the offense as “1/1/85 through 12/31/86,” although the crime was not enacted until 1988. *Id.* at 717. Observing that “[t]he phrase ‘on its face’ has been interpreted to mean those documents signed as part of a plea agreement,” the *Thompson* Court held that the petitioner’s documents showed that he was charged with a crime that did not exist until two years after the conduct at issue. *Id.* at 718, 719.

Second, the *Coats* Court considered what it meant for the invalidity to be “facial.” There, it noted that the court has looked beyond the face of the judgment and sentence to determine whether there is legal error. 173 Wn.2d at 138-39. Again citing *Hinton* and *Thompson*, as well as other cases in which the court looked at related law and documents associated with plea agreements, the *Coats* Court distinguished between those circumstances in which the charging documents, plea statements, and similar documents reveal the existence of a legal error, and circumstances in which the defendant asserts he has not received a fair trial based upon jury instructions, trial motions, and similar documents. *Id.* at 140. Based on this distinction, the Court clarified that the question is not whether the plea documents evidence unfairness, but whether they disclose invalidity in the judgment and sentence. *Id.* at 141.

Blair’s case satisfies these requirements. As in *Hinton* and *Thompson*, the documents associated with his judgment and sentence demonstrate that he was charged with, and pleaded guilty to, two counts of theft of a motor vehicle for stealing snowmobiles. The Court of Appeals took issue with the fact that determining whether there was legal error here – i.e., whether a snowmobile is a “motor vehicle” – required more than a cursory review of the statutory elements and the case law. But nothing in the facial invalidity jurisprudence precludes a court from analyzing the

law to determine if there is legal error; indeed, there is precedent for doing so.

In *In re Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015),¹ the Court of Appeals considered whether a conviction for failure to register as a sex offender was facially invalid because the duty to register arose from a conviction that was subsequently repealed as an offense. There, a separate division of the Court of Appeals had already concluded that the duty to register could not arise from a predicate sex offense that was subsequently repealed. *Id.* at 618 (*discussing State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011)). However, the *Wheeler* court went beyond simply adopting the *Taylor* court’s analysis and engaged in an independent interpretation of the definition of a “sex offense,” considering the legislative history and statutory context of the term. *Id.* at 619-21. Contrary to the Court of Appeals’ decision in this case, the *Wheeler* court did not consider the need to engage in statutory interpretation as a bar to determining whether the petitioner’s conviction was for a non-existent crime.

¹ This Court has recently rejected *Wheeler*’s substantive analysis in *In re Arnold*, ___ Wn.2d ___, 410 P.3d 1133 (2018). However, at no point did *Arnold* take issue with the procedure the *Wheeler* court employed – interpreting the statute to determine whether the conviction was facially invalid – to distinguish or otherwise criticize its holding.

Moreover, as a matter of common sense, some degree of statutory interpretation is *always* necessary to determine whether charged conduct constitutes a crime. In *Thompson*, for example, the Court was required to look beyond the plain statutory language to the legislative history showing the date of enactment of the offense. It is true that in some instances, the analysis will be simple, while in other cases it will be more complex. But interpreting statutes may often be the only way to determine what the law is, in order to determine whether a legal error has been committed. Under the Court of Appeals' framework, a conviction for a non-existent crime can only be facially invalid if it is plain on the face of the judgment and sentence *and* in the statutory language. This restrictive reading has no basis in the case law and is inconsistent with the principles of the facial invalidity jurisprudence elaborated in *Coats*.

Here, Blair has alleged the kind of legal error that is shown on the face of the conviction documents. The facts set forth in the information, incorporated into the judgment and sentence, are sufficient to determine that the conviction is for a non-existent crime. That legal analysis is necessary to evaluate the merits of the challenge is neither historically, nor as a matter of principle, a bar to relief. The Court of Appeals' holding that the need to interpret the statutory definition of "motor vehicle" to

determine whether Blair’s conviction is invalid precludes any invalidity from being facial should be reversed.

2. Following *Barnes*, it is unnecessary to interpret the statute defining a “motor vehicle” to determine that Blair’s convictions are facially invalid.

To the extent the Court of Appeals held that the need to interpret the definition of a “motor vehicle” precluded Blair from demonstrating that his prior convictions were facially invalid, that rationale for avoiding the merits has been eliminated by the issuance of *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017), in which this Court squarely addressed the statutory term at issue. Because *Barnes* acknowledges that the statute contemplates only automobiles, application of *Barnes* in the present case shows that Blair is entitled to relief.

The statute criminalizing theft of a motor vehicle under which Blair was convicted is RCW 9A.56.065. CP 43. As recognized in *Barnes*, that statute does not define a “motor vehicle.” 189 Wn.2d at 496. Rather than adopting the definition of “motor vehicle” set forth in the traffic codes, the *Barnes* Court gave the term its ordinary dictionary meaning as “an automotive vehicle not operated on rails; *esp[ecially]*: one with rubber tires for use on highways.” *Id.* at 496. Recognizing that the definition

could conceivably include machines other than automobiles that are capable of transporting people or cargo, although designed for another purpose – such as a riding lawnmower – the *Barnes* Court reviewed the legislative history and determined that only automobiles were contemplated. *Id.* at 496-97. It considered the short title and findings, the language used throughout the act, and the legislature’s express purpose to address a rising incident of automobile theft. *Id.* at 497. The bill’s advocates also noted links between auto theft and other crimes. *Id.* at 497-98. Based upon its reading of the legislative intent, the *Barnes* Court concluded that RCW 9A.56.065 only intended to address thefts of cars and automobiles. *Id.* at 498.

Although *Barnes* was a plurality decision, a majority of the Court agreed that the legislature intended for RCW 9A.56.065 to apply only to automobile theft. *Id.* at 499-503. The concurring justices concluded that applying the terms “vehicle” and “motor vehicle” from other parts of code compounded the ambiguity of the terms rather than resolving it. *Id.* at 504-05. Accordingly, the concurrence then considered the legislative purpose and the circumstances of its enactment, noting that the enactment of RCW 9A.56.065 carved out a specific category of theft and made it subject to uniform penalties, regardless of the value of the car. *Id.* at 507. Lastly, the concurring justices observed that applying a broad, rather than

a narrow, interpretation of “motor vehicle” could potentially violate article II, section 19 of the Washington Constitution because the statute’s title only specifically referred to automobile theft. *Id.* at 509.

Read together, the plurality and concurring opinions both support the conclusion that the items Blair was accused of stealing – snowmobiles – were also not contemplated under RCW 9A.56.065. A snowmobile is

[A] self-propelled vehicle that is capable of traveling over snow or ice that (1) utilizes as its means of propulsion an endless belt tread or cleats, or any combination of those or other similar means of contact with the surface upon which it is operated, (2) is steered wholly or in part by skis or sled type runners, and (3) is not otherwise registered as, or subject to, the motor vehicle excise tax in the state of Washington.

RCW 46.04.546. It is not equivalent to a family car, either in value or utility, and while it may occasionally be capable of traveling upon a public roadway, that is not its primary purpose. To the contrary, a snowmobile is primarily a recreational vehicle, largely because it can only travel on packed snow and ice, conditions that are not generally consistent with passable highway conditions even in the winter. Moreover, there is no indication that thefts of snowmobiles are associated with identity theft, methamphetamine possession, gang activity, or other types of crimes. *Barnes*, 189 Wn.2d at 197-98.

For all the same reasons set forth in *Barnes*, a snowmobile is not a “motor vehicle” within the meaning of RCW 9A.56.065 any more than a riding lawnmower is. Accordingly, while stealing a snowmobile is undoubtedly some kind of crime, it is not the crime of theft of a motor vehicle. Blair’s convictions, on their face, are for conduct insufficient to satisfy the statutory elements of the charge.

In light of this conclusion that theft of a motor vehicle cannot be predicated on the theft of something other than an automobile, Blair’s prior convictions for theft of a motor vehicle are facially invalid and should not have counted in his offender score. As in *Hinton*, Blair’s convictions were for non-existent crimes. The *Hinton* Court stated:

One of the elements of second degree felony murder is the predicate felony. No statute established a crime of second degree felony murder based upon assault at the time the petitioners committed the acts for which they were convicted. A conviction under former RCW 9A.32.050 resting on assault as the underlying felony is not a conviction of a crime at all.

152 Wn.2d 857 (internal citations omitted). Similarly, an essential element of theft of a motor vehicle is the unlawful taking of an automobile. No statute established a crime of theft of a motor vehicle premised upon taking a snowmobile at the time of Blair’s offenses.

Consequently, a conviction under RCW 9A.56.065 resting on a snowmobile as the item wrongfully taken is not a conviction of a crime.

Moreover, this was not a trivial or harmless error. But for the inclusion of the theft of a motor vehicle convictions, Blair's offender score would have been a "7" and carried a standard sentencing range of 17-22 months. *Opinion*, at 2. Instead, he was sentenced under a score of "9" with a standard range of 43-57 months. CP 67. The inclusion of the invalid convictions, in addition to running afoul of *Ammons*, had real and identifiable consequences in the imposition of Blair's sentence. Correcting the error by reversing the judgment and sentence and remanding Blair's case for resentencing is, therefore, necessary and appropriate.

VI. CONCLUSION

For the foregoing reasons, Blair respectfully requests that this Court REVERSE his judgment and sentence and REMAND the case for resentencing based on an offender score of "7."

RESPECTFULLY SUBMITTED this 9 day of March, 2018.

TWO ARROWS, PLLC

A handwritten signature in blue ink, appearing to read "Andrea Burkhart". The signature is fluid and cursive, with a long horizontal stroke at the end.

ANDREA BURKHART, WSBA #38519
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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Supplemental Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mail to:

Brian O'Brien, Deputy Prosecuting Attorney
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9th day of March, 2018 in Walla Walla, Washington.



Andrea Burkhart

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