

68643-7

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NO. 68643-7-1

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

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STATE OF WASHINGTON

Respondent

v.

LEONARD C. WOODY,

Appellant

2012 DEC 13 PM 1:43  
#12

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Were the defendant's Ohio convictions for aggravated trafficking of a controlled substance and trafficking of a controlled substance legally comparable to Washington's statutes proscribing delivery or possession with intent to deliver a controlled substance?

2. If the charges were not legally comparable to a Washington offense is the remedy to remand to the trial court for further proceedings to determine if the Ohio charges were factually comparable?

## **II. STATEMENT OF THE CASE**

On May 18, 2010 Cara Murray was awaked around 2:30 a.m. by the sound of an alarm going off. She looked out her back bedroom window and saw that the alarm was coming from Jack's espresso bar located just over 500' from her home. She saw a car drive slowly down the street where the espresso stand was located. When the car stopped someone got out and went into Jack's espresso bar. She then saw the person leave the business and walk briskly to the car as it drove up to him. Ms. Murray called 911 to report what she saw. 1 RP 16-31; 2 RP 115.

Officer Sutherland from the Marysville Police Department responded to the business. He found the glass door to the stand

had been shattered by a large rock, which he found inside the stand. Officer Sutherland talked to Ms. Murray and got a description of the car associated with the burglary. He then called dispatch to broadcast the information to other officers in the area. 1 RP 92-94, 97.

Officer Riches from the Marysville Police Department saw the car matching the description given 10 blocks from Jack's espresso bar. Officer Riches stopped the car and contacted the driver, Leonard Woody, the defendant. Officer Riches asked the defendant and his two passengers to step out of the car. Mr. Riley, who had been sitting in the front passenger seat, was sweating profusely. The defendant gave Officer Riches permission to search the car. Under the front passenger seat he found a bank bag with the name Jack's on it. The bag contained approximately \$74.00 inside. 1 RP 80-83, 99-100.

Todd Borseth was one of two officers for the corporation that owned Jack's espresso bar. Mr. Borseth did not give the defendant or either of the passengers in his car permission to be in the espresso stand or take any property from the stand. 1 RP 59, 68, 70.

The defendant was charged with one count of second degree burglary. 1 CP 53-54. He was convicted of the charge by a jury. 1 CP 2, 13. At sentencing the State asserted the defendant had an offender score of 6 based on two prior convictions for Aggravated Trafficking in drugs (cocaine), three counts of Aggravated Trafficking in drugs (marijuana) both from Ohio, and one count of possession of a controlled substance from Snohomish County. 2 CP 55-70. The standard range based on that score was calculated as 22-29 months confinement. 4-12-12 RP 2. The defense did not dispute the offender score or standard range calculation. 4-12-12 RP 3-4. The trial court determined the prior offenses all counted toward the defendant's offender score. It then sentenced him within that standard range. 1 CP 3, 5; 4-12-12 RP 5.

### **III. ARGUMENT**

#### **A. THE DEFENDANT'S PRIOR CONVICTIONS UNDER THE OHIO TRAFFICKING STATUTE ARE NOT LEGALLY COMPARABLE TO A WASHINGTON OFFENSE.**

Out of state convictions are included in the defendant's offender score if the foreign crime is comparable to a Washington Felony offense. RCW 9.94A.525(3). If the elements of a foreign offense are substantially similar to the elements of a Washington

offense then the out of state offense is legally comparable to a Washington offense and the prior conviction is included in the defendant's offender score. State v. Morely, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998), State v. Jordan, 158 Wn. App. 297, 300, 241 P.3d 464 (2010).

If the elements of the foreign offense are not identical to the Washington counterpart, or if the foreign statute is broader than the Washington definition of the particular crime then the court may look to the defendant's conduct to determine whether he would have violated the comparable Washington statute. Morely, 134 Wn.2d at 606. To determine whether a foreign offense is factually comparable the court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The court may not include the prior offense in the offender score if it is neither legally nor factually comparable to a Washington offense. Id.

The defendant here was convicted under Ohio Revised Code § 2925.03(A)(1). 2 CP 66-68. That statute states in relevant part:

No person shall knowingly do any of the following: sell or offer to sell a controlled substance.

Ohio St. §2925.03(A)(1).

Ohio courts have held that a person may offer to sell a controlled substance even if he does not possess the substance, or if the substance sold is not actually a controlled substance. State v. Bazy, 621 N.E.2d 604 (Ohio 1993), State v. Scott, 432 N.E.2d 798 (Ohio 1982).

In Washington a person violates RCW 69.50.401 if he manufactures or possess with intent to deliver a controlled substance. The defendant asserts that the Washington statute is not legally comparable because it requires some form of possession, whether actual or constructive, whereas the Ohio statute does not. Brief of Appellant at 11-12. The State concedes that the Washington and Ohio statutes are not legally comparable.

The record does not contain any information regarding the facts which formed the basis for the convictions out of Ohio. The Court should remand the case to the trial court for a new sentencing hearing. This remedy is available pursuant to statute and case authority.

Where the offender score determined by the trial judge is not supported by the record, and the defendant has failed to put the trial court on notice of any defect in the score, remand for an evidentiary hearing to allow the State to prove the classification of the disputed convictions is the appropriate remedy. State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999). Here the defendant did not object to the offender score calculated by the State and adopted by the trial court. 4-12-12 RP 3-4. Remand for an evidentiary hearing to determine whether the Ohio offenses were factually comparable to a Washington offense is appropriate.

Moreover, even if the defendant had raised an objection to the offender score, remand to allow the State to present additional evidence to permit the court to determine whether those convictions were factually comparable to a Washington offense would be appropriate. Before 2008 the trial court was limited to the record as it existed at the original sentencing hearing if the defendant had objected to the court's calculation and it was later found on review that the score was incorrect. State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999), In re Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2004), State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). In 2008 the Legislature amended RCW 9.94A.530 in response to

those decisions. Laws of Washington 2008, Ch. 231, § 1. The statute was amended to read in part “[o]n remand for resentencing following appeal or collateral attack the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.” RCW 9.94A.530(2). This amendment clearly permits the State to supplement the record on remand for re-sentencing.

The Supreme Court recently addressed the 2008 amendments to RCW 9.94A.530(2) in State v. Hunley, \_\_\_ Wn.2d \_\_\_, 287 P.3d 584 (2012). The trial court may rely on information that the defendant “acknowledges” when determining a sentence RCW 9.94A.530(1). The 2008 amendments to that statute redefined “acknowledge” to include not objecting to criminal history at the time of sentencing. RCW 9.94A.530(2), Laws of Washington 2008, Ch. 231, §4. The Supreme Court found this portion of the statute unconstitutional because it conflicted with its earlier interpretation of the requirements for due process at sentencing. Hunley, 287 P.3d at 591-92. That decision did not address the portion of the amendment relevant here. Rather, the Court stated the proper remedy was to remand for re-sentencing to permit the

State to prove the defendant's prior convictions if the defendant did not affirmatively acknowledge them. Id. at 592.

#### **IV. CONCLUSION**

For the foregoing reasons the State asks the Court to remand the case to the trial court to consider additional information regarding the Ohio convictions and to re-determine the defendant's offender score.

Respectfully submitted on December 12, 2012.

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