

NO. 68115-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY MOSLEY,

Appellant.

FILED
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COURT OF APPEALS
DIVISION I
SEATTLE, WA
KW

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAGH, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When a defendant's criminal history includes an out-of-state conviction, the Sentencing Reform Act (SRA) requires that the conviction be classified according to the comparable Washington offense. The State is required to prove the existence and classification of the out-of-state conviction by a preponderance of the evidence. Here, the State produced records establishing that the defendant's out-of-state conviction was comparable to a Washington felony. Did the trial court properly include that conviction when determining the defendant's offender score?

B. STATEMENT OF THE CASE

On June 16, 2011, the defendant, Larry Mosley, was charged with robbery in the first degree while armed with a deadly weapon, and assault in the second degree. CP 1-6. On December 1, 2011, he pled guilty to the amended charges of theft in the first degree and assault in the third degree. CP 20-38.

At the time of the plea, the State calculated Mosley's offender score as a seven based, in part, upon two out-of-state felony convictions. CP 22-38. By the time of sentencing, the State conceded that only one of the out-of-state convictions should be

scored. CP 39-45. The State argued that Mosley's 1997 Minnesota conviction for attempted burglary in the third degree was comparable to a Washington burglary second degree. Id. The State provided the criminal complaint, the plea form and other certified documents from the State of Minnesota in support of its argument. CP 46-66. These documents established that Mosley pled guilty to the amended crime of attempted burglary in the third degree, under Minnesota statute 609.582(3). Id.

Mosley disputed the inclusion of this out-of-state conviction, claiming that it was not comparable to any Washington felony. CP 200-02; RP 8, 13. After hearing argument and reviewing the certified public records of the conviction, the court concluded that Mosley's out-of-state conviction for burglary in the third degree was comparable to Washington's burglary in the second degree and included it in the offender score. RP 13. The court calculated Mosley's score as a six, with a standard range on the assault in the third degree of 22 months to 29 months. CP 204. The court imposed a prison-based DOSA. CP 206. This appeal follows.

C. **ARGUMENT**

**MOSLEY'S 1997 MINNESOTA BURGLARY CONVICTION
WAS PROPERLY INCLUDED IN HIS OFFENDER SCORE.**

Mosley's sole claim on appeal is that the trial court erred by including his 1997 Minnesota burglary in the third degree conviction in his offender score. However, because the State provided records of this conviction establishing that it was comparable to the Washington crime of burglary in the second degree, the trial court appropriately included this in his offender score. Accordingly, Mosley's sentence should be affirmed.

1. The Law Governing Comparability Of
Out-Of-State Convictions.

When a defendant's criminal history includes an out-of-state conviction, the SRA requires that the conviction be classified according to the comparable Washington offense. State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999); RCW 9.94A.525(3). The State is required to prove the existence and classification of the out-of-state convictions by a preponderance of the evidence. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). The Washington Supreme Court has explained this burden as follows:

It is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history, including the classification of out-of-state convictions.

Ford, 137 Wn.2d at 480.

In determining whether a foreign conviction is comparable to a Washington felony, the court has devised a two-part test for comparability. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the sentencing court compares the elements of the out-of-state offense with the elements of the apparently comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are comparable as a matter of law, or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score for the present crime. Ford, 137 Wn.2d at 479-80.

If the elements of the out-of-state crime are broader, then the court must examine the proven facts from the record of the foreign conviction to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington crime. State v. Larkins, 147 Wn. App. 858, 863, 199 P.3d 441 (2008) (citing Morley, 134 Wn.2d at 606; and Lavery, 154

Wn.2d at 255). “The sentencing court may look at the defendant’s conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.” Morley, 134 Wn.2d at 606.

In this case, the State produced the amended complaint, plea paperwork and other documentation of the conviction from the State of Minnesota. CP 46-66. Given that the defendant had tendered a plea of guilty in that case, the sentencing court properly examined the allegations in the complaint and determined that Mosley’s Minnesota attempted burglary in the third degree conviction was comparable to Washington’s burglary in the second degree.

2. The 1997 Minnesota Attempted Burglary In The Third Degree Conviction Is Comparable To A Washington Felony.

In 1997, Washington’s statute for burglary in the second degree provided:

- (1) A person is guilty of burglary in the second degree, if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030; Laws of 1989, 2nd ex. S.c 1 sec 2; 1989 c 412

sec 2. The comparable Minnesota statute provided:

Subd.3 Burglary in the third degree. Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building commits burglary in the third degree.

Former Minn. St. Sec. 609.582; Laws of 1988, c 712, sec. 11. It is not disputed that the definitions of attempt in both Washington and Minnesota are essentially the same as they both require the intent to commit a crime and also require the defendant to take a substantial step in the commission of that crime. See Appellant's Brief at 6-7.

As to the comparability of the two burglary statutes, both required that a trespass occur inside a building. Furthermore, both required the intent to commit a crime therein. Washington's statute required the intent to commit a crime against persons or property therein. Minnesota's statute required the intent to steal or to commit a felony or gross misdemeanor while in the building. Since the Minnesota statute allows for the intent to commit any felony or misdemeanor as a predicate, its definition was more expansive than Washington's. Thus, the inquiry turns to a review of the

undisputed facts from the record of this prior conviction to determine if the conduct was comparable to Washington's burglary in the second degree.

The amended complaint for the Minnesota burglary alleged:

That on or about the 25th day of August, 1997, in Ramsey County, Minnesota, defendant Larry Steele Mosley did wrongfully and unlawfully attempt to enter a building located at 680 Virginia without consent of the lawful possessor, Thomas Carrey, and with intent to steal while in the building.

CP 48 (Emphasis Supplied). The defendant pled guilty to this offense. CP 46-66. Mosley claims that the charging document in this situation is insufficient to establish the requisite facts. That assertion is contrary to Minnesota case law. "It is well established that a defendant, by his plea of guilty, in effect judicially admit[s] the allegations contained in the complaint." Rickerts v. State, 795 N.W.2d 236 (2011), citing State v. Trott, 338 N.W.2d 248, 252 (Minn.1983).

The language from these admitted facts and elements from the amended complaint match the corresponding Washington statute. The 'intent to steal' language mirrors the 'intent to commit a crime against property' language from Washington.

To 'steal' something, in its common usage, is to commit theft (to take someone's property unlawfully). RCW 9A.56.020(1)(a), defines theft as, "[w]rongfully obtain or exert unauthorized control over the property. . . of another with intent to deprive him of such property..." (emphasis supplied). The crime of theft is, axiomatically, a crime against property. Mosley's reliance on RCW 9.94A.411, for a listing of property crimes is misplaced. Moreover, the use of RCW 9.94A.411 for this purpose was explicitly rejected in State v. Snedden, 149 Wn.2d 914, 73 P.3d 995 (2003).

Snedden was convicted of burglary in the second degree, based on the predicate crime of indecent exposure, as *a crime against a person*. Id. Snedden appealed, arguing, in part, that indecent exposure was not a listed crime under the Sentencing Reform Act of 1981 (Former 9.94A.440, *recodified as* RCW 9.94A.411). The Court in Snedden ruled:

First, the SRA list applies only to felonies. . . The crime of indecent exposure is a misdemeanor or gross misdemeanor for first time offenders. . . Thus, one would not expect to find indecent exposure among the SRA list of felonies. Second, the legislature clearly indicated that the list was solely for the purpose of guiding prosecutors. RCW 9.94A.401. The SRA list of prosecuting standards serves a wholly different purpose than the second degree burglary statute. Third, the SRA list is not applicable because it was enacted several years after the second degree

burglary statute. The SRA list was enacted in 1983, while the second degree burglary statute was enacted in 1975, former RCW 9.94A.440 (1983); RCW 9A.52.030. The SRA list, therefore, could not have been considered by the legislature when adopting the burglary statute. Finally, the SRA list and second degree burglary statutes are contained in separate chapters of the code. If the legislature intended the SRA list to be used as an interpretive device in other chapters of the code, it presumably would have indicated its intent. Mr. Snedden errs in relying upon the SRA list as an interpretive device.

Snedden, 149 Wn.2d at 922. Thus, while the court in Larkins opined that certain crimes exist that would not fit within the definition of burglary, certainly the intent to commit a theft, in any degree, while trespassing inside a building would most certainly meet that definition. Larkins, 147 Wn.2d at 864.

Based on Mosley's plea to the elements as set forth in the amended complaint no inferences or fact-finding by this court are necessary. All of the necessary facts were presented to the trial court at sentencing.

The State met its burden of proving by a preponderance of the evidence that Mosley's Minnesota attempted burglary in the third degree conviction was comparable to the Washington felony of Attempted Burglary in the Second Degree.

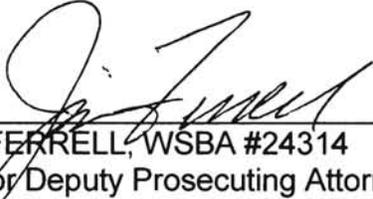
D. CONCLUSION

For the reasons stated above, the trial court's decision to count the Minnesota burglary conviction for scoring purposes should be affirmed.

DATED this 26th day of September, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen, Broman and Koch 1908 East Madison, Seattle, WA 98122, containing a copy of the Brief of Respondent and Notice of Appearance, in STATE V. LARRY MOSLEY, Cause No. 68115-0-1, in the Court of Appeals of the State of Washington, Division 1.

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

Mary Heinzen
Name Mary Heinzen
Done in Kent, Washington

9/26/12

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