

63323-6

63323-6

NO. 63323-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. THORNE,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant was convicted of two counts of first degree robbery and one count of attempted first degree robbery. He has 11 prior felony convictions, including three for robbery. Does imposition of a life sentence constitute cruel punishment in violation of article 1, § 14 of the Washington Constitution?

(2) Does imposition of a life sentence under these circumstances constitute cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution?

(3) Does the constitutional right to a jury trial require that the existence of prior convictions be determined by a jury?

(4) Under certain statutes, the existence of a prior conviction is an element of a crime, which elevates a gross misdemeanor to a felony. Prior convictions used to establish persistent offender status are not defined as elements. Is there a rational basis for this distinction?

II. STATEMENT OF THE CASE

The defendant, James Thorne, has been committing felonies for more than 45 years. His first felony was taking a motor vehicle in 1965. He committed an additional three felonies before

graduating to robbery in 1975. Between then and 1988, he committed three more robberies. 1 CP 41.

In 1994, the defendant robbed a hospital gift shop with a BB gun. He forced the cashier out of the gift shop at gunpoint. As a result, he was convicted of robbery and kidnapping. He received a life sentence as a persistent offender. 1 CP 103. This sentence was upheld by the Washington Supreme Court. State v. Thorne, 129 Wn.2d 736, 772-76, 921 P.2d 514 (1996).

In subsequent proceedings, however, the defendant alleged that his attorney erred in not exploring an insanity defense. He was then allowed to plead guilty to first degree theft and two counts of unlawful imprisonment. He received a sentence totaling 240 months. He was released in August, 2006. 1 CP 41. (The full list of the defendant's prior offenses is set out in the appendix, 1 CP 41-42.)

Following his release, the defendant received mental health services from Compass Health. 1 CP 74. He received prescriptions for anti-psychotic drugs. He told his practitioner that these drugs were working. On November 14, 2006, his case manager personally delivered a prescription refill to the defendant. 1 CP 78.

On November 20, the defendant entered Dollarwise, a payday loan and check cashing service in Everett. Three tellers were on duty: Jessica Pilon, Shauna Baker, and Ruby Lucero. The defendant was carrying a paper bag holding a square object. He told Ms. Pilon that he had a bomb and was robbing the place. She did not believe him. Nonetheless, she told the other tellers that they were being robbed and that the man had a bomb. She told them to stop what they were doing and get the customers out. 1 RP 35-37, 76.

Another teller, Nicole Flynn, was outside talking to the manager. When she saw Ms. Pilon waving at her, she went inside. Ms. Pilon told her that the guy was robbing the place with a bomb and to get out. Ms. Flynn turned around to run, but the defendant grabbed her by the shoulder. He pulled her up to Ms. Pilon's window. He kept one hand in his pocket. Ms. Flynn thought that he had a gun. 1 RP 79-82. Ms. Pilon likewise believed that he had a gun or a knife. Frightened for Ms. Flynn's safety, Ms. Pilon gave the defendant money. 1 RP 58-59. So did Ms. Lucero.¹ 1 RP 40-

¹ Ms. Lucero did not testify. At the time of trial, she was in California. 2 RP 153.

41, 58-59. Ms. Baker refused to give him money, closed her till, and hid behind the counter. 1 RP 61-65.

The defendant then ran out of the building. Ms. Pilon pursued him. A bystander joined in the chase. While running, the defendant dropped the bag. 1 RP 46-49, 96-99. A police officer arrived and took over the pursuit. He arrested the defendant nearby. The defendant had a wad of cash in his left front coat pocket. He told the officer, "that's theirs." 2 RP 135-42. The wad amounted to \$2,748, which is less than a dollar different from the amount that Dollarwise reported as stolen. 2 150-51.

Bomb technicians were summoned to deal with the bag. After examining it, they decided that they had to treat it as a real bomb. Because the bag was lying next to a gas main, they had nearby buildings evacuated. They then used a water cannon to tear the bag apart. 2 RP 158-63. It turned out to contain strawberry yogurt. 2 RP 166-67.

The defendant later received two forensic examinations. According to a psychologist retained by the defense, the defendant's mental illness "played a substantial role in his actions that day in the store." 1 CP 102. This conclusion was largely based on the defendant's own account 1 CP 98-102.

An evaluation from psychologists at Western State Hospital considered not only the defendant's account but those of other witnesses. 1 CP 91-95. They concluded that "at the time of the instant offense Mr. Thorne was not experiencing symptoms of mental disorder of such significance that he would have been considered psychotic or otherwise cognitively impaired." 1 CP 95

The defendant was charged with two counts of first degree robbery and one count of attempted first degree robbery. 2 CP 210-11. A jury found him guilty as charged. 1 CP 113-15. Following a hearing, the court found that the State had proven two prior robbery convictions beyond a reasonable doubt. 3 RP 243. The court also had "the strong belief that Mr. Thorne is going to reoffend and continue with his criminal behavior until he dies." 3 RP 234. In accordance with the Persistent Offender Accountability Act, the court sentenced him to life imprisonment. 1 CP 24.

III. ARGUMENT

A. THE SENTENCE OF LIFE IMPRISONMENT DOES NOT CONSTITUTE CRUEL PUNISHMENT.

1. The State Supreme Court Has Already Determined That A Life Sentence For This Offender Does Not Constitute Cruel Punishment In View Of The Seriousness Of The Offense, The Penalty For The Same Crime In Other Jurisdictions, And The Penalty For Other Crimes In Washington.

The defendant contends that the sentence of life imprisonment constitutes “cruel punishment” in violation of Const., art. 1, § 14. The Washington Supreme Court has already rejected this contention in an earlier appeal involving *the same defendant*. State v. Thorne, 129 Wn.2d 736, 772-76, 921 P.2d 514 (1996). In rendering this decision, the court acknowledged the defendant’s history of mental illness. Id. at 751. The only significant difference between this prior decision and the present case is that the defendant’s criminal history has *increased*. This court is bound by the Supreme Court’s interpretation of Washington law. State v. Gore, 101 Wn.2d 481, 487, 81 P.2d 227 (1984).

Even if this court had the power to reconsider the holding of Thorne, there would be no basis for doing so. The analysis used in determining whether a sentence is disproportionate is set out in State v. Fain, 94 Wn.2d 387, 617 P.2d 720 (1980). This analysis rests on “objective standards [that] minimize the possibility that the

merely personal preferences of judges will decide the outcome of each case.” Id. at 397. The possibility of parole is not considered. Id. at 394-95. The court examined three factors: the nature of the offense, punishment in other jurisdictions for the same offense, and punishment in Washington for other offenses. Id. at 397-400.

In Thorne, the court applied these three factors to the crime of first degree robbery committed by a person with prior robbery convictions. Robbery is a serious crime, since it involves the threat of violence against another person. Thorne, 129 Wn.2d at 773-74. Washington’s Persistent Offender Accountability Act (POAA) is similar to legislation throughout much of the United States. Id. at 775. The penalty of life imprisonment is comparable to that imposed for other serious, violent offenses. Id. at 775-76. Consequently, a life sentence for a recidivist robber does not constitute cruel punishment. Id. at 776. In another case decided on the same day, the court similarly upheld a life sentence for *second* degree robbery. State v. Manussier, 129 Wn.2d 652, 674-79, 921 P.2d 473 (1996).

Nothing in the present case alters this analysis. With regard to the seriousness of the offense, the defendant obtained money by threatening to detonate a bomb. 1 RP 73. He illustrated this threat

with a bag containing a square object. 1 RP 76. No one could tell from the external appearance of this bag whether it contained a bomb. Even experienced bomb technicians could not make this determination. 2 RP 171. At least one of the tellers believed the defendant's threats and feared for her life. 1 RP 83. Another did not believe that there was a bomb, but she gave the defendant money because she was afraid for her co-worker. 1 RP 54, 40. The seriousness of a crime does not, however, depend on the victims' degree of skepticism. Workers are entitled to do their jobs without having to figure out whether a person who threatens their lives actually means what he says.

With regard to the penalty in other jurisdictions, the defendant points out that several states have statutes allowing a verdict of "guilty but mentally ill" ("GMBI"). The last such statute was enacted in 1984.² See 2 Robinson, Substantive Criminal Law § 173(h) n. 93 (1984 and 2009 Supp.). A GMBI verdict does not reduce the penalty for a crime:

²The defendant's brief claims that "as many as 20 [states] may be considering" legislation authorizing a GMBI verdict. His authority for this claim is a law review article written in 1985. Brief of Appellant at 12. Since that article was written, no state has enacted such a statute.

Upon a verdict of guilty but mentally ill, the court may impose the same prison sentence that would have been imposed had the defendant been found guilty of the offense charged. The only difference between the two guilty verdicts is that under the guilty-but-mentally ill form, the defendant must be examined by psychiatrists before beginning his prison term, and if he is in need of treatment he is to be transferred to a mental health facility.

Id. § 173(h) at 310-11.

Notwithstanding a GMBI finding, a court may impose a lengthy prison sentence or even a death sentence. Green v. State, 469 N.E.2d 1169, 1173-74 (Ind. 1984) (upholding aggravated sentence of 50 years for GMBI defendant); State v. Wilson, 306 S.C. 498, 503-04, 413 S.E.2d 19, 22, cert denied, 506 U.S. 846, 113 S. Ct. 137, 121 L. Ed. 2d 90 (1992) (upholding death sentence for GMBI defendant); Sanders v. State, 585 A.2d 117, 124-25 (Del. 1990) (holding death sentence permissible if jury is instructed that finding of GMBI is mitigating factor). Thus, the availability of a GMBI verdict in some jurisdictions does not alter the court's conclusion in Thorne: the sentence available in Washington is comparable to that available in many other jurisdictions.

Finally, with regard to the penalty in Washington for comparable crimes, nothing has changed. Under the POAA, a life sentence can be imposed for crimes less serious than first degree

robbery – for example, second degree robbery and first degree extortion. Washington law also authorizes a maximum term of life imprisonment for first degree robbery with *no* prior convictions. RCW 9A.56.200, RCW 9A.20.021 Thus, an examination of the Fain factors supports the conclusion reached in Thorne: a life sentence for this defendant is not disproportionate.

2. Even If The Test Requires Consideration Of The Purpose Behind The Habitual Criminal Statute, The Supreme Court Has Already Held That Life Imprisonment For This Offender Serves That Purpose.

In addition to the three factors discussed above, the defendant asks the court to consider a fourth factor: “the legislative purpose behind the habitual criminal statute.” Fain cited a Federal case that included this factor. Fain, 94 Wn.2d at 397, citing Hart v. Coiner, 483 F.2d 136 (4th Cri. 1973), cert. denied, 415 U.S. 938, 39 L. Ed. 2d 495, 94 S. Ct. 1454 (1974). Fain discussed this factor as follows:

In its proportionality analysis, the court in [Hart] considered a fourth factor, the relationship between the punishment imposed and the legislative objective in making the conduct a punishable offense. If the purpose of the statute can be equally well served by a less severe punishment, the court believed that factor should be considered.

In our view, this standard should be employed with caution. Legislative judgments as to punishments for criminal offenses are entitled to the greatest possible

deference, and we are reluctant to venture a conclusion, given the inexactitude of current theories of penology, that a given sentence more nearly accomplishes the legislative purpose.

Fain, 94 Wn.2d at 401-02 n. 7.

Subsequent cases have been inconsistent in their treatment of this factor. Some cases have included it in their analysis, while others have left it out. Compare Thorne, 129 Wn.2d at 773 (citing Fain as establishing 4-factor test). with Manussier, 129 Wn.2d at 677 (citing Fain as establishing 3-factor test). Since the proportionality test is an objective one, and this factor is essentially subjective, it should not be included in the Fain analysis.

Ultimately, however, it makes no difference to the present case whether or not this factor is included. The legislative purpose of the POAA includes “deterrence of criminals who commit three ‘most serious offenses’ and the segregation of those criminals from the rest of society.” This purpose is served by life imprisonment for recidivist robbers. Thorne, 129 Wn.2d at 775.

It is hard to see what other way there is to protect the community from this defendant. Lengthy incarceration did not alter his dangerousness: he committed the current robberies less than four months after being released from a 20-year sentence. 1 CP

41. Age has not altered his dangerousness: he committed these robberies at the age of 66. Mental health treatment did not alter his dangerousness: he was receiving community mental health treatment at the time of the robberies. His health care providers prescribed drugs that were effective in alleviating his symptoms – but that was not sufficient to prevent him from committing additional robberies. 1 CP 77-78. Five robberies and nine other felonies from a single person is enough. The purposes of the POAA are served by bringing this string of crimes to an end.

The defendant cites a U.S. Supreme Court decision barring the death penalty for mentally retarded offenders. Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). This decision exemplifies the analysis condemned in Fain. The U.S. Supreme Court found itself unpersuaded that “the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.” Atkins, 536 U.S. at 321. The court thus substituted its own view for that of the legislature on the best way to achieve the objectives of the criminal law.

However valid the analysis of Atkins might be, it has no bearing on non-capital sentences. The court looked solely at the

objectives of the death penalty, which it viewed as deterrence and retribution. Persistent offender sentencing is not intended solely for these purposes. It also protects the public from dangerous offenders. Thorne, 129 Wn.2d at 775. This protective function is fully applicable to defendants who are sane but mentally ill.

It does indeed appear that the present defendant cannot be deterred from committing robbery, whether because of mental illness or for some other reason. This only strengthens the justification for keeping him incarcerated to prevent future crimes. As the state Supreme Court held in Thorne, the purposes of the POAA fully support life imprisonment for this offender.

B. THE STATE SUPREME COURT HAS ALREADY HELD THAT LIFE IMPRISONMENT FOR THIS OFFENDER DOES NOT VIOLATE THE CRUEL AND UNUSUAL CLAUSE OF THE FEDERAL CONSTITUTION, WHICH IS LESS PROTECTIVE THAN THE COMPARABLE PROVISION OF THE STATE CONSTITUTION.

The defendant also claims that the sentence constitutes "cruel and unusual punishment," in violation of the Eighth Amendment to the federal Constitution. In Thorne, the court said that since the Washington Constitution is more protective, the federal claim did not need to be examined. Thorne, 129 Wn.2d at 773. In Manussier, however, the court did conduct a separate

Eighth Amendment analysis. The court held that a life sentence for *second* degree robbery did not constitute cruel and unusual punishment for a defendant who had two prior robbery convictions. Manussier, 129 Wn.2d at 675-76. This court is bound by that holding until it is altered by the U.S. Supreme Court or the Washington Supreme Court.

Even if this court were not bound by the holdings in Thorne and Manussier, there is no basis for a contrary result. Under the federal Constitution, a consideration of mitigating circumstances is not required in non-capital cases. Harmelin v. Michigan, 501 U.S. 957, 1006-08, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring) see id. at 993-94 (per plurality opinion, proportionality analysis is not appropriate in non-capital cases). No comparative proportionality analysis is required in non-capital cases, unless “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” If an offense is a serious one, further analysis is unnecessary. Id. at 1005 (Kennedy, J., concurring). Since robbery is a serious offense, life imprisonment for that crime does not violate the Eighth Amendment. Manussier, 129 Wn.2d at 676.

C. THE WASHINGTON SUPREME COURT HAS ALREADY HELD THAT THERE IS NO RIGHT TO A JURY TRIAL ON THE EXISTENCE OF PRIOR CONVICTION.

The defendant next argues that he was entitled to a jury trial on the existence of his prior convictions. The Washington Supreme Court has held that there is no right to a jury trial on prior convictions that are used to establish persistent offender status. State v. Smith, 150 Wn.2d 135, 140-41, 75 P.3d 934 (2003). The U.S. Supreme Court has likewise held that the right to a jury trial does not apply to prior convictions Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008, 143 P.3d 829 (2006). The sentencing court acted properly in determining the existence of the defendant's prior convictions (which were not even disputed).

D. THERE IS A RATIONAL BASIS FOR DISTINGUISHING BETWEEN THE USE OF PRIOR OFFENSES TO ELEVATE A CRIME TO A FELONY AND THEIR USE TO ESTABLISH THE PENALTY FOR A FELONY.

Finally, the defendant claims that Equal Protection principles give him the right to a jury trial on prior convictions. He points out that the existence of a prior conviction aggravates some crimes to felonies. See, e.g., RCW 9.68A.090(2) (communication with minor for immoral purposes); RCW 9A.46.110(5)(b) (stalking), RCW

9A.88.010(2)(c) (indecent exposure), RCW 26.50.110(5) (violation of protection order). These prior convictions are often elements that must be proved to the jury. See State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008) (communication with minor). The defendant claims that it is irrational to deny the same procedural protection to persistent offenders.

The POAA is subject to analysis under the “rational basis” test.

Under this test, a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. The burden is on the party challenging the classification to show that it is purely arbitrary.

Thorne, 129 Wn.2d at 771 (citations omitted).

The classification that the defendant challenges is necessary to accomplish the fundamental goal of the POAA. One of the purposes of that statute is “to improve public safety by placing the most dangerous criminals in prison.” Id. at 771. To achieve this, the people adopted a mandatory sentencing scheme that did not allow for prosecutorial discretion. Id. at 766-67. If the prior convictions were classified as an “element,” prosecutors would have discretion not to charge that “element.” This would prevent sentences under the POAA from being mandatory.

The same considerations do not apply when prior convictions are used to elevate crimes to felonies. The crimes involved are less serious than those covered by the POAA, so the public requires less protection. The Legislature could consider it unnecessary and even counter-productive to eliminate prosecutorial discretion for crimes that are elevated to felonies.

“[E]qual protection does not require the state to attack every aspect of a problem. Rather, the legislature is free to approach a problem piecemeal and to learn from experience.” Yakima County Dep’y Sheriffs’ Ass’n v. Board of Commissioners, 92 Wn.2d 831, 836, 601 P.2d 936 (1979). The people or the Legislature can eliminate prosecutorial discretion in some cases without being required to eliminate it in all cases.

Even if the Legislature had wished to eliminate prosecutorial discretion for crimes that are elevated to felonies, there would be serious practical obstacles. Most misdemeanors and gross misdemeanors are adjudicated in district courts. Those courts have no jurisdiction to adjudicate felonies. They also have no jurisdiction to impose sentences of imprisonment exceeding one year. RCW 3.66.060. As a result, to eliminate prosecutorial discretion, the Legislature would have had to require that *all* of the relevant

offenses be filed into Superior Court. Otherwise, prosecutors could control the sentence simply by choosing which court to file the charge in. This could easily happen through ignorance, since prosecutors often do not know the defendant's criminal history at the time charges are filed. Even if eliminating prosecutorial discretion were considered advantageous, the Legislature could decide that those advantages were outweighed by the disadvantages of requiring all of the affected crimes to be adjudicated in Superior Court.

The people could also have decided that treating prior convictions as elements would be harmful to alleged offenders. This procedure often results in having the existence of prior convictions disclosed to the jury that determines guilt. See Roswell, 165 Wn.2d at 198. This can increase the likelihood of a conviction. This problem could be avoided by holding bifurcated trials, but that alternative is time-consuming and expensive. In contrast, having the judge determine the existence of prior convictions can be viewed as doing little harm to the defendant's rights, since there is rarely any genuine dispute about their existence. Thus, the POAA provides *more* protection to offenders who are facing the most serious sentences.

This court should be especially wary of using Equal Protection principles to create procedural rights. Equality can be created in two ways – by increasing the protections for one group or by reducing them for the other group. If this court accepts the defendant's argument, the outcome could be unfavorable to future defendants – either by eliminating jury trials on prior offenses in additional cases, or by exposing alleged persistent offenders to the potential prejudicial effects of having juries learn of their prior convictions. This court should not risk these outcomes in order to grant this defendant a jury trial on facts that were not even disputed.

There are multiple bases for a rational distinction between prior convictions under the POAA and those that elevate gross misdemeanors to felonies. The POAA sentencing scheme eliminates prosecutorial discretion for the most dangerous offenders, while protecting them from the possible prejudice of having their convictions disclosed to juries. Treating prior convictions as elements for less serious offenders allows prosecutorial discretion by exposing the jury to potentially prejudicial information. The Legislature could rationally decide that this procedure is appropriate for less serious offenses but not for

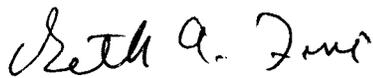
the most serious offenses. The classification does not violate Equal Protection.

IV. CONCLUSION

For these reasons, the sentences should be affirmed. Since the defendant has not challenged his convictions, they should be affirmed in any event.

Respectfully submitted on March 1, 2010.

MARK K. ROE
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By: 

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Attorney for Respondent

APPENDIX A TO PLEA AGREEMENT
PROSECUTOR'S UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY
(SENTENCING REFORM ACT)

DATE: March 2, 2009 (da/dhw/gp)
 DEFENDANT: **THORNE, James Monroe**
 DOB: 7/16/42 M/W
 SID: WA10093248 FBI: 358851D DOC: 118554

<u>CRIME</u>	<u>DATE OF CONVICTION</u>	<u>PLACE OF CONVICTION</u>	<u>Incarceration/Probation DISPOSITION</u>
ADULT FELONIES:			
* Unlawful Taking of Auto (C)	4/12/60	Pierce County 33606	10 Yrs Confinement Paroled 6/15/65
Burglary (B)	6/1/70	Snohomish County 4212	10 Yrs Confinement 5/11/70 Released
* Escape (C)	10/26/71	Snohomish County 4901	10 Yrs Confinement 9/4/74 Released
* Interstate Transportation of Stolen Vehicle (C)	1/21/75	U.S. District Court Detroit Michigan	4 Yrs Confinement
* Conviction "washes"			
Bank Robbery (B)	7/3/75	U.S. District Court	10 Yrs Confinement
Second Degree Robbery (B) (2 Counts)	5/22/80	King County 80-1-00382-4	10 Yrs Confinement 11/10/82 Released
First Degree Robbery (A)	1/15/88	Pierce County 87-1-02004-7	57 Mos Confinement 7/1/93 Released
**First Degree Theft (B)	12/10/01	Snohomish County 01-1-02344-1	120 Mos. Confinement (exceptional sentence)
**Unlawful Imprisonment (C) (2 Counts)	12/10/01	Snohomish County 01-1-02344-1	60 Mos. Confinement 8/3/06 Released

****court ruled sentences on all three counts to run consecutively for a total confinement of 240 Mos.**

ADULT MISDEMEANORS:

1. Disorderly Conduct	10/1/62	King County
2. Issue Check to Defraud	9/24/63	South Dakota
3. Drunk in Public	9/28/63	North Dakota
4. Shoplifting	12/29/92	Columbia County
5. Consume Liquor in Public	9/29/93	Snohomish County
6. Theft	12/30/93	Columbia County

THORNE, James Monroe

JUVENILE FELONIES:

None.

JUVENILE MISDEMEANORS:

None

OTHER: (NOT COUNTED AS CRIMINAL HISTORY)

4/6/09
Date

Helene C. Blane
Deputy Prosecuting Attorney WSBA# 15462