

65047-5

65047-5

No. 65047-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LOVE,

Appellant.

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

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2010 JUL -6 PM 4:36

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove felony DUI beyond a reasonable doubt.

2. The trial court violated Mr. Love's right to due process by rejecting his proposed instruction requiring the State to prove the comparability of an out-of-state conviction for driving under the influence of alcohol ("DUI").

3. The State presented insufficient evidence to prove the comparability of a prior Alaska conviction for inclusion in Mr. Love's offender score.

4. The sentencing court erred in imposing a 12-month term of community custody on Mr. Love.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. To prove felony DUI the State must show, inter alia, that the defendant has four "prior offenses" within the last 10 years. An out-of-state conviction is not a "prior offense" unless it is comparable to a Washington DUI conviction. Here, the State presented evidence of three prior King County DUI convictions and one Alaska DUI conviction, but the Alaska DUI statute is broader than Washington's, and the State did

not present evidence that Mr. Love admitted the necessary facts or that those facts were proved to a jury beyond a reasonable doubt.

Did the State fail to prove felony DUI?

2. If jury instructions either incorrectly define or are silent on an element of a crime, the State is impermissibly relieved of its burden to prove beyond a reasonable doubt that the defendant committed all the essential elements. To prove felony DUI, the State must prove, inter alia, that the defendant has four "prior offenses" within the last ten years. "Prior offense" means a Washington DUI conviction or out-of-state equivalent. Here, the State alleged Mr. Love committed felony DUI on the basis that he had three prior Washington DUI convictions and one prior DUI conviction from Alaska, where the definition of the crime is broader. Did the trial court violate Mr. Love's right to due process by refusing to instruct the jury that it had to find the Alaska conviction comparable to a Washington DUI conviction?

3. Under the Sentencing Reform Act, the State bears the burden of proving the comparability of an out-of-state conviction by a preponderance of the evidence. Here, the State presented evidence of an Alaska DUI conviction, but the Alaska DUI statute is broader than Washington's, and the State did not present evidence

that Mr. Love admitted the necessary facts or that those facts were proved to a jury beyond a reasonable doubt. Did the sentencing court err in including the Alaska conviction in Mr. Love's offender score?

4. Under RCW 9.94A.701(8), "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provide in RCW 9A.20.02." Former RCW 9.94A.715, which allowed for imposition of community custody equal to earned early release time, has been repealed. These amendments are retroactive. Mr. Love's standard range was 51-60 months and the statutory maximum is 60 months. The sentencing judge imposed a 55-month sentence plus a 12-month term of community custody, stating that he expected Mr. Love to be able to serve more than 5 months of community custody because he would receive earned early release. Did the sentencing court lack statutory authority to impose more than 5 months of community custody on top of a 55-month sentence?

C. STATEMENT OF THE CASE

The State charged appellant Robert Love with felony DUI, alleging that on December 1, 2009, he drove under the influence of intoxicating liquor, and that he “had previously incurred four or more prior offenses within ten years as defined in RCW 46.61.505 [sic]; proscribed by RCW 46.61.502(1) and (6).” CP 71.

To prove that Mr. Love had four “prior offenses,” the State offered documentation purporting to show that Mr. Love had three King County District Court DUI convictions and one conviction from Wrangell, Alaska. Exs. 3, 4, 5-10; 2/8/10 RP 57-59. Mr. Love objected to the admission of exhibit 3, a judgment from the Wrangell, Alaska district court, and exhibit 4, a handwritten “log note” from the same court. 2/8/10 RP 58. Mr. Love argued that Alaska statute 28.35.030, under which he had apparently been convicted, is broader than Washington’s DUI statute, and that the State had not presented any evidence of factual comparability. 2/8/10 RP 62-63.

The court agreed:

[I]t looks to me on the face of it as though there would need to be some factual basis because the Alaska statute looks to me to be more broad than the Washington statute meaning that you can violate the Alaska statute without violating the Washington

statute. Which means that, based on what I've seen so far, it doesn't look to me as if the State could prove that those Wrangell convictions were convictions for purposes of the law that pertains to this case.

2/8/10 RP 68.

The next day, the State offered the complaint from the Alaska case as an additional exhibit. 2/9/10 RP 3; Ex. 3A. The complaint included an affidavit alleging that Mr. Love drove a Jeep Cherokee while intoxicated, and that his breath test result was 0.161. Ex. 3A. However, the State did not offer any plea paperwork showing that Mr. Love admitted to these facts. Rather, the documents simply showed that he pled guilty under Alaska Stat. 28.35.030, which is broader than Washington's DUI statutes. Thus, Mr. Love continued to object to the admission of the documents from Alaska, and simultaneously argued for dismissal of the felony charge for insufficient evidence. 2/9/10 RP 6-7.

The court admitted the documents as relevant. It also denied the motion to dismiss, stating, "a reasonable jury could conclude from these documents that the defendant was convicted of driving under the influence in Alaska on facts which would have led to the exact same result in this state." 2/9/10 RP 11.

After both parties rested, they discussed jury instructions with the court. The State proposed, and the Court provided, a “to convict” instruction with the following elements:

1. That on or about December 1, 2009 the defendant drove a motor vehicle;
2. That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor;
3. That at the time the defendant drove the motor vehicle he had been convicted of four or more prior offenses within ten years;
4. That the act occurred in the State of Washington.

CP 56 (Instruction 6). The State also proposed, and the Court provided, a definitional instruction for “prior offense”:

Prior offense means a conviction for driving under the influence of intoxicating liquor for which the date of arrest is within ten years of the date of arrest for the current charge.

CP 58 (Instruction 8).

Because one of the alleged prior offenses was from Alaska,

Mr. Love proposed the following instruction:

An out-of-state conviction is a prior offense if it is proven that if the out-of-state violation had occurred here that it would be a violation of the law in Washington.

CP 65; 2/9/10 RP 21. The State objected to the proposed instruction, stating, “I think it’s kind of confusing for them. I’m not sure they’re really in a position to deal with it.” 2/9/10 RP 22. Mr.

Love countered that whether it was confusing or not, it “is something that needs to be proved to the jury.” 2/9/10 RP 23.

The court refused to give the instruction:

The instructions presented by the State do define DUI. And it appears to the Court to go on and say Washington law applies would be superfluous and may be confusing. I think that the defense-proposed instruction – and I certainly understand why it is being proposed – I don’t think it adds anything to the set of instructions that were already here. A prior offense must be a prior DUI offense, and prior DUI offenses are defined. And the offenses are defined correctly according to the Washington law, and that’s what they need to be.

2/9/10 RP 28.

Mr. Love was convicted of felony DUI as charged. CP 47.

At sentencing, the parties agreed that Mr. Love’s offender score was seven, resulting in a standard range of 51-60 months. 2/25/10 RP 3. The parties also agreed that, given the statutory maximum for the crime is 60 months, the court could not impose any community custody if it imposed a 60-month sentence. 2/25/10 RP 4. The court asked, “what is his earned early release likely to be? ... could I not, on the Judgment and Sentence, simply reduce his community custody by any time which would otherwise extend past December 1st, 2014?” 2/25/10 RP 5. The prosecutor replied, “section 701 of the Sentencing Reform Act states that the court is to

reduce the community custody, so I guess that's where I got the idea that you have to zero it out because they're asking the Court to do it. And we can't know what the earned early release is going to be." 2/25/10 RP 5-6.

The court proposed:

Let's say I imposed a term of community custody and then added, following a comma, but, in no wise shall the term of community custody extend past December 1, 2014, another comma, so that community custody shall be and the same is hereby reduced by any time by which it would otherwise extend beyond that date. ... Can I do that?

2/25/10 RP 6-7. The prosecutor responded:

I think so, and, I mean, definitely you could do it under the Supreme Court case I'm thinking of. That's exactly what they had in mind, I think. And then I don't know whether the statute changes that.

2/25/10 RP 7. The defense attorney stated he thought "the sentence and the community custody period need to be certain."

2/25/10 RP 9-10.

The court disagreed, stating it thought it could impose community custody for the earned early release time. 2/25/10 RP 14-15. The court therefore sentenced Mr. Love to 55 months' confinement plus 12 months' community custody. CP 18-19. The

court scrawled the following in the bottom margin of page 5 of the Judgment and Sentence:

★ but in no wise shall the term of community custody extend past December 1, 2014, so that community custody shall be, and the same is, hereby reduced by any time by ^{which} it would otherwise extend beyond that date, which

CP 19.

D. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE EACH ELEMENT OF FELONY DUI BEYOND A REASONABLE DOUBT.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to

support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The crime of driving under the influence of alcohol is generally a gross misdemeanor. RCW 46.61.502(5). However, it is a class C felony if “[t]he person has four or more prior offenses within ten years as defined in RCW 46.61.5055.” RCW 46.61.502(6)(a); State v. Castle, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 2561515 (No. 63627-8-I, filed June 28, 2010). “Prior offense” means, inter alia, a prior Washington DUI conviction or “[a]n out-of-state conviction for a violation that would have been a violation of [the Washington DUI statute] if committed in this state.” RCW 46.61.5055(14). Because proof of four “prior offenses” elevates the crime of DUI from a misdemeanor to a felony, the prior offenses are elements of the charge which the State must prove beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008).

b. The State produced insufficient evidence to prove beyond a reasonable doubt that Mr. Love had four prior offenses that are comparable to Washington State DUI convictions. In this case, the State failed to prove the comparability of the Alaska conviction beyond a reasonable doubt. The Alaska DUI statute is broader than Washington's, and is therefore not legally comparable. Accordingly, the State was required to prove factual comparability, but it did not present sufficient evidence to do so. The State presented evidence of the facts that were alleged, but no evidence that Mr. Love admitted to the alleged facts when pleading guilty. Accordingly, the State failed to prove Mr. Love had four "prior offenses," and the felony conviction must be reversed.

Even where prior convictions are merely used to elevate the offender score – and therefore need only be proved by a preponderance of the evidence – the State must show that any out-of-state convictions are comparable to Washington convictions. Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the elements of the out-of-state crime must be compared to the relevant Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d

837 (2005). If the elements are comparable, the defendant's out-of-state conviction is legally equivalent to a Washington conviction. Id. at 254.

But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

In this case, as the trial court and parties recognized, the Alaska and Washington DUI statutes are not legally comparable.

Under Washington law:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made

under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

RCW 46.61.502. "Vehicle" means a "device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles." RCW 46.04.670.

Under Alaska law, in contrast:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance, singly or in combination; or

(2) and if, as determined by a chemical test taken within four hours after the alleged operating or driving, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if there is 0.08 grams or more of alcohol per 210 liters of the person's breath.

Alaska Stat. 28.35.030 (emphasis added). Alaska's statute is broader because it prohibits flying and boating under the influence, not just driving. Operating aircraft or watercraft under the influence of alcohol or drugs do not constitute "prior offenses" under RCW

46.61.5055(14). Thus, to convict Mr. Love of felony DUI, the State was required to prove factual comparability beyond a reasonable doubt. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606; Roswell, 165 Wn.2d at 189; RCW 46.61.502(6)(a).

Where crimes are not legally comparable, it is very difficult for the State to prove factual comparability. As the Lavery Court explained, even in a context where the standard of proof is a preponderance of the evidence:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. In Lavery, the Supreme Court held the State failed to prove by a preponderance of the evidence that the defendant's federal robbery conviction was comparable to a Washington robbery conviction, because the State did not present evidence that the defendant had admitted or stipulated to the necessary facts, or that those facts had been proved to a jury. Id.

The same is true here. The State did not present evidence that the necessary facts were proved to a jury or that Mr. Love

admitted or stipulated to the necessary facts. Exs. 3-4. The State only presented evidence that Mr. Love pleaded guilty under Alaska Stat. 28.35.030, which is broader than Washington's DUI statute. The State presented the complaint which alleged certain facts, but did not present the guilty plea or statement of defendant on plea of guilty. If the evidence in Lavery was insufficient to prove comparability by a preponderance of the evidence, then the evidence here was certainly insufficient to prove comparability beyond a reasonable doubt.

Other cases are also instructive. In Thiefault, for example, the Supreme Court held the State failed to prove the comparability of a Montana robbery conviction by a preponderance of the evidence even though the State presented the judgment and sentence, an affidavit, and the motion for leave to file information which alleged conduct that would have constituted robbery in Washington. State v. Thiefault, 160 Wn.2d 409, 415-17, 158 P.3d 580 (2007). "[A]lthough the motion for leave to file information and the affidavit both described Thiefault's conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt." Id. at 416 n.2.

In Thomas, this Court held the State failed to prove the comparability of two California burglary convictions by a preponderance of the evidence because California's burglary statute does not require unlawful entry. State v. Thomas, 135 Wn. App. 474, 476-77, 144 P.3d 1178 (2006). The State presented certified copies of charging documents, a judgment on plea of guilty, minutes from a jury trial, and a transcript from the sentencing hearing. This Court held the State failed to prove factual comparability even though the State's evidence showed that California had alleged unlawful entry in the charging documents and the defendant had pled guilty to the crime as charged in one count and had been found guilty beyond a reasonable doubt as charged in the other count. Id. at 483-85.

In Ortega, this Court held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. State v. Ortega, 120 Wn. App. 165, 167, 84 P.3d 935 (2004). Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. Id. at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating

that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. Id. at 173-74. But this Court held the evidence was insufficient to prove the Texas victim was under 12 years old. Id. at 174. Because the relevant facts were not admitted or proved to a jury beyond a reasonable doubt, the Texas conviction was not comparable to a Washington conviction and could not count as a “strike” for sentencing purposes. Id. at 167.

As in Lavery, Thiefault, Thomas, and Ortega, the State in this case failed to prove the comparability of the foreign conviction because it did not present evidence that Mr. Love admitted to the necessary facts or that the facts were proved to a jury beyond a reasonable doubt. The State did not present the guilty plea, the statement of defendant on plea of guilty, or transcript showing that Mr. Love admitted to the necessary facts. If the failure to present such evidence was fatal in the above cases – where the standard of proof was a mere preponderance – then the failure to do so here certainly is. The State failed to prove beyond a reasonable doubt that Mr. Love’s Alaska conviction was comparable to a Washington conviction. Accordingly, the State failed to prove felony DUI, and the conviction must be reversed.

c. Reversal and dismissal of the felony charge is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Love committed felony DUI, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is reversal of the felony conviction and remand for entry of a conviction on the lesser-included offense of misdemeanor DUI. Green, 94 Wn.2d at 234-35.

2. THE TRIAL COURT LOWERED THE STATE'S BURDEN OF PROOF BY GIVING ONLY THE STATE'S PROPOSED INSTRUCTION ON PRIOR OFFENSES AND REJECTING MR. LOVE'S INSTRUCTION WHICH WOULD HAVE REQUIRED THE JURY TO FIND THE STATE PROVED THE COMPARABILITY OF THE OUT-OF-STATE CONVICTION.

As explained in Section (D)(1)(a) above, to prove felony DUI, the State must show the defendant has four "prior offenses" that

are comparable to Washington DUI convictions. RCW 46.61.502(6)(a); RCW 46.61.5055(14); Roswell, 165 Wn.2d at 189; Castle at 3. The trial court refused to instruct the jury that it had to find Mr. Love's Alaska conviction was comparable to a Washington DUI conviction. This failure violated Mr. Love's right to due process, requiring reversal.

a. The trial court improperly lowered the State's burden of proof by refusing to give Mr. Love's proposed instruction defining the prior offense element of the crime. The "failure to define every element of a charged offense is an error of constitutional magnitude." State v. Gordon, 153 Wn. App. 516, 531, 223 P.3d 519 (2009). "If the jury instructions either incorrectly define or are silent on an element of a crime, the State is impermissibly relieved of its burden to prove beyond a reasonable doubt that the defendant committed all the essential elements." Id. at 532; U.S. Const. amend. XIV; accord State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (reversing conviction for ineffective assistance of counsel where defense attorney proposed definitional instruction that lowered State's burden of proof with respect to self-defense). A technical legal term must be defined if requested. Gordon, 153 Wn. App. at 532.

Here, the court instructed the jury that it had to find beyond a reasonable doubt that Mr. Love committed four “prior offenses” within the last ten years. CP 56. However, the court provided an incomplete definition of prior offense which did not explain the State’s burden with respect to out-of-state convictions:

Prior offense means a conviction for driving under the influence of intoxicating liquor for which the date of arrest is within ten years of the date of arrest for the current charge.

CP 58 (Instruction 8). Because one of the alleged prior offenses was from Alaska, the court should have also provided the instruction proposed by Mr. Love:

An out-of-state conviction is a prior offense if it is proven that if the out-of-state violation had occurred here that it would be a violation of the law in Washington.

CP 65; 2/9/10 RP 21. This instruction tracks the statutory definition of the element. RCW 46.61.5055(14)(a)(vi). The court’s refusal to provide an instruction correctly defining the element violated Mr. Love’s right to due process. Gordon, 153 Wn. App. at 532.

b. Reversal is required. Under state law, “[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The trial court’s refusal to define

“prior offense” with respect to out-of-state convictions relieved the State of its burden to prove every element of the crime.

Accordingly, automatic reversal is required.

Even if it applies the federal standard, this Court should reverse. Under that standard, constitutional errors require reversal unless the State proves, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot prove beyond a reasonable doubt that this error did not prejudice Mr. Love. The Alaska DUI statute is broader than Washington’s, and the State did not present Mr. Love’s guilty plea or statement of defendant on plea of guilty to the jury. Alaska Stat. 28.35.030; RCW 46.61.502; exs. 3-4. Thus, it would have been impossible for the jury to ascertain which facts Mr. Love admitted, had it been properly asked to do so. The conviction should be reversed, and the case remanded for a new trial.

3. THE STATE FAILED TO PROVE THE
COMPARABILITY OF A PRIOR CONVICTION
INCLUDED IN MR. LOVE'S OFFENDER SCORE.

a. The State bears the burden of proving a defendant's prior convictions by a preponderance of the evidence. The Sentencing Reform Act ("SRA") creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608 (2005).

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

As explained in Section (D)(1) above, Washington courts apply a two-part test to determine whether the State has satisfied the burden as to comparability. Morley, 134 Wn.2d 588 at 605-06.

First, the court compares the elements of the out-of-state crime with the comparable Washington crime. Lavery, 154 Wn.2d at 255. If the elements are comparable, the sentencing court counts the defendant's out-of-state conviction as an equivalent Washington conviction. Id. at 254. But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant's underlying conduct, as evidenced by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, "the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial." Lavery, 154 Wn.2d at 255 (quoting Morley, 134 Wn.2d at 606).

An Alaska DUI conviction is not legally comparable to a Washington DUI conviction. Compare RCW 46.61.502 and Alaska Stat. 28.35.030. Therefore, an Alaska DUI conviction should be included in a defendant's Washington offender score only on the rare occasion that the State can prove factual comparability. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606.

b. The State failed to prove that Mr. Love's Alaska DUI conviction is comparable to a Washington DUI conviction. The State fails to show factual comparability if it does not present evidence that the necessary facts were admitted by the defendant or proved to a jury beyond a reasonable doubt. Lavery, 154 Wn.2d at 258; Thiefault, 160 Wn.2d at 416; Thomas, 135 Wn. App. at 483-85; Ortega, 120 Wn. App. at 174. As explained in section (D)(1) above, the State failed to prove that Mr. Love's Alaska DUI conviction is factually comparable to a Washington DUI conviction, because it did not present a plea agreement, statement of defendant on plea of guilty, or transcript showing that Mr. Love admitted the necessary facts. This case must be remanded for resentencing under an offender score that does not include the Alaska conviction..

c. Mr. Love's sentence must be vacated and his case remanded for resentencing on the existing record. On remand, the State may not introduce new evidence because Mr. Love specifically objected to the State's evidence of the comparability of the Alaska conviction in the trial court. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). Mr. Love repeatedly argued that the evidence the State presented was not sufficient to prove the

comparability of the Alaska conviction, and cited Thiefault in support of his argument. 2/8/10 RP 58-68; 2/9/10 RP 2-12.

In Lopez, after the defendant objected, the prosecutor replied, "We can provide copies of the judgments and sentences in both cases. I don't have them with me right now." Lopez, 147 Wn.2d at 518. The judge declined to accept the prosecutor's offer and proceeded with sentencing. Id. The State argued that because it offered to find the judgments and sentences it should not be penalized for the sentencing court's decision to proceed without them. Id. at 523. This Court and the Supreme Court disagreed, holding that the State could not be given a second opportunity to prove its allegations of the defendant's criminal history where the defendant had objected below. Id. at 521. As in Lopez, this Court should "hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." Lopez, 147 Wn.2d at 520-21 (quoting Ford, 137 Wn.2d at 485).

4. THE SENTENCING COURT ERRED IN IMPOSING 12 MONTHS OF COMMUNITY CUSTODY WHERE THE TERM OF CONFINEMENT WAS 55 MONTHS AND THE STATUTORY MAXIMUM WAS 60 MONTHS.

The sentencing court imposed a 55-month term of confinement and also imposed a 12-month term of community custody, even though the statutory maximum for the offense is 60 months. CP 18-19. The court reasoned that Mr. Love would serve up to seven months of community custody as part of his earned early release time. 2/25/10 RP 14-15. However, the statutory authority for such a sentence has been repealed, and the amendment is retroactive.

Engrossed Substitute Senate Bill 5288 amended RCW

9.94A.701 to add:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Laws of 2009, ch. 375, § 5; RCW 9.94A.701(8). Section 7 of the same bill deleted the portion of RCW 9.94A.707 that had stated community custody could begin "at such time as the offender is transferred to community custody in lieu of earned release." Laws

of 2009, ch. 375, § 7. A similar provision allowing for the imposition of community custody during earned early release was also repealed. See In re the Personal Restraint Petition of Brooks, 166 Wn.2d 664, 672 n.4, 211 P.3d 1023 (2009) (discussing former RCW 9.94A.715). These amendments took effect August 1, 2009, and are retroactive to all cases in which a community custody term was imposed and has not yet been completed. Laws of 2009 ch. 375, § 20.

In sum, under the current statutory scheme the court erred in imposing more than 5 months of community custody on top of a 55-month sentence for a Class C felony. Mr. Love's case must be remanded for resentencing.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Love's conviction and remand for entry of a conviction on the lesser-included offense of misdemeanor DUI. In the alternative, it should reverse Mr. Love's conviction and remand for a new trial. Finally, this Court should reverse the sentence for improper inclusion of the Alaska conviction in the offender score and for improper imposition of community custody, and remand for resentencing.

DATED this 6th day of July, 2010.

Respectfully submitted,


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