NO. 45464-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEESHAWN REDIC, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 00-1-00810-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdiction

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the issues that Defendant could raise in an appeal are frivolous and could not be made by defense counsel in good faith?

2. Should defense counsel be allowed to withdraw as defendant's attorney on appeal when there are no non-frivolous issues to be raised and when counsel has met the requirements of ***Anders v. California***, which apply in Washington through ***State v. Theobald***, and the additional requirement set out by ***State v. Folden***?

B. STATEMENT OF THE CASE.

Defendant, Leeshawn Redic, appeals the sentencing court's determination of his offender score.

For the purposes of this brief, the State accepts the procedural and factual history as presented in the Appellant's brief.

C. ARGUMENT.

1. THE ISSUES THAT THE DEFENDANT COULD RAISE IN AN APPEAL ARE FRIVOLOUS AND COULD NOT BE MADE BY DEFENSE COUNSEL IN GOOD FAITH.

In defense counsel's motion to withdrawal, pursuant to RAP 18.3(a)(2), defense counsel identifies two issues which could be raised on appeal if they had merit: whether the sentencing court erred when it found Defendant's 2000 Nevada conviction comparable to a Washington felony when calculating his offender score and; whether the sentencing court erred when it refused to find Defendant's 1997 juvenile convictions involved the "same criminal conduct" and treated them as separate offenses when calculating his offender score. Brief of Appellant at 2-3. If raised, these issues would be frivolous.

a. The trial court did not err when it found Defendant's 2000 Nevada conviction comparable to a Washington Felony when calculating his offender score.

Out of state prior convictions may count in the offender score if they are comparable to a Washington felony. RCW 9.9A.525(3); ***State v. Collins***, 144 Wn. App. 547, 553, 182 P.3d 1016 (2008). Comparability may be shown by either demonstrating legal comparability—the elements of the crimes are legally identical—or factual comparability— the conduct

underlying the out of state crime would have violated a comparable Washington statute. ***State v. Theifault***, 160 Wn.2d 409, 421, 158 P.3d 580 (2007). Courts conduct de novo review of a sentencing court's decision to consider a prior conviction as a strike. ***State v. Ortega***, 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

To determine comparability, the Washington Supreme Court has devised a two part test. ***State v. Farnsworth***, 133 Wn. App. 1, 130 P.3d 389 (2006). *See* ***State v. Morley***, 134 Wn.2d 588, 952 P.2d 167 (1998). First, the court looks to see if there is legal comparability. To do this, the court must determine if the elements of the foreign conviction are substantially similar to the elements of a Washington crime. ***State v. Farnsworth***, 133 Wn. App 1 at 17. Where a foreign crime provides alternative elements, it must contain all the elements of its Washington counterpart to be considered comparable. *Id.* If the court finds that the elements of the foreign offense are substantially similar to the Washington offense, then the foreign conviction will count toward the defendant's offender score. *Id.* If the Washington statute defines an offense more narrowly than the foreign statute, then the offense is not legally comparable and the court must proceed to the second prong of the test to determine if the offense is factually comparable. ***State v. Collins***, 144 Wn. App. 547, at 552.

Factual comparability requires the court to determine whether the defendant's conduct, as evidenced by the indictment or information or the records of the foreign conviction, would have violated the comparable Washington statute. ***State v. Farnsworth***, 133 Wn. App. 1, at 18 *citing* ***State v. Morley***, 134 Wn.2d 588. The underlying facts in the foreign record must be admitted, stipulated to, or proven beyond a reasonable doubt. *Id.* If in convicting the defendant, the foreign court necessarily found facts that would support each element of the comparable Washington crime, the foreign conviction counts toward defendant's offender score. ***State v. Russell***, 104 Wn. App. 422, 441, 16 P.3d 644 (2001).

"Under the SRA, acknowledgement allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing." ***In re Connick***, 144 Wn.2d 442, 463-64, 28 P.3d 729 (2001) *quoting* ***State v. Ford***, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). In 2000, Defendant entered a guilty plea to one count of possession of a controlled substance with intent to sell, a felony in Nevada. CP 34. According to the Nevada information, the controlled substance was cocaine and/or marijuana. Exhibit 1. RCW 69.50.401(1) states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. A "controlled substance"

includes drugs in Schedules I-V. RCW 69.50.101(1)(d). Marijuana is a Schedule I drug. RCW 69.50.204(c)(22). Cocaine is a Schedule II drug. RCW 69.50.206(b)(4). Possession with intent to deliver a Schedule I or II drug is a Class B felony. RCW 69.50.401(2)(a). Thus, the Nevada conviction is comparable to a Washington felony.

Defendant also stipulated to his offender score—which included his Nevada conviction—when he pleaded guilty to second degree murder. CP 33-34. Defendant signed the stipulation, which contained the following language:

> CONVICTIONS FROM OTHER JURISDICTIONS
> The defendant also stipulates that the following convictions are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3) (Classification of felony/misdemeanor, Class, and Type made under Washington law):

CP 33-34. Furthermore, this Court has already ruled on the issue of comparability when they granted in part Defendant's PRP. CP 61-63. This Court previously held that "[Defendant's] stipulation relieved the State of its burden of presenting proof of the comparability of his [Nevada] conviction." CP 62. Finally, the sentencing court conducted an on the record comparability analysis and held that Defendant's Nevada conviction is in fact comparable to a Washington felony. RP 30. The sentencing court read Defendant's briefing and heard arguments from

Defendant and the State prior to making its ruling. RP 18-31. Specifically, the sentencing court stated:

> I feel that I am bound by the Court of Appeals' decision. However, if I looked at the comparability of it, it is clear that it was a plea in Nevada to unlawful possession with intent to sell. If it is cocaine, clearly takes it out of the analysis that Mr. Redic has asked the Court to take. Even if it is marijuana, if it is with intent to sell, it is a felony. It does not count as a misdemeanor....The plea was to the crime with the intent to sell. It would be comparable to the Washington felony.

RP 29-30. As Defendant's Nevada conviction is comparable to a Washington felony, the sentencing court did not err in finding the crimes comparable.

b. The court properly counted separately Defendant's 1997 juvenile convictions when calculating his offender score, because the two convictions did not involve the same criminal conduct.

In determining a defendant's offender score, multiple current offenses are presumptively counted separately unless the trial court finds that the current offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct only if they share each of three elements: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. *Id.* If any of these elements are missing, the multiple offenses cannot encompass the same criminal

conduct and must be counted separately in calculating the offender score. ***State v. Vike***, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Criminal intent is the same for two or more crimes when the defendant's intent, viewed objectively, does not change from one crime to the next, such as when one crime furthers another. ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). Intent, in this context, is not the mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. ***State v. Adame***, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts narrowly construe the statutory language to disallow most assertions of the same criminal conduct. ***State v. Price***, 103 Wn. App 845, 855, 14 P.3d 841 (2000). Appellate courts review a trial court's same criminal conduct determination for abuse of discretion or misapplication of the law. *Id.* at 855.

Here, Defendant had two juvenile convictions from 1997: unlawful possession of a controlled substance and; unlawful possession of a firearm in the second degree. CP 33. The relevant statutes state in part:

> Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Former RCW 69.50.401(a)(1997). And:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under (a) of this subsection for the crime of unlawful possession of a firearm in the first degree and the person owns, or has in his or her possession, or has in his or her control any firearm:
> (i) after having previously been convicted in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under (a) of this subsection....

Former RCW 9.41.040(b)

Defendant stipulated to the separate convictions as well as to his offender score when he pleaded guilty. CP 33-34. On remand, Defendant argued that his juvenile convictions consisted of the same criminal conduct, and thus should not be counted separately in calculating his offender score. RP 22-23.

In granting Defendant's PRP in part, this Court previously held that Defendant failed to show that his two 1997 convictions for unlawful possession of a controlled substance and for second degree unlawful possession of a firearm consisted of the same criminal conduct because both crimes required different intents. CP 62. The sentencing court agreed with this Court, and stated that because the two crimes had separate intents they did not constitute the same criminal conduct and thus the two convictions were to be counted separately in calculating Defendant's offender score. RP 30. The sentencing court stated the following:

> The other two juvenile adjudications from 1997, Unlawful Possession of a Controlled Substance, Unlawful Possession of a Firearm Second Degree, the analysis is correct that if you look at whether the same victim is involved, look at the time and place, you look at the same criminal intent is involved....In this case, what Mr. Redic is asking the Court to do is to assume that his intent was the same that he was going to possess both of these to sell them or both of them to keep them. I don't believe the argument that...one crime is used to further the other. Possession of a firearm is used to further possession of drugs. I think the Court of Appeals is right when they say that they don't have the same criminal intent. They would not be the same criminal conduct. I find that the offender score that he has, based upon the Court of Appeals' decision...is 3.

RP 30-31. Because both crimes have separate intents and this Court has already ruled that Defendant's two juvenile convictions do not constitute the same criminal conduct, the sentencing court did not err in counting his juvenile offenses separately in calculating Defendant's offender score.

2. DEFENSE COUNSEL SHOULD BE ALLOWED TO WITHDRAW AS DEFENDANT'S ISSUES ON APPEAL ARE FRIVOLOUS.

Pursuant to RAP 15.2(h) a court appointed counsel for an indigent defendant may move to withdraw as counsel if he finds no good faith argument can be advanced on behalf of his client on appeal. This rule codifies federal and state decisional law announced in ***Anders v. California***, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and

State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970). In ***Theobald***, the court quoted ***Anders*** with approval, stating:

> [Defense counsel's] role as advocate required that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, (1) be accompanied by a brief referring to anything in the record that might arguably support the appeal; (2) a copy of counsel's brief should be furnished to the indigent; and (3) time allowed him to raise any point he chooses; (4) the court - not counsel - then proceeds, after a full examination of all proceedings, to decide whether the case is wholly frivolous.

State v. Theobald, 78 Wn.2d at 185.

When all four of the ***Anders*** requirements are met, a defense counsel's motion to withdraw should be granted and the appeal dismissed as frivolous.

Appellant has filed a brief, accompanied by a motion to withdraw. The court has served the defendant with a copy of the brief. There has been no response from the defendant. Thus, the first three ***Anders*** requirements have been met. The State believes the court's examination of the record will reveal that there are no meritorious issues on appeal.

The Court of Appeals, Division III, added an additional step that the defense counsel must take before his representation of his client is complete. ***State v. Folden***, 53 Wn. App. 426, 767 P.2d 589, *review denied*, 112 Wn.2d 1022 (1989). In ***Folden***, the court ruled that there are

procedures that must be used in a case involving a defense counsel's motion to withdraw. ***Folden***, at 428 (following ***State v. Rolax***, 104 Wn.2d 129, 702 P.2d 1185 (1985)).

In accordance with ***Rolax***, the defendant must receive a copy of the commissioner's ruling and a notice that failure to file a motion to modify will terminate his appellate review. ***Rolax***, at 135-136; *see* RAP 17.7. The defense counsel must then notify his client that he is there to assist the defendant in preparing the motion to modify. If the defendant chooses not to file the motion, or if the court denies the motion, the defense counsel's obligation is completed. Only if the defendant files a motion to modify that the court grants must the defense counsel continue to represent the defendant.

The State acknowledges that ***State v. Folden*** appears to control the court's determination of a defense counsel's motion to withdraw but notes that, in order to be entitled to file a motion to modify, one must be "an aggrieved party." RAP 17.7. The defendant in an appeal is aggrieved as contemplated by RAP 17.7 only if he files a pro se brief and objects to his counsel's motion to withdraw. *See* ***Folden***, at 427.

The defendant in the instant case has filed no such brief or objection to his counsel's motion. Thus, he has no standing to file a motion to modify. The ***Folden*** requirement is inapplicable where the

defendant has not filed a pro se brief or objection to his counsel's motion to withdraw. There being no objection, defense counsel's motion to withdraw should be granted.

D. CONCLUSION.

The State asks that this Court dismiss Defendant's appeal as being without merit and grant David B. Koch's motion to withdraw as counsel. Also, unless this court finds further issues requiring response, the State will waive oral argument in this case.

DATED: March 20, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Miryana Gerassimova
Appellate Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/20/14
Date Signature

PIERCE COUNTY PROSECUTOR

March 20, 2014 - 1:23 PM

Transmittal Letter

Document Uploaded: 454645-Respondent's Brief.pdf

Case Name: State v. Leeshawn Redic

Court of Appeals Case Number: 45464-5

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ___
- ○ Answer/Reply to Motion: ___
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ___
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

sloanej@nwattorney.net