

No. 82868-7

SANDERS, J. (dissenting)—I agree Vincent Adolph’s personal restraint petition is not procedurally barred and is properly before the court. However, because the State’s evidence was not comparable to a certified copy of the judgment and sentence and was insufficient to prove the Lincoln County DUI<sup>1</sup> conviction, I dissent.

*The State must present evidence comparable to a certified copy of the judgment and sentence of a prior conviction.*

At sentencing “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing . . . .” Former RCW 9.94A.530(2) (2005).<sup>2</sup> The State bears the burden to prove prior convictions for purposes of sentence enhancements by a preponderance of the evidence. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); *see also In re Pers. Restraint of Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988) (“[I]t [is] inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.”).

“The best evidence of a prior conviction is a certified copy of the judgment.” *Lopez*, 147 Wn.2d at 519 (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). “[O]ther comparable documents of record or transcripts of prior proceedings”

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<sup>1</sup> (“[D]riving under the influence of intoxicating liquor or any drug . . . .” RCW 46.61.502(1))

<sup>2</sup> Former RCW 9.94A.530(2) (2005) had an effective date of April 15, 2005. Mr. Adolph’s trial began May 31, 2005, and his sentencing hearing occurred September 19, 2005.

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may also be sufficient to prove the prior conviction. *Ford*, 137 Wn.2d at 480. The State bears the burden of showing the comparable evidence bears ““some minimal indicium of reliability beyond mere allegation.”” *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (quoting *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982)); see also *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *Ford*, 137 Wn.2d at 481.

Comparable evidence is generally another court-certified record. See, e.g., *State v. Chandler*, No. 38726-3-II, 2010 WL 3004786, at \*2 (Wash. Ct. App. Aug. 3, 2010) (finding certified copies of court docket sheets and a certified copy of the defendant’s driver’s license sufficient evidence of a prior conviction); *State v. Aronhalt*, 99 Wn. App. 302, 306, 310, 994 P.2d 248 (2000) (finding adequate certified verdict forms, judgments, clerk minute entries or court orders submitted to prove each conviction). But see *State v. Winings*, 126 Wn. App. 75, 92, 107 P.3d 141 (2005) (“While [the documents presented by the State] appear to be certified, this determination is immaterial.” (footnote omitted)). Moreover, presenting or referring to “uncertified or unauthenticated photocopies of apparent or purported court records . . . represents a ‘loose practice’ which we do not condone.” *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001) (criticizing the use of uncertified and unauthenticated copies at sentencing).

Yet a certified court record is not necessarily sufficient. The State may satisfy its

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burden to prove a prior offense by presenting a certified copy of a judgment and sentence reflecting a prior conviction in the defendant's criminal history or offender score calculation, but only if the defendant does not object to the use of the document. *State v. Cabrera*, 73 Wn. App. 165, 168-69, 868 P.2d 179 (1994). If the defendant objects, the State must produce additional evidence to prove the existence of the prior conviction. *State v. Mitchell*, 81 Wn. App. 387, 390 n.2, 914 P.2d 771 (1996).

Where the State has established a defendant's prior conviction by a preponderance of the evidence using documents other than certified Washington court records, other indicia of the evidence's reliability were present. *State v. Vickers*, 148 Wn.2d 91, 120, 59 P.3d 58 (2002) (finding sufficient a docket sheet from a Massachusetts court, signed by the judge and attested as a true copy by a court clerk); *State v. Morley*, 134 Wn.2d 588, 611, 952 P.2d 167 (1998) (finding the State established a prior conviction by presenting an entire court-martial record, including a stipulation of facts signed by the defendant and a transcript of the court-martial judge questioning the defendant on the underlying facts of the prior conviction); *State v. Blunt*, 118 Wn. App. 1, 5, 8-9, 71 P.3d 657 (2003) (finding a district court docket printout, bolstered by a court administrator's testimony, sufficient evidence of a prior DUI conviction).

*The State's evidence of the Lincoln County DUI was not comparable to a certified copy of the judgment and sentence.*

The State presented a certified copy of Adolph's Washington State Department of Licensing (DOL) driving record abstract and a copy of a defendant case history from DISCIS<sup>3</sup> to establish the Lincoln County DUI conviction. These were not certified court records. The question, then, is whether the documents contained other indicia of reliability, sufficient to make them comparable to a certified copy of the judgment and sentence, the "best evidence" of a prior conviction.

The majority gives a cursory explanation of the documents' reliability. Courts and court clerks across the state forward records of driving-related convictions to the director of licensing. RCW 46.52.101(1), (2). The director compiles a case record for every driver. RCW 46.52.120(1). The DISCIS database is a case management system. It "serves as a statewide clearinghouse for criminal history information." Washington Courts Judicial Information System (JIS), *available at* <http://www.courts.wa.gov/jis/> (last visited Nov. 15, 2010). Only court personnel can add records to the DISCIS database. *State v. Cross*, 156 Wn. App. 568, 588, 234 P.3d 288 (2010).

Two courts have accepted a DISCIS printout to establish the existence of a prior conviction by a preponderance. In *State v. Labarbera*, 128 Wn. App. 343, 348, 115 P.3d 1038 (2005), the State met its burden by presenting a DISCIS printout and a presentence investigation report (PSI). The Department of Corrections prepares a presentence report containing the defendant's criminal history pursuant to CrR 7.1(b).

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<sup>3</sup> District and Municipal Court Information System.

The PSI is specifically intended to provide relevant information to sentencing courts.

*See* CrR 7.1(b).

In contrast, DOL driving records are intended to promote highway safety. *See State v. Harlow*, 85 Wn. App. 557, 563-64, 933 P.2d 1076 (1997). They are confidential records, accessible by state patrol officers, police officers, and traffic safety commission personnel. RCW 46.52.120(2). A driving record abstract, as was introduced by the State to prove the Lincoln County DUI, is available to a wider class of people. *See* RCW 46.52.130. Insurers, employers, and drug treatment programs approved by the Department of Social and Health Services may access driving record abstracts. *Id.* City and county prosecuting attorneys may access an individual's driving record abstract, but nothing in the statute allows prosecutors to introduce the abstract as proof of a prior conviction. *See* RCW 46.52.130(1)(h).

The statute did not intend Adolph's DOL driving record abstract to establish in court the existence of the Lincoln County DUI conviction. The DOL driving record abstract depends on a correct report of a driving-related conviction from the court and a correct compilation of reports by the director of licensing. *See* RCW 42.56.101(1)-(2), .120(1). In a document that is at least two steps removed from the original conviction, there is an unreasonable risk of error.<sup>4</sup> *See City of Redmond v. Moore*, 151 Wn.2d 664,

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<sup>4</sup> The majority is correct that "we have found DOL records to be presumptively reliable in other contexts." Majority at 14 n.1. Specifically, we have found DOL records sufficient to give police probable cause to arrest a driver for driving with a suspended license. *State v. Potter*, 156 Wn.2d 835, 842, 132 P.3d 1089 (2006); *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). The

673, 91 P.3d 875 (2004) (describing examples in the record where the DOL erroneously suspended drivers' licenses based on misinformation of prior convictions or infractions provided by the courts). Unlike a certified copy of a judgment and sentence, a document intended to establish the existence of the conviction, the DOL driving record abstract is not reliable for that purpose.<sup>5</sup>

In *Cross* the State met its burden by presenting only a DISCIS printout to establish the existence of a prior conviction for third degree assault. 156 Wn. App. at 588-89. The court stated, "The validity and reliability of criminal history reports generated from information in the JIS, such as DISCIS reports, is secure because only

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consequence of allowing a DOL record to serve as the basis for probable cause is an arrest that may never lead to prosecution or may be challenged in court. In contrast, the consequence of allowing a DOL record to serve as proof of a prior conviction is an increased prison sentence. This greater consequence requires a higher standard of reliability, as our case law demonstrates by requiring a certified copy of the judgment and sentence of a prior conviction or comparable evidence.

<sup>5</sup> Similarly, in *State v. Rivers*, 130 Wn. App. 689, 704, 128 P.3d 608 (2005), the court found certified copies of Washington State Patrol records, containing uncertified copies of the defendant's judgment and sentence from a prior conviction, were intended to be used to prove the identity of the defendant, not to serve as proof of the prior conviction.

The majority claims RCW 46.52.101(7) "contemplate[s] that DOL records will be relied upon in the prosecution of vehicular crimes." Majority at 14 n.1. The majority also cites RCW 46.52.120(2), allowing a driver case record to be admitted where relevant in a criminal case. *Id.* RCW 46.52.101(7)'s requirement that prosecuting attorneys in DUI cases request DOL abstracts does not bolster the driving records' reliability at sentencing, it merely requires prosecutors to take the first step toward determining if the defendant has a prior driving-related conviction. RCW 46.52.101(7) and RCW 46.52.120(2) allow prosecutors to use DOL records, but they do not imply DOL abstracts are comparable to a certified copy of a judgment and sentence or sufficient to prove a prior conviction by a preponderance. I do not dispute DOL records might be useful in the prosecution of driving-related crimes, but their usefulness does not negate the State's duty to introduce a certified copy of the judgment and sentence of a prior conviction or other comparable evidence.

Washington State court personnel have access to the JIS to input case information. As such, the reports generated from the JIS are an official court record.” *Id.* at 588.

However, the fact that a document contains information originating in the courts does not make it comparable to a certified copy of a judgment and sentence.<sup>6</sup> *See State v. Rivers*, 130 Wn. App. 689, 704, 128 P.3d 608 (2005) (finding insufficient a judgment and sentence including a previous conviction in the defendant’s criminal history and finding insufficient Washington State Patrol records containing uncertified copies of a judgment and sentence from a previous conviction). Relying on the JIS web site, neither the majority nor *Cross* describes any procedural safeguards to ensure a DISCIS printout does not contain wrong information or mistakes by the various court personnel with access. Moreover, unlike a certified copy of a judgment and sentence, where the defendant saw the original and may access a copy, the full DISCIS printout is an internal court document.

The State did not make a showing that the DISCIS printout or the DOL driving record abstract was comparable to a certified copy of a judgment and sentence. The State did not meet its burden to show these documents bore “some minimal indicium of reliability.” *Ibarra*, 737 F.2d at 827 (quoting *Baylin*, 696 F.2d at 1040). The State’s

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<sup>6</sup> The majority also makes this assumption, stating, “A DOL driving record abstract and a DISCIS defendant criminal history are thus comparable to a certified judgment and sentence because they are official government records, based on information obtained directly from the courts, and can be created and modified only by government personnel following procedures established by statute or court rule.” Majority at 15.

burden to prove prior convictions under the Sentencing Reform Act is “not overly difficult to meet,” but the State expressly bears the ultimate burden. *Ford*, 137 Wn.2d at 480. “Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. . . . To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public.” *Id.* at 484. Where the State introduces evidence that is not comparable to a certified copy of a judgment and sentence, the State has not proved the existence of a prior conviction by a preponderance.

I would remand for resentencing. On remand, because Adolph objected to the evidence presented to establish the Lincoln County DUI conviction, the State should be held to the evidence on record used by the sentencing judge. *See id.* at 485 (“[W]here the disputed issues have been fully argued to the sentencing court, we would 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.”).



I dissent.

AUTHOR:

Justice Richard B. Sanders

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WE CONCUR:

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