IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31641-6-III

STATE OF WASHINGTON, Respondent,

v.

THOMAS RALPH LEVITON, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Thomas Ralph Leviton was sentenced to a prison term based upon an offender score of "5" after his DOSA sentence was revoked. At the time of entering his guilty plea, Leviton stipulated to the fact and comparability of several prior convictions from Montana. However, his attorney did not investigate the comparability of the Montana convictions with Washington felonies until after he signed and entered the stipulation.

Leviton's stipulation was not knowing, intelligent and voluntary because his counsel failed to conduct a reasonable investigation into comparability before he entered the stipulation. Further, counsel's deficient performance was prejudicial because two convictions, for burglary and forgery, were not legally comparable to Washington felonies and the State did not present any evidence of factual comparability. As a result, Leviton's sentence should be vacated and the case remanded for resentencing following a hearing on factual comparability of the charges.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Leviton's sentence is based upon an erroneous offender score that includes out-of-state convictions that cannot be found comparable with Washington felonies.

ASSIGNMENT OF ERROR 2: Leviton's counsel provided ineffective assistance in failing to investigate or research the comparability of the prior out-of-state convictions before Leviton stipulated and entered the guilty plea.

ASSIGNMENT OF ERROR 3: Leviton's acknowledgment of his prior history was not knowing and voluntary because of counsel's ineffective assistance.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Whether defense counsel rendered ineffective assistance of counsel when trial counsel failed to properly investigate Leviton's criminal history score until after he pled guilty.

ISSUE 2: Whether the State failed to prove by a preponderance of the evidence the legal and factual sufficiency of the Montana convictions for purposes of Leviton's offender score.

ISSUE 3: Whether Leviton's stipulation to the comparability of his prior criminal history was uninformed and involuntary when counsel did not investigate in advance.

ISSUE 4: Whether Leviton was prejudiced by counsel's deficient performance.

ISSUE 5: Whether remand for resentencing is the appropriate remedy.

IV. STATEMENT OF THE CASE

On May 30, 2012, Leviton pleaded guilty to trafficking in stolen property in the second degree. CP 12. The agreed recommendation was that Leviton would be given a residential DOSA sentence, plus the standard costs and fines. CP 8. At the time of the plea, Leviton signed a document evidencing his criminal history and agreed that for the purposes of sentencing he had an offender score of "5." CP 48-49; RP 4, 5/30/12. Paragraph 1.5 of the document states:

> Defendant's understanding of defendant's criminal history is set out above. Defendant agrees that, unless otherwise noted in writing here, each of the listed convictions counts in the computation of the offender score and that any out-of-state or foreign conviction is the equivalent of a Washington felony offense.

CP 49. Leviton's Montana criminal history showed the following crimes: (1) January 2005 conviction for two counts of criminal possession of dangerous drug; (2) January 2005 conviction for forgery; (3) November 2003 conviction for bail jumping; (4) November 1994 conviction for criminal possession of dangerous drug; (5) November 1994 conviction for forgery; (6) May 1991 conviction for theft; (7) June 1994 conviction for burglary (although it is unclear whether the second burglary is a new conviction or a violation on another conviction); and (8) February 1989

conviction for fraudulently obtaining dangerous drugs. CP 45-46. All of Leviton's prior recorded criminal history for purposes of his offender score took place in Montana. CP 40, 45-46.

Before Leviton was sentenced, he filed a motion to withdraw his plea, asserting that his plea was involuntary and he was denied ineffective assistance of counsel because his attorney did not properly investigate his criminal history. CP 40-49. The court denied Leviton's motion to withdraw his plea because Leviton failed to explain how the consequences of his plea would change. RP 8-14, 10/16/12.

Defense counsel again raised the issue of Leviton's offender score at the sentencing hearing. A certified copy of Leviton's Montana criminal record from the Montana Department of Corrections was entered in the record. RP 21, 11/20/12. After hearing arguments, the court found that Leviton had "an offender score of 5 for the purposes of the plea that was given back on May 30th." RP 39, 11/20/12. The court sentenced Leviton to a residential chemical dependency treatment-based alternative sentence ("DOSA") and ordered him to serve 24 months of community custody under the supervision of the Department of Corrections. CP 59.

On April 12, 2013, the State filed a petition to revoke Leviton's residential DOSA. CP 89. At that time, defense counsel requested the

court to reconsider the offender score and conduct a comparability analysis, particularly regarding the forgery and the burglary charge. RP 17, 04/12/13. The court allowed Leviton to re-open the issue of his offender score. RP 17-21, 04/12/13. Defense counsel argued that the Montana statues were broader than the Washington statutes, and because of that, the court must look at whether the defendant's conduct would be a felony in Washington. RP 17, 04/12/13. Defense counsel asked the court to specifically look at the forgery and burglary convictions. According to defense counsel's comparability analysis, Leviton had an offender score of "2" or a "3" instead of "5" for purposes of sentencing. RP 20, 04/12/13.

The court terminated Leviton from the residential DOSA program and continued the matter for sentencing to allow the State to respond to defense counsel arguments regarding Leviton's offender score. CP 91; RP 21, 04/12/13. The State did not file a response to defense counsel's arguments regarding the comparability analysis.

During the sentencing hearing, the State argued the offender score was waived. The court did not conduct a comparability analysis, but instead adopted the sentencing data entered on the judgment and sentence, which reflected an offender score of "5" with a standard range of 17 to 22

months. RP 65, 04/18/13. Based upon that score, the court ordered Leviton confined for 17 months. CP 93.

Leviton now appeals.

V. ARGUMENT

A. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED LEVITON'S DEFENSE BY FAILING TO INVESTIGATE THE COMPARABILITY OF LEVITON'S PRIOR OUT-OF-STATE CONVICTIONS BEFORE THE PLEA WAS ENTERED.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

"To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable *legitimate* trial tactics or theories explaining counsel's performance, such performance falls "below an objective standard of reasonableness" and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

1. Counsel's performance was objectively unreasonable because she failed to investigate whether the out-of-state convictions were comparable.

Leviton challenges the adequacy of defense counsel's investigation into his Montana criminal history until after he had already signed a document entitled "Understanding of Defendant's Criminal History" and pleaded guilty, thereby effectively stipulating to his offender score. Failure to investigate can amount to ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010). Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *Id.* at 111. The degree and extent of investigation required will vary depending upon the issues and facts of each case, but at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant

can make a meaningful decision as to whether or not to plead guilty. *Id.* at 111-12. A defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. *Id.* at 109.

Meaningful investigation includes determining a defendant's correct offender score. *See State v. Thiefault,* 160 Wn.2d 409, 417, 158 P.3d 580 (2007) (holding that failure to object to the superior court's comparability analysis regarding defendant's prior Montana conviction pursuant to guilty plea amounts to ineffective assistance of counsel). A defendant's sentence is a direct consequence of the offender score. A defendant must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea. *A.N.J.,* 168 Wn.2d at 114; *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). The distinction between direct and collateral consequences of a plea turns on whether the result represents a definite, immediate and largely automatic effect on the range of defendant's punishment. *A.N.J.,* 168 Wn.2d at 114.

Here, counsel did not investigate the comparability of the Montana convictions with Washington offenses. But the comparability of the offenses is directly related to the defendant's punishment, by establishing the standard range of confinement. Comparability affects the standard range, which is a direct consequence of the plea; consequently, counsel

has an obligation to ensure the defendant is correctly advised of the offender score before entering a plea. *See State v. Mendoza,* 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

As such, the performance of Leviton's counsel was objectively unreasonable because he failed to investigate whether the out-of-state convictions were comparable. Counsel has a duty to investigate prior to a plea agreement, *see A.N.J.,* 168 Wn.2d at 110, and a nominal legal investigation would have shown that as to the Burglary and Forgery charges, the elements differed for each state. Thus, an inquiry into the factual bases for the convictions would have been required and the State did not present evidence to show factual comparability. Researching legal comparability is precisely the kind of activity that a person relies upon his attorney to do because he lacks the expertise to do the analysis himself. There is no valid strategic reason for not analyzing the prior convictions – nothing suggests the offer was contingent upon the offender score calculation and Leviton could only have benefited from the possibility of a reduced offender score. The failure to investigate prior to stipulation is contrary to the standards set forth in *A.N.J.* and is objectively unreasonable.

2. Counsel's deficient performance was prejudicial to Leviton because it resulted in a higher sentence than he should have received.

As a result of the stipulation, Leviton had two convictions for forgery and one conviction for burglary included in his offender score. Engaging in a comparability analysis demonstrates that the burglary and the forgery charges are not legally comparable to Washington offenses, and therefore they should not have been included in Leviton's offender score under RCW 9.94A.525(3).

To properly sentence a defendant, the court is required to calculate his defender score based upon his prior convictions and the seriousness level of the current offense. *State v. Wiley,* 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The Sentencing Reform Act ("SRA") provides that "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). When prior convictions include some from out-of-state, those prior convictions cannot be included in the offender score calculation unless the prosecution proves that the offense is "comparable" to a Washington state felony. *State v. Ford,* 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). Such a comparison requires that the record reflect the nature and type of out-of-state conviction the State seeks

to include in the offender score. *See State v. Morley,* 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Washington law employs a two-part test to determine the comparability of a foreign offense. *Thiefault,* 160 Wn.2d at 415. First, the court determines whether the foreign offense is legally comparable—"that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Id.* Second, if the foreign offense elements are broader than Washington's elements, precluding legal comparability, the court determines "whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Id.* In making its factual comparison the court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *Id.*

The state has the burden of proving by a preponderance of the evidence the existence of all of the defendant's prior convictions and both the existence and comparability of any such convictions which are from out-of-state. *Ford,* 137 Wn.2d at 482-83; *State v. McCorkle,* 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Absent sufficient evidence to prove the existence and comparability of a prior out-of-state conviction, "the sentencing court is without the necessary evidence to reach a proper

decision, and it is impossible to determine whether the convictions are properly included in the offender score." *Ford,* 137 Wn.2d at 480-81. A defendant generally cannot waive a challenge to a miscalculated offender score where the resulting sentence is in excess of what is statutorily authorized. *In re Pers. Restraint of Goodwin,* 146 Wn.2d 861, 50 P.3d 618 (2002). Although the prosecution may agree to sentencing recommendations, the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; *State v. Malone,* 138 Wn.App. 587, 593, 157 P.3d 909, 912 (2007). The trial court's failure to calculate the standard range based on correct classification of prior convictions is "legal error subject to review." *McCorkle,* 137 Wn.2d at 496.

Under a comparability analysis of Montana and Washington statutes, Leviton's offender score would have been a 3 instead of 5. That would have made his standard range for purposes of sentencing 9 to 12 months, instead of 17 to 22 months.

For instance, as to the crime of forgery, the Montana statute provides:

> (1) A person commits the offense of forgery when with purpose to defraud the person knowingly:

> (a) without authority makes or alters a document or other object apparently capable of being used to defraud another in a manner that it purports to have been made by another or at another time or with different provisions or of different composition;
>
> (b) issues or delivers the document or other object knowing it to have been thus made or altered;
>
> (c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or
>
> (d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting or otherwise forging written instruments.

Mont. Code Ann. § 45-6-325.

On the other hand, in Washington, the forgery statute in RCW 9A.60.020 provides: "A person is guilty of forgery if, with intent to injure or defraud: (a) He or she falsely makes, completes, or alters a written instrument or; (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged." RCW 9A.60.020.

While Washington's statute is limited to forging written instruments, Montana's forgery statute permits conviction for possessing counterfeiting materials. Montana's statute is therefore broader than Washington's statute and permits conviction for acts that would not constitute felonies in Washington.

Similarly, the Montana burglary statute resembles Washington's, except that it permits conviction for entry into an "occupied structure." An "occupied structure" includes any building, vehicle, or other place suitable for human occupancy or night lodging of persons, or for carrying on business, whether or not a person is actually present. Mont. Code Ann. § 45-2-101(47). The offense is elevated to an aggravated burglary under Mont. Code Ann. 45-6-204(2) if, in addition, the defendant is armed with explosives or a weapon, or inflicts or attempts to inflict bodily injury on someone.

By contrast, Washington's burglary statutes generally do not permit a burglary to occur in a vehicle. *See* RCW 9A.52.025, 9A.52.030 (providing that the entry occurs into a building "other than a vehicle"). The exception, the first degree burglary statute, provides:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Thus, while first degree burglary is comparable to an aggravated burglary in Montana, simple burglary is broader under the Montana statute because it permits a felony conviction for an entry into a

vehicle without a weapon or an assault, while Washington does not. Instead, in Washington, entering or remaining in a vehicle with the intent to commit a crime would be a misdemeanor, that is, vehicle prowling in the second degree.

Because the forgery and the burglary statutes are not comparable as a matter of law, the court must then look at the actual conduct of the defendant to determine whether or not the conduct would be a felony in Washington. *Thiefault,* 160 Wn.2d at 415. But the State provided no factual evidence of Leviton's conduct in either case to support a finding of comparability. Because the State has the burden to support the offender score, this would have resulted in a score of 3 and a lower standard range. This means Leviton's standard range for the crime of trafficking in stolen property in the second degree under the SRA would have been 9 to 12 months, instead of 17 to 22 months. Thus, the unreasonable performance by counsel in failing to investigate the comparability of the Montana prior convictions was prejudicial to Leviton because it directly affected the length of the sentence he could be required to serve.

3. The remedy should be to disregard stipulation that was not knowing and voluntary, and remand for resentencing.

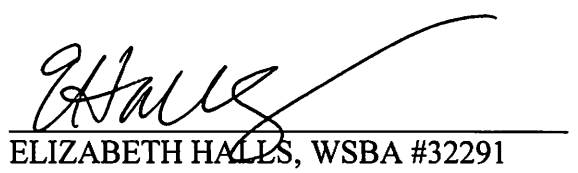
Leviton's stipulation to his offender score was not knowing, voluntary, and intelligent because counsel did not investigate and raise the issue of comparability of the statutes until after he had already pleaded guilty. Here, to the extent the stipulation was part and parcel of Leviton's guilty plea, he could not have made an informed decision as required under *A.N.J.* because of the lack of investigation and legal analysis.

Because Leviton's stipulation to his offender score was not knowing, voluntary, or intelligent, it should be disregarded. The remedy for a miscalculated offender score is resentencing using the correct offender score. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950, 954 (2010); *Thiefault,* 160 Wn.2d at 420. When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing. *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113, 121 (2009); *McCorkle*, 88 Wn.App. at 500 (finding that the State is held to the existing record on remand). Because Leviton objected to his offender score at his sentencing hearing as well as numerous other proceedings, the State should be held to the existing record on remand at the resentencing hearing.

VI. CONCLUSION

Leviton respectfully requests that the court find that prejudicial errors were committed below such that his sentence ought to be reversed and his case remanded for further proceedings. Leviton's attorney rendered ineffective assistance of counsel by failing to investigate his offender score until after Leviton had already pleaded guilty. To the extent that Leviton stipulated to his offender score for purposes of sentencing, it was not a knowing and intelligent stipulation because defense counsel failed to investigate or analyze the comparability of out-of-state convictions until after the fact. Leviton's judgment and sentence should be vacated, and the case remanded for new sentencing.

RESPECTFULLY SUBMITTED this 20th day of November, 2013.



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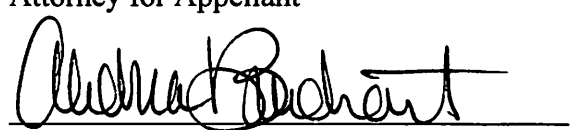

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 20th day of November, 2013 in Walla Walla, Washington.

Elizabeth Halls