Case # 311660

Statement of Additional Grounds for Review

State of Washington
v.

ROCKY RHODES KIMBLE

No. 31166-0-III

IN THE COURT OF APPEALS

Division III

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent,

V.

ROCKY RHODES KIMBLE,

Appellant.

REPLY BRIEF OF APPELLANT IN OPPOSITION TO ANDERS BRIEF

Rocky R. Kimble D.O.C# 808179

Appellant-Pro Se

Airway Heights Correction Center

P.O. Box 2049 MB60

Airway Heights, WA 99001-2049

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I) INTRODUCTION

This brief is offered by the appellant in opposition to my appointed appellate counsel's request to withdraw made upon counsel's belief that appellant's appeal is without merit and wholly frivolous. Appellant contends that his record, grounds for relief, and this appeal include many legal issues with merit as set-forth, herein. Upon the Court finding at least one legal issue with merit the Court should appoint new counsel and call for an advocade brief.

Alternatively, the court may find the proper course of action would be to remand this back to the trial court for a proper fact-finding hearing to adequately develop the record and resolve the factual claims asserted by appellant. With new appointment to conflict-free counsel to brief and argue appellant's action.

PLEASE NOTE: Unfortunately appellant is unable to properly identify the portions of the record as submitted by appointed appellate counsel. Appointed appellate counsel did not provide appellant with a clerk's index of a paginated verbatim report of proceeding's index. Appointed appellate counsel also did not provide all the relevant record, or the portions of the trial court record requested by appellant. Therefore, appellant respectfully offers the list below of the supporting record to be referenced to by abbreviated title, date and/or sub# as listed in the Stevens County Superior Court docket.

II RELEVANT RECORD IN SUPPORT

Please find attached a copy of Stevens Co. Superior Court to provide INDEX to the record referenced to by appellant in support of this REPLY BRIEF.

List of most Used Portions of Trial Court Record In Support

Sub# 35 PLEA AGREEMENT/SENTENCE RECOMMON

Sections 1.1
1.2
1.11
1.12
2.2

Sub # 36 STATEMENT OF DEFENDANT, PLEA GUILTY
Section 6, 6(c) & (g)

sub# 43 JUDGMENT AND SENTENCE
Sections 2.1, 2.2, & 2.3

Sub # 54 VERBATIM REPORT OF PROCEEDINGS
March 16, 2000 Page 6-8

Sub # 54 VERBATIM REPORT OF PROCEEDINGS
April 20, 2000 pages 7,15 & 19

Sub # 59

Sub #'s 66-97

Need Docket for 2-4

III) ASSIGNMENTS OF ERROR

No. 1 The Trial court abused its discretion when it concluded appellant's motion to be untimely.

No. 2 The trial court abused its discretion when it concluded appellant's motion to not include a substantial showing that he is entitled to relief.

No. 3 The trial court abused its discretion when it concluded that the appellant's motion did not require a factual hearing for resolution.

No. 4 The trial court abused its discretion in not treating the multiple current offenses as a single crime for a computation of appellant's offender score, and by applying the anti-merger statute sua sponte, post-sentencing.

No. 5 The trial court erred in failing to find the appellant's Judgment and sentence invalid on its face.

No. 6 Appellant received ineffective assistance of counsel from counsel appointed to represent appellant on motion to withdraw plea of guilty.

No. 7 Appellant has received ineffective assistance of appointed appellate counsel.

IV) ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1

Is there merit to assignment of error no. 1 when considering the trial court determined appellant's motion as untimely without any evidence or authority opposing appellant's claim & argument that his offender score is miscalculated, and because untimely was determined only under the "unreasonableness standard"?

No. 2

Is there merit to assignment of error no. 2 when considering the trial court received no argument, no authority and no briefing from appellant's appointed trial court counsel to advocate appellant's grounds for entitlement to relief?

No. 3

Is there merit to assignment of error no. 3 when considering the appellant asserts and shows that:

i) his offender score is miscalculated under the SRA, and there is not other record to how the score was determined;

ii) no evidence has ever been presented by the state to prove the existence of my out of state conviction;

iii) there has never been a comparability analysis conducted in order to properly classify the purported out-of-state conviction - assuming the state can prove if it exists;

iv) there has been no evidence produced to prove that the purported out-of-state conviction should not wash-out;

v) there are no underlying facts in the record upon which the purported out-of-state conviction was based; and

vi) appellant has never waived his challenge to the miscalculated offender score, or has he affirmatively acknowledged his criminal history as incorrect.

No. 4

Is there merit to assignment of error no. 4 when considering that the trial court computation has no support in the record to find an offender score of 3? Trial court's reliance on a score of 2 for the out-of-state conviction is presumptively made without the above identified necessary factual determination requisite to include the purported out-of-state conviction in computing the offender score. The record does not support the use of the burglary conviction as a separate offense for a score of 1 by the trial court in the plea hearing nor the sentencing hearing by the trial court.

No. 5

Is there merit to assignment of error no. 5 when considering that the trial court failed to acknowledge the miscalculated offender score & incorrect standard range on the face of appellant's Judgment and sentence and plea agreement documents.

No. 6

Is there merit to assignment of error no. 6 when considering that appellant's appointed trial court counsel submitted no briefing, and offered no substantive argument, authority or evidence to advocate appellant's motion heard on August 21, 2012.

No. 7

Is there merit to assignment of error no. 7 when considering that appellants' appointed appellate counsel has failed to promote the above legal issues with merit upon submission of an advocates brief, and instead has elected to submit an Anders brief.

V) STATEMENT OF THE CASE

Appellant Mr. Kimble entered a plea of guilty on two current offenses (Rape 1° & Residential Burglary) on March 16, 2000. Appellant entered the plea in exchange for the states recommendation to receive a standard range sentence on both offenses to run concurrent. (please see plea record; sub #'s 35 &36, and sub # S4 VRP 3-16-2000)

Appellant was sentenced on April 20, 2000 and was blind-sided with an exceptional sentence to nearly 3x the recommended sentence. (Please see sentencing record - sub # 43 and sub # S4 VRP 4-20-2000)

Within the record to the above proceedings there is no reference, mention, citation, evidence, or discussion that the residential burglary offense would receive tha discretionary application of the anti-merger statute RCW 9A.52.050. There is no record that the burglary offense to seperately scored and then used to increase the offender score.

The record clearly reflects that the two current offenses were to be counted as same criminal conduct, one offense and served concurrently. (Please see sub #'s 35 @ §2.2, #36 @ n.6 (g), #43 @ §2.2 and #54 VRP 3-16-2000 @ 6-9 & VRP 4-20-2000 @ 15)

The record reflects that the two current offenses consistantly receiving an identical offender score of 3 indicating that the burglary offense was never separately counted. Otherwise, the burglary offense would be denoted with a separate and lower score of 1, and the rape offense of 2. (Please see sub #35, @§1.12, #36 @ no.6 (a), #43 @ §§ 2.1-2.3, #54 VRP 3-16-2000 @ 6-9 & VRP 4-20-2000 @ 7)

The record reflects that the out-of-state conviction was acknowledged by all parties, but never properly compared to Washington law; never proved to exist, or proved that it doesn't wash-out. (Please see sub# 35 @ § 1.11, #36 @ n.6 (c), #43 @§ 2.2 and #54 VRP 3-16-2000 @ 6)

The record includes citations to only RCW's 9.94A.360 & 9.94A.400 (1)(a) as the authority applied to govern the computation and determination of the offender score. (please see sub# 43 @ §§ 2.1 & 2.2)

Direct appeal was taken with Mr. Wasson appointed to represent appellant in 2000. (See sub # 46 & 49) That appeal was dismissed based upon the holding in State v. Gore, 143 Wn2d 288 (2001) (See sub# 59) Gore is no longer good law and was overruled by State v. Hughes, 154 Wn2d 118 (2003) in accordance with the Blakely v. Washington in decision. Blakely & Hughes constitute a significant change-in-law rendering the mandate in appellants case invalid. Thus, no finality has ever properly attached due to the overrulling of Gore.

In 2012, appellant submitted a "MOTION TO WITHDRAW PLEA OF GUILTY" w/Memorandum, affidavit & attachments in Stevens County Superior Court. Appellant presented 3 grounds demonstrating entitlement to relief with ground III RESERVED. (Please see sub# 65-71)

The Honorable Judge Monasmith appointed counsel for appellant to presumedly advocate the determination of the MOTION on the merits. Two continuances were afforded Mr. Wasson to prepare. (Please see sub # 75-78)

The Honorable Judge Nielson assumed the matter and held a brief hearing on August 21. 2012. Although appellant fully expected a hearing on the merits, it appeared defense counsel Mr. Wasson had agreed to only address "venue" of the motion. No facts, evidence, authority or briefing was presented by Mr. Wasson on behalf of appellant. The only argument presented by Mr. Wasson was summarized by Judge Nielson in one sentence - "... look, lets have the hearing here because it likely will be sent back by the Court of Appeals, anyway, he (Wasson) sees some factual issues that need to be developed at this level..." (Please see sub # 96 VRP 8-21-2012 @ 5)

Although Mr. Wasson seemed to express a desire to have the trial court retain the motion, he stated that he "...would not be prepared to argue..." the merits of the motion, and was, only there in court to argue proper venue under "the reasonable time language" of RCW 10.73.090 & CrR 7.8 (.1 @ 3)

The record of the hearing includes no argument from the state asserting that the offender score is not miscalculated. Nor any argument that there is no error attached to the use of the purported out-of-state conviction in appellant's criminal history.

The State has not controverted the appellant's position with any substantive facts or argument with authority. The State contends that appellant's motion includes only legal issues and was not brought with a reasonable time to justify a transfer. (Sub # 73 & #96 VRP 8-21-2012)

On 8-29-2012 the Honorable J. Nielsen entered his decision. (See sub# 86) The decision includes only conclusive findings set forth without any supporting underlying facts, evidence er authority,. The conclusions without any application of the facts to the law, or reasons why appellant's authority cited facts. (Id)

In none of the record relied upon by the trial court can evidence be found to support a 2 + 1 calculation to determine the offender score;

- no record or mention of the anti-merger statue RCW 9A.52.050 is cited, identified, or applied to the computation of the offender score;
- no trial court judge has made a record of excercising their discretion to apply RCW 9A.52.050;
- no record to support an affirmative acknowledgment by appellant to accept an incorrect offender score, or a valid waiver from appellant to challenge a miscalculated offender score and subsequent incorrect standard range;
- No record or proof from the state to prove criminal history or prove the existence, the classification, or record to the underlying facts used to include the purported out-of-state conviction of robbery toward computing an offender score; and
- there is no record of opposition from the state to controvert or challenge appellant's grounds for relief until this appeal.

Before this appeal proceeding the state submitted only one pleading in opposition to appellant's motion. Basically, the state argues appellant is not entitled to any relief because he cannot overcome the time restrictions within CrR 7.8 (c)(2). The state relies upon State v. Lowden,165 WnApp 1009 (2011);

State v. Smith, 144 WnApp 860 and RCW 10.73.090 in support of thsir proposition. The state argues appellant, motion fails to meet the reasonableness requirement of CrR 7.8, (See sub# 73)

Appellant responded by submitting a REPLY to the states motion asserting controlling case law to find my motion timely as based upon an invalid J & S with an incorrect offender score and incorrect standard range on its face. (Pleas see REPLY, SUB # 77)

It should be noted that appellant had only one meeting with Mr. Wasson. Appellant was under the impression that Mr. Wasson would be advocating appellant's motion to be retained in Superior Court and determined on the merits.

Appellant has never spoken with appellant attorney Ms. Gemberling, and has never engaged in any meaningful communication to discuss the merits & issues to appellant's appeal.

Appellant believes that adequate representation would have resulted in the trial court granting my pursuit to withdraw my plea of guilty , and that adequate appellate representation would find merit in this appeal and promote appellant's pursuit to relief.

VI ARGUMENT & AUTHORITY

A. ABUSE OF DISCRETION
Issues No. 1-4

STANDARD OF REVIEW

"A trial courts order on a motion to withdraw a guilty plea or vacate a judgment is reviewed for abuse of discretion." In re Pers. Restraint Cadwallder, 155 Wn2d 867 (2005); State v. Marshall, 144 Wn2d 266, 280 (2001). "A trial court abuse its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn 2d 244, 258 (1995).

A courts decision "is based on untenable reasons if it is based on a incorrect standard or the facts do not meet the requirements of the correct standard." In re Marriage of Littlefield, 133 Wn2d 39, 47 (1997) " A courts decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable standard." Id. The "untenable grounds" basis applies" if the factual findings are unsupported by the record."Id.

ISSUE No. 1 TIMELINESS

Appellant claimed that his J&S and plea documents are invalid on their face because his conviction without further elaboration evidences infirmities of constitutional magnitude. Ammons, 105 Wn2d 175, 188 (1975). Relying on State v. Bradley, 165 Wn2d 934 (2009) & In re PRP of Goodwin, 146 Wn2d 861 (2002) appellant asserted that the miscalculated offender score on the face of his J&S renders it facially invalid, and his motion timely under 10.73.090 (1), Bradley and Goodwin.

The trial court ordered a hearing and appointed counsel to hear and decide the issue of timeliness. Which, should have included the issue of appellant's allegation of a miscalculated offender score, and unproven, unclassified, wash-out purported prior out-of-state conviction. However, neither issue was addressed, argued or briefed for the Aug. 21 2012 hearing.

The trial court ruled appellants motion as untimely based upon a finding of fact of the score to be correct at 3. The trial court set-forth a method of computation of score of 2 for count I and a score of 1 fore Count II. However, there is no evidence in the record to support such a method of computation. Which for the record object to because that is not only not correct but is clearly breaking the rules. The record includes only a consistent score of 3 being applied to both offenses. The score of 3 is applied to both offenses because the current offenses have been determined to be same criminal conduct under RCW 9.94A.400 (1)(a), and thus counted and scored as one crime.

The only way within the SRA the trial court can acheive an offender score of 3 is to seperately count the burglary charge (Count II) under the anti-merger statue RCW 9A.52.050. (for further argument and authority see ISSUE No. 4 below)

Thus, the trial court has abused its discretion by:

1) failing to request argument and briefing on the issue;
2) attempting to correct a miscalculated offender score by applying a discretionary special sentencing statute ex paret and sua sponte, post - sentencing, and
3) using the burglary charge to count separately to compute the appellant's offender score to base a ruling to determine appellant's motion as untimely.

The trial court found count I to have a score of 2. The trial court used a criminal history of an out-of-state conviction that has never been subject to a comparability analysis required under the SRA RCW 9.94A.360(3).

Appellant asserted that the purported out-of-state conviction used for criminal history has never been properly classified or proven as required under State v. ford, 137 Wn2d 472 (1999) & RCW 9.94A.360 (3). Additionally, the appellant asserted that the out-of-state conviction should wash out under RCW 9.94A.360 (2). (Please see Issue No. 3 below for further argument & authority.)

Thus, the trial court's use of the purported out-of-state conviction to compute the offender score to base its ruling to appellants motion as untimely is an abuse of discretion.

Appellant contends that adequate representation would have recognized that the finality of appellant's judgment of conviction is based upon an appeal dismissed pursuant to State v. Gore, 143 Wn2d 280 (2001). (Sub# 59 & # 86) Gore has been overruled by State v. Hughes, 154 Wn2d 118 (2005) as a result of the Blakely decision. Thus, appellant's judgment is not final and RCW 10.73.090 restriction cannot apply.

" A decision by an appellate court that effectively overturns a prior judicial holding that was originally determanative of a material issue in defendant's case can constitute " a significant change in the law," within the meaning of RCW 10.73.100 (6). In re Pers. Restraint of Lawery, 154 Wn2d 249 (2005)

"New legal authority constitutes good cause : incorrect sentence calculation is unlawful restraint and miscarriage of justice. " In re Johnson, 131 Wn2d 558 (1997)

"Cannot extend 7-year mandatory rule for "ends of justice", or for "good cause". However, if there is new law or case law, there is no requirement that the successive collateral attack be made within one year of change. Also, if successive applications are made without counsel, then application is made with counsel, having counsel is " good cause" and not abuse of process, because counsel allows for the effective use of the collateral process." In re Greening, 141 Wn2d 687 (2000).

Ironically, Mr. Wasson was the appellate counsel who lost appellant's firs appeal of right under Gore. Pursuant to Johnson, Greening, Lowery & Goodwin appellants motion could be rendered timely, or at least argued so. Pursuant to In re Pers. Res. of Hoisington, 99 WnApp 423 (2000) RCW 10.73.090 is a statute of limitation and not a jurisdictional time limit, therefor, it can be equitably tolled. Accord State v. Littlefair, 112 WnApp 749 (2002).

The issue of whether appellant's motion is timely or untimely is a meritorious issue and cannot be accounted to render this appeal wholly frivolous.

ISSUE No. 2 ENTITLEMENT TO RELIEF

The trial court appears to have reasoned that since it determined that the offender score was not miscalculated. Then, all other issues raised by appellant in his motion must fail to make a substantial showing that he is entitled to relief. (Sub # 86)

However, all the factual allegations & legal claims in appellant's motion remain undisputed by the state. The blanket denial by the trial court is unsupported by the record and lacks support in law. The trial court provided no facts or law, or reasoning to rule that appellant made no substantial showing for entitlement to relief.

Unless the state can produce evidence that the sentencing court specifically excercised its discretion under RCW 9A.52.050-the offender score is miscalculated and appellant is entitled to relief persuant to State v. Collicut, 112 Wn2d 349 (1989): State v. Rowland, 97 WnApp 301 (1999); State v. Roose, 90 Wn App 513 (1998) & State v. Longguskio, 59 Wn App 838 (1990).

Unless the state can produce reliable evidence to prove the existence of the purported out-of-state conviction the offender score is miscalculated and appellant is entitled to relief pursuant to State v. Ford, 137 Wn2d 472 (1999); State v. Wilson, 133 Wn App 122 (2002); State v. Mitchell, 81 Wnapp 387 (1486), and State v. Cabrera, 73 WnApp 500 (1994).

Unless the state can produce authority that holds that appellants judgment of conviction can be upheld as final when based upon an unlawful dismissal of his rirs appeal or right - appellant is entitled to relief.

The remaining claims in appellant's motion are meritorious and their merit would increase with proper advocacy under professional representation. Effective representation would have properly developed appellant's claims.

The trial court's ruling does'n give any facts or law in support of why appellant's motion doesn't make a substantial showing to entitlement to relief. The trial courts unsupported, unreasoned denial of appellant's motion constitutes an abuse of discretion.

ISSUE No. 3 FACT FINDING HEARING

The trial court abused its discretion when it determined appellant's offender score to be correct without any fact finding in open court. Appellant plainly raised issues of fact surrounding the accuracy of the computation of his offender score. The law clearly commands the state provide evidence in open court to carry it's burden in establishing out-of-state convictions for purposes of calculating a defendant's offender score. State v. Ford, 137 Wn2d 472 (1999); State v. Wilson, 113 WnApp 122 (2002); State v. Mitchell, 81 WnApp 387 (1996); State v. Roche, 75 WnApp 500 (1994) & State v. Cabrera, 73 WnApp 165 (19945)

When a defendant's criminal history purportedly includes out-of-state convictions, the SRA requires those convictions to be classified "according to the comparable offense definitions and sentences provided by Washington Law. ford, @ 478, RCW 9.94A.525 (3) (formerly .360(3)) To properly classify an out -of-state conviction according to Washington law, the court must compare the elements of potentially comparable Washington crimes. State v. Worley, 134 Wn2d 588, 606 (1998). State v. Wiley, 124 Wn2d @ 684; & Wecord, 66 WnApp @ 31-32.

If the elements are not identical, or if the statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendants conduct would have violated the comparable Washington offenses, Morley, @ 606.

The state has only recently in their REPLY BRIEF in this appeal offered the purported comparable Wisconsin strong arm robbery offense. Which is a Class C felony and would wash-out under Washington law. (formerly RCW 9.94A.360(2))

The state must prove the existence, classification and underlying conduct of the purported out-of-state conviction by a preponderance of evidence. Otherwise, it must be removed from appellants criminal history altogether, pursuant to Wilson, Ford, Mitchell, Roche & Cabrera, Supra. For the state to do so requires a fact finding hearing which the trial court didn not hold.

In fact, no fact finding was conducted on Aug. 21 2012 on any issue raised by appellant, including; whether or not:

-the offender score was properly calculated, and thus miscalculated;
-the burglary offense was counted seperately;
-the state proved the existence of the purported conviction by a preponderance of the evidence;
-the state has met the burden of proving that the purported prior out-of-state conviction is comparable to a felony offense in this state;
-the standard range is incorrect;

-appellant was misinformed of a direct consequence;
-appellant knowingly, volentarily & intelligently waived his right to a jury during penalty phase of trial;
-the plea agreement contract was invalid;
-appellant received ineffective assistance of counsel pretrial, and during the plea process; and at sentencing;
-the prosecutor notified and consulted with the victim
re -regarding the plea agreement; and whether or not the prosecutor breached the plea agreement by promoting and providing the sentencing court with alleged evidence to support an exceptional sentence, alleged evidence that was not part of the plea agreement.

The trial court and appellants appointed counsel failed to afford appellant a fair hearing in accordance with due process.

ISSUE No. 4 SAME CRIMINAL CONDUCT/ANTI-MERGER

The trial court found "...the offender score of 3 was comprised of a 2 for the strong armed robbery in Wisconsin,... and a 1 for the other current felony of residential burglary." (sub# 86)

However, the record is clear that the plea agreement contract, J&S and sentencing court determined both current offenses to be scored as same criminal conductunder former RCW 9.94A.400 (1)(a) & .360 for offender score calculation. There is no record that the sentencing court excercised its discretion to seperate the burglary conviction to increase the offender score under the anti-merger statue RCW 9A.52.050.

The sentencing court or prosecutor could have called upon the anti-merger statute to increase the appellant's punishment by increasing the offender score under RCW 9A.52.050. However RCW 9A.52.050 was not applied or imposed and the record speaks clearly to this fact.

The law allows for same criminal conduct to be used with the anti-merger statute. See State v. Lessley, 118 Wn2d 773(1992) Moreover, because same criminal conduct and antimerger require independent exercise of discretion. Same criminal conduct can also operate, of course, without antimerger, See State v. Collicut, 112 Wn2d 399 (1989); State v. Tresenriter, 100 WnApp 486 (2001); State v. Rowland, 97 WnApp 301(1999) & State v. Roose, 90 WnApp. 513(1998).

The trial courts computation of appellants offender score as 3 is erroneous in lacking support from the record, is contrary to the above cited authority, untenable and an abuse of discretion.

ISSUE No. 5 INVALID ON ITS FACE

STANDARD OF REVIEW

RCW 10.73.090(1) forbids collateral attack more than one year after judgment, if the J&S is valid on its face. Under this statue the "facially invalidity: inquiry is directed to the J&S itself. " In re Goodwin, supra. .In re stoudmire, 141 Wn2d 342 & In re Thompson, supra.

Constitutionally invalid on its face means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. Ammons. @ 188.

The phrase "on its face" has been interpreted to mean those documents signed as part of a plea argeement. State v. Phillips, 94 WnApp 373, 317(1999)(Citing Ammons)

If the state is unable to prove the prior out-of-state conviction exists, or that it doesn't wash-out, under Goodwin appellants J&S is invalid on its face and his motion is therefor timely.

Appellants offender score remains miscalculated under state v. Bradley, supra appellants motion is timely. In Bradley the state conceded that Bradley's offender score for his simple possession charge was miscalculated. The state also conceded that the misscalculated offender score resulted in facial invalidity on Bradley's J&S allowing him to avoid the one year time bar under RCW 10.73.040. See also, Pers. Restraint of La Chapelle, 153 Wn2d (2004).

Appellants motion was determined untimely without a proper fact finding hearing, without adequate representation and with out a finding that the J&S is, infact, valid on its face. Notably: In re Scott, 173 Wn2d 911(2012) did not overrule any of the authority cited by appellant for relief.

ISSUE No. 6 INEFFECTIVE ASSISTANCE OF COUNSEL

STANDARD OF REVIEW

"We review a claim of ineffective assistance of counsel de novo." State v. White, 80 WnApp 406, 410(1995). "We begin with a strong presumption of effective represnetation." State v. McFarland, 127 Wn2d 322, 335 (1995)

To show ineffective assistance of counsel a defendant must show that (1) counsels performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn2d 222, 225-26 (1987) (citing Strickland v. Washington, 466 US 668, (1984)) Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn2d 668, 705 (1997) Prejudice occurs if, but for the deficient performance, the outcome would have been different. In re Pirtle, 186 Wn2d 467,487(1998)

Appellants motion to withdraw his plea of guilty was a critical stage of criminal proceedings. Thus, he was entitled to representation. State v Daris, 125 WnApp 59, 63-64(2004); CrR3.1.

The record reflects that Mr. Wasson, by his own admission, was not prepared to argue the merits, or material factual issues relevant to determining appellant's motion at the hearing held on Aug. 21, 2013. Mr. Wasson submitted on briefing, and offered no authority or evidence on behalf of appellant. This is not reasonable representation under the circumstances. Appellant is serving a 33 year sentence, and his first appeal of right was dismissed on bad law.

Mr Wasson failed to develop a factual basis for the trial court to properly pass on the factual and legal issues determinative to whether appellant's motion was timely, or made a substantial showing to entitlement to relief.

The representation that appellant received on Aug. 21, 2012 constitutes a deficient performance. Had appellants counsel argued some of the controlling authority cited above, and developed the relevant facts material to the issues to be decided the outcome of proceeding would have been different. A properly developed factual record applied & argued upon controlling

authority would have established a record for review on an appeal with merit.

Pursuant to State v. Chavez, 162 WnApp. 431 (2011) this court should follow Chavez and remand this matter for further proceedings on appellant's motion to withdraw his plea of gulity. Or alternatively, at least to develop the record for appeal. Accord, In re Jagana, 170 WnApp 32 (2012)

ISSUE No. 7 INEFFECTIVE APPELLATE COUNSEL

STANDARD OF REVIEW

The united States Supreme Court has recognized that a criminal defendant has a right to have effective assistance of counsel on his first appeal of right. Evitts v. Lucey, 469 US 387, 396 (1985). This is not appellant's first appeal of right, however, appellate counsel still has an obligation to provide effective representation under Strickland, and function as an advocate under Anders v. California, 386 US 738 (1967).

A criminal defendant's first opportunity to raise an ineffective assistance of appellate counsel claim is often on collateral review. See, e.g., Maxfield, 133 Wn2d 332. This court has held that: in order to prevail on an appellate ineffective assistance of counsel claim, petitioner's must show that a legal issue which appellate counsel failed to raise had merit, and that they were actually prejudiced by the failure to raised or adequately raised the issue. In re Dalluge, 152 Wn2d 772,787 (2004) (Citing In re Mayfield)

If a petitioner can show that his appellate counsel failed to raise an issue with underlying merit, then the first prong of the ineffective test is inct. Maxfield, @ 394. Under the second prong of the ineffective assistance of appellate counsel test. The court has required that the petitioner show that he was "actually prejudiced by the failure to raise or adequately raise the issue.:Id.

The court found in Dalluge that appellate counsels failure to raise and argue the relevant issue under Dillenburg established that his appellate counsel had failed to raise a meritorious issue. Namely because Dillenburt requires remand for a hearing when a lower court fails to hold one. Dillenburg was a source of authority that entitled Dalluge to a form of relief he sought of the issues of error raised by Dalluge.

As in Dalluge appellant contends that the authority cited herein, & within his motion to withdraw entitle appellant to the relief he requested in the trial court. Furthermore, the authority cited establishes at least meritorious issues for review, and again, actual entitlement to relief. (Please see, e.g. Bradley, Mendoza, Icadore, Thompson, Goodwin, La Chapelle, Cadwallder, Greening, Johnson, Noon, McDermond, Parker, Ford, Roche, Wilson, Rowland, Cabrera, Mitchell, Roose, Davis, Chavez, Ammons, Collicut, Treviter, Moeurn, & Smith)

The prejudiced suffered by appellant is evident in the fact that he is under the shadow of dismissal of this appeal upon his counsel's belief that he has no legal issues with merit, and that his appeal is wholly frivolous. Counsel's conclusion doesn't appear to be a reasonable one in light of the relevant facts and available authority creating entitlement to relief on the issues raised by appellant.

Moreover, appellant has already served all of the maximum standard range sentence on a miscalculated offender score. A sentence that he unintelligently negotiated in exchange for a plea of guilty. Not in hindsight, it is starkly apparent that the prosecutor's negotiation process and plea agreement was conducted in bad faith and is illegal and dishonest.

A&A - 13

Appellant contends that the above, & record herein establishes that he has received ineffective assistance of appellate counsel.

Appellant contends that issues 1-7 have merit and this appeal should no be dismissed as wholly frivolous.

VII REBUTTAL TO ARGUMENTS MADE BY
APPOINTED APPELLATE COUNSEL AND STATE

Appellant unequivocally disputes the accuracy of the offend offender score and standard sentence range as calculated by the trial court (3). Appellant's first appeal of right challenged the trial courts findings of fact & conclusions of law in support of an exceptional sentence. However, as pointed out above, appellant's first appeal of right was dismissed on bad law rendering the dismissal null & void. Thus, appellants judgement of conviction is not final.

Appellant doesn't agree with appellate counsels Characterization of her issue no. 9. No where in appellant's motion did I argue that misinformation of direct consequences as the basis for the Court to find my J&S invalid on its face. Appellant's Ground I raised the issue of invalidity, but not on the grounds claimed by appellate counsel. Appellant Ground II raised the issue of misinformation. Ground II is directed toward the validity of the plea agreement contract. Issue no. 9 seems to be misplaced.

Appellant counsels legal references are selectively deficient and appear impartial. The SRA provision lacks the language for finding same criminal conduct to count as one offense for computing offender score. Reliance on In re Scott

is misplaced, as noted above-the Scott decision has not overruled any authority relied upon by appellant. The language quoted out of Scott is out of context, and merely dicta.

The state offers argument and attempts to introduce argument & authority that was not presented in the trial court proceeding. Appellant is not sure what the proper scope of the state's participation is supposed to be in appellant counsel's request to withdraw. It would appear that the state has exceeded the allowed level of participation, and it has assuredly improperly attempted to introduce argument that was not offered before the trial court. Nevertheless, appellant takes exception to the following points made by the state.

In issue 2 the state appears to discount any of the available exceptions to time limitations, and that invalid judgments are never final. RCW 10.73.090 applies to valid judgments. Appellant contends that my judgment of conviction is invalid, and is an unresolved legal issue with merit that is subject to meritorious challenge under the law.

In Issue 3 the state recites In re Scott for a general proposition holding. However, the specifics of this case do not fit into the general proposition dicta of Scott. Scott has not overruled any of the authority relied upon by the appellant to find J&S invalid on its face. The state makes reference to an alleged prior PRP litigated by appellant. Appellant has not litigated, not had a PRP ever, ruled upon on any of the issues relevant to this appeal. It could be the state is making reference to appellants first appeal of right that was dismissed on bad law. Prior history of this case, nor Scott provide a lawful or factual basis to render issue 3 without merit or frivolous.

In Issue 4 the state infers that the miscalculation of the offender score is a moot issue because the sentencing court imposed an exceptional sentence. Fortunately, State v. Parker, 132 Wn2d(1997) holds that the trial court must properly calculate the standard sentence range (offender score) BEFORE IMPOSING AN EXCEPTIONAL SENTENCE. Parker is cited in appellants motion, see memorandum page 3. The state then goes on to present a comparability analysis that it was statutorily bound to under the SRA before determining the offender score. Noteworthy is that the state purports the Wisconsin statute to be classified as a Class C felony, Appellant had five years in the community without a conviction which would satisfy the Washington wash-out statute under former RCW 9.94A.360 (2). A novel issue may be relevant to decide whether an out-of-state Class C conviction can be elevated to a class B under Washington law without the state proving the existence of the out-of-state conviction by preponderance of evidence of the evidence in order to increase the punishment of a Washington conviction? Here, the state has not produced <u>any</u> evidence to prove the existence of the out-of-state conviction, not any record including the underlying facts regarding the conviction. The fact that the state now presents their version of a comparison demonstrates that the Issue has merit. Moreover, appellant should have representation to effectively participate in analysis. The state asserts that "--either offense has a multiplier attached to it for the present conviction of rape.." What multiplier, and to multiply by how much? The offender score is not properly calculated at 3. This issue has merit and cannot be determined to be frivolous.

In ISSUE 5 the state relies on its own unopposed, unverified and alleged comparability analysis to render its own secondary self-serving conclusion that the alleged conviction does not wash-out and that the issue is frivolous & without merit. However as noted the state continues to fail to provide proof that the out-of-state conviction exists. Furthermore, the state has also not satisfied the second prong of the analysis requiring proof of the underlying conduct would violate comparable Washington law. Absent a sufficient record, the court is without necessary evidence to reach a proper decision, and it is impossible to determine whether the conviction is properly included in the offender score. Here, a sufficient record is absent as the state has provided no evidence but an unknowing acknowledgment which cannot sustain the states burden to prove the existence of the out-of-state conviction by a preponderance of the evidence. ISSUES 5 & 6 are not frivolous and have merit for appeal, and/or remand.

In ISSUE 7 the state argues again by general proposition. Arguing the burglary conviction was counted separately to score as 1. However, there is no record that the anti-merger statute wasused. The operation & application of RCW 9A.52.050 doesn't come with a silent record. Antimerger requires the record of the court that excercise's discretion to apply it, must plainly document the execution of that discretionary authority. The state cannot prevail on a silent record to support their allegation. Furthermore, the state contends that "... Due to this statute ,[9A.52.050], the " same criminal conduct rule' does not apply,..." Such a statement is not accurate, lacks support in the law, and is contrary to the law cited above by appellant. " Same criminal conduct" & "anti-merger" each require independent exercise of discretion. One originates in the SRA the other in the criminal code. If the state wanted the plea/sentencing court to apply RCW 9A.52.050, then it should

have been documented in the record. Including proper citation in the charging, plea & sentencing documents. Its not there because the state didn't use it, didn't rely on it - because the score is miscalculated. The state cannot fix a miscalculated offender score 12 years later with a special charging/sentencing statute that it didn't use originally. If the state meant to use it, it would be in the record. RCW 9A.52.050 is a criminal code statute for increasing punishment, and it is constitutionally impermissible to increase punishment without notice. Appellant's legal issue of a miscalculated offender score has merit and is not frivolous.

ISSUE 8 is addressed by appellant above with appellate counsel; issue no. 8.

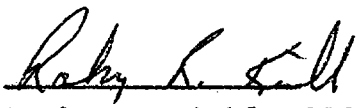
In ISSUE 9 The state misinterprets In re Scott, and applies it to an issue manifested by appellate counsel. Appellant did not raise or assert the issue as set forth by appellate counsel. Misinformation and invalid J&S are part of appellants motion, but are seperate issues asserted under different grounds, for different errors & allegation's. (Ground I - invalid J&S/Ground II-invalid plea)

VIII CONCLUSION

Based on the record and argument before the Court, appellant respectfully requests this Court order that appellant be permitted to withdraw my plea of guilty entered on March 16, 2000. In the alternative, this Court order this matter be remanded to the trial court for development of the record with appointment to conflict free counsel, and/or any other helpful directions or instructions.

Upon finding one meritorious issue this Court should follow State v. Nicholos, 136 Wn2d 859(1998) and order appointment of counsel to file an advocates brief.

Extremely respectfully submitted this 27th day of June, 2013



Rocky R. Kimble 808179
Airway Heights Correction Center
P.O. Box 2049 MB60L
Airway Heights, WA 99001-2049

Conclusion

cc/Prosecutor/COA/file

RECEIVED

JUL 01 2013

STEVENS COUNTY
PROSECUTING ATTORNEY

FILED

Aug 26, 2013
Court of Appeals
Division III
State of Washington

SUPERIOR COURT OF WASHINGTON
FOR STEVENS COUNTY

STATE OF WASHINGTON, Respondent, v. ROCKY R. KIMBLE, Appellant.	No: 311660-III DECLARATION OF SERVICE BY MAILING [General Rule 3.1]

I, ~~Rocky R. Kimble~~, ~~appellant~~, in the above entitled cause, do hereby declare that I have served the following documents:

APPELLANTS REPLY BREIF IN OPPOSITION

TO ANDERS BRIEF

Upon: Stevens County Prosecutor's Office
215 SaKOak- room 206
Colville, Washington 99114-2861

I deposited with the M -Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001-~~2049~~.

On this ~~June~~ day of 27, 2013.
I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,
Rocky R. Kimble
Petitioner

To: Court of Appeals, Division III June 27,2013
ATTN: Ms. Townsley - Clerk of the Court
500 N. Cedar St.
Spokane, WA 99201-1405

From: Rocky R. Kimble
AHCC MB60L
PO Box 2049
Airway Heights, WA 99001-2049

RE: Case # 311660-III
STATE v. KIMBLE

APPELLANTS REPLY BRIEF IN OPPOSITION
TO ANDERS BRIEF
Declaration of Service (General Rule 3.1)

Dear Ms. Townsley,

Please find enclosed my REPLY brief in opposition to my appointed appellate counsel's Anders Brief/Motion to withdraw. Please record my BRIEF as filed on June 27th, 2013 in accordance with General Rule 3.1, mailbox rule.

I'm Gratefully thankful for your valuable time and assistance.

Respectfully,

Rocky Kimble

Rocky R. Kimble