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No. 70224-6

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MICHAEL REAVELEY,

Appellant.

2010 DEC 23 PM 4:33  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in including a prior Wisconsin conviction for “burglary” in Mr. Reaveley’s offender score, where the State did not prove the conviction was comparable to a Washington felony.

2. The trial court erred in including a prior Wisconsin conviction for “operating a vehicle without owner’s consent” in Mr. Reaveley’s offender score, where the State did not prove the conviction was comparable to a Washington felony.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A sentencing court may not include a prior out-of-state conviction in a defendant's offender score unless the State proves the foreign offense is both legally and factually comparable to a Washington felony. Did the trial court err in including two prior Wisconsin convictions in Mr. Reaveley’s offender score, where the foreign offenses were not legally comparable to Washington felonies and the State presented no documents to show the offenses were factually comparable?

### C. STATEMENT OF THE CASE

Joshua Reaveley was charged with one count of second degree burglary, arising from an incident that allegedly occurred on December 2, 2012. CP 55. Following a jury trial, Mr. Reaveley was convicted as charged. CP 3, 23.

Prior to sentencing, the State asserted Mr. Reaveley had two prior convictions from Wisconsin that should be included in his offender score: one for “Burglary – Building or Structure (B)” and one for “Take & Drive Vehicle w/o Consent (C).” CP 21-22. The State presented no documents or other information to show the Wisconsin priors were comparable to Washington felonies. Nonetheless, the court included the two Wisconsin convictions in Mr. Reaveley’s offender score. CP 4-5, 14.

### D. ARGUMENT

**The trial court erred in including two Wisconsin prior convictions in Mr. Reaveley’s offender score because the State did not prove the offenses were comparable to Washington felonies**

A defendant’s offender score establishes the range a sentencing court may use in determining the sentence. RCW 9.94A.530. The court calculates the offender score based upon its findings of the defendant’s criminal history, which is a list of the defendant’s prior

convictions. RCW 9.94A.030(11); RCW 9.94A.525. With limited exceptions, the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994).

If a defendant's criminal history includes prior convictions from another state, the Sentencing Reform Act requires the court to translate the convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether an out-of-state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the out-of-state crime with the comparable Washington felony offense. If the elements are comparable, the out-of-state conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. If the elements of the out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute.

Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

“If the elements of the foreign offense are broader than the Washington counterpart,” that is, if the out-of-state statute criminalizes more conduct than the comparable Washington statute, the elements are not legally comparable. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); Morley, 134 Wn.2d at 606. Put another way, if the court can conceive of a situation in which a defendant could commit the foreign crime without committing the Washington crime, the crimes are not legally comparable. State v. Jackson, 129 Wn. App. 95, 107-09, 117 P.3d 1182 (2005).

If the out-of-state conviction is not legally comparable, the court must determine whether the defendant's underlying conduct would have violated the comparable Washington felony statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The court may examine only those documents that show conclusively that the facts necessary to establish comparability were proved to a jury or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258.

The mere fact of the prior conviction is not sufficient to make this showing. Id.

1. The State did not prove Mr. Reaveley's prior Wisconsin conviction for "burglary" was legally or factually comparable to a Washington felony

Mr. Reaveley's prior Wisconsin conviction for burglary was not legally comparable to a Washington felony because Wisconsin's statute criminalizes a broader range of conduct than the comparable Washington statute.

Wisconsin's burglary statute provides:

- (1m) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
- (a) Any building or dwelling; or
  - (b) An enclosed railroad car; or
  - (c) An enclosed portion of any ship or vessel; or
  - (d) A locked enclosed cargo portion of a truck or trailer; or
  - (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
  - (f) A room within any of the above. . . .

Wis. Stat. § 943.10. Thus, a person who intentionally and without consent enters an enclosed portion of any ship or vessel, or a locked enclosed cargo portion of a truck or trailer, with intent to steal or commit a felony inside, is guilty of felony burglary in Wisconsin. Id.

In Washington, however, if a person unlawfully entered one of those structures with the intent to commit a crime inside, he or she would be guilty only of a gross misdemeanor. Washington's second degree vehicle prowling statute provides:

(1) A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a vehicle other than a motor home, as defined in RCW 46.04.305, or a vessel equipped for propulsion by mechanical means or by sail which has a cabin equipped with permanently installed sleeping quarters or cooking facilities.

(2) Except as provided in subsection (3) of this section, vehicle prowling in the second degree is a gross misdemeanor.

(3) Vehicle prowling in the second degree is a class C felony upon a third or subsequent conviction of vehicle prowling in the second degree. A third or subsequent conviction means that a person has been previously convicted at least two separate occasions of the crime of vehicle prowling in the second degree. . . .

RCW 9A.52.100.

“Vehicle” is defined for purposes of Washington’s statute as “a ‘motor vehicle’ as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail.”

RCW 9A.04.110(29). “Motor vehicle” as defined in the vehicle and traffic laws means “every vehicle that is self-propelled and every

vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.” RCW 46.04.320.

Thus, in Washington, a person who unlawfully enters an enclosed portion of a ship or vessel, or a locked enclosed cargo portion of a truck or trailer, with intent to commit a crime therein, is guilty of second degree vehicle prowling. RCW 9A.52.100(1). That crime is only a gross misdemeanor and may not be included in a person’s offender score. RCW 9A.52.100(2); RCW 9.94A.525.

Because Wisconsin’s burglary statute criminalizes a broader range of conduct than the comparable Washington statute, Mr. Reaveley’s Wisconsin conviction for “burglary” is not legally comparable to a felony offense in Washington. The State presented no evidence to show that the Wisconsin conviction was factually comparable to a Washington felony. Therefore, the court erred in including the Wisconsin conviction for “burglary” in Mr. Reaveley’s offender score. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255.

2. The State did not prove Mr. Reaveley’s prior Wisconsin conviction for “operating vehicle without owner’s consent” was legally or factually comparable to a Washington felony

As with Mr. Reaveley’s prior conviction for “burglary,” his prior Wisconsin conviction for “operating a vehicle without owner’s

consent” was not legally comparable to a Washington felony because Wisconsin’s statute criminalizes a broader range of conduct than the comparable Washington statute.

Wisconsin’s statute, “Operating vehicle without owner’s consent,” provides:

(2) Except as provided in sub. (3m), whoever intentionally takes and drives any vehicle without the consent of the owner is guilty of a Class H felony.

(3) Except as provided in sub. (3m), whoever intentionally drives or operates any vehicle without the consent of the owner is guilty of a Class I felony.

(3m) It is an affirmative defense to a prosecution for a violation of sub. (2) or (3) if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was taken from the possession of the owner. An affirmative defense under this subsection mitigates the offense to a Class A misdemeanor. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence. . . .

Wis. Stat. § 943.23.

Wisconsin’s statute defines “vehicle” as “any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.” Wis. Stat. § 939.22(44). Plainly, the statute encompasses a motorboat or other self-propelled vessel that operates on water. Thus, in Wisconsin, a person who intentionally takes and drives away a

motorboat without the owner's consent is guilty of a felony. Wis. Stat. § 943.23(2).

In Washington, however, a person who intentionally takes and drives away a motorboat without the owner's consent is not guilty of the felony offense of taking a motor vehicle. Washington's statute for second degree taking a motor vehicle without permission provides:

(1) A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

(2) Taking a motor vehicle without permission in the second degree is a class C felony.

RCW 9A.56.075.

A "motor vehicle" for purposes of the statute means "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails." RCW 46.04.320. The term does *not* include a motorboat or other motor vessel that operates on water rather than on land. State v. Martin, 55 Wn. App. 275, 276-77, 776 P.2d 1383 (1989). A person

cannot be convicted in Washington of taking a motor vehicle without permission for taking a motorboat without the owner's permission. Id.

Because Wisconsin's statute for operating a vehicle without the owner's consent criminalizes a broader range of conduct than the comparable Washington statute, Mr. Reaveley's Wisconsin conviction is not legally comparable to a felony offense in Washington. The State presented no evidence to show that the Wisconsin conviction was factually comparable to a Washington felony. Therefore, the court erred in including the Wisconsin conviction for "operating vehicle without owner's consent" in Mr. Reaveley's offender score. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255.

3. Mr. Reaveley must be resentenced

If the court erroneously includes a prior offense in the offender score and the defense fails to "specifically object" before imposition of the sentence, the case is remanded for resentencing and the State is permitted to introduce new evidence. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002). The Washington Supreme Court reaffirmed "the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing" in order to constitute a waiver of the right to challenge the offender score on

appeal. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009).

The mere failure to object to the prosecutor's factual assertions underlying the offender score calculation does not constitute an acknowledgement of those facts. Id. “Nor is a defendant deemed to have affirmatively acknowledged the prosecutor's asserted criminal history based on his agreement with the ultimate sentencing recommendation.” Id. In other words, a defendant who agrees with the State's asserted sentence range does not thereby “affirmatively agree” with the implicit factual assertions underlying that range.

Here, defense counsel did not object to inclusion of the two Wisconsin prior convictions in Mr. Reaveley's offender score but neither did he “affirmatively acknowledge” any facts or information introduced by the State for the purposes of sentencing. Mr. Reaveley conceded that he had a prior conviction from Wisconsin for “burglary” but he did not affirmatively agree that the conviction was comparable to a Washington felony. 4/09/13RP 3. The State presented no facts or information at all regarding comparability.

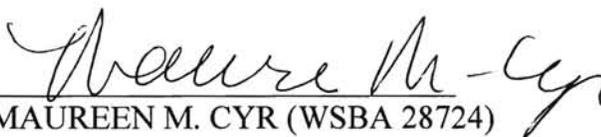
Because Mr. Reaveley did not waive his right to challenge his offender score, but did not specifically object, he is entitled to be

resentenced at a hearing at which the State may present additional evidence. Lopez, 147 Wn.2d at 520; Mendoza, 165 Wn.2d at 928.

E. CONCLUSION

The trial court erred in including two prior Wisconsin convictions in Mr. Reaveley's offender score. He must be resentenced.

Respectfully submitted this 28th day of October, 2013.

  
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Washington Appellate Project - 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent/Cross-appellant,	)	NO. 70224-6-I
	)	
	)	
JOSHUA REAVELLEY,	)	
	)	
Appellant-Cross-respondent.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                   |                                     |
|-----|--|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201      | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | JOSHUA REAVELEY<br>635572<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 28<sup>TH</sup> DAY OF OCTOBER, 2013.

X \_\_\_\_\_ 

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