70857-1

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NO. 70857-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRENDA NICHOLAS,

Appellant.

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

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred when it included two out of state convictions in appellant's offender score without conducting a comparability analysis.

2. Appellant received ineffective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

At a single hearing, appellant was sentenced for first degree murder and for two counts of first degree theft and one count of first degree identity theft. The trial court included two 2010 California convictions described in the prosecutor's presentence report and appendix of appellant's criminal history as "theft of elder/dependent adult $400+" and "grand theft." The State provided no documentation or details of the California convictions and did not prove the comparability of either conviction. Defense counsel acknowledged the existence of the California convictions in the offender score, and agreed with the prosecutor's standard range sentence determination. Counsel did not, however, specifically agree the California convictions were for crimes comparable to Washington felonies. The sentencing court adopted the prosecutor's calculation of appellant's offender score without conducting a comparability analysis.

1. Did the court err by including the California convictions in the offender score even though the State failed to show appellant's California convictions were for crimes comparable to felonies in Washington?

2. In the alternative, did defense counsel provide ineffective assistance at sentencing by failing to hold the State to its burden of proving appellant's California convictions were for felonies that were comparable to Washington felonies?

B. STATEMENT OF THE CASE

The King County Prosecutor charged appellant Brenda Nicholas with one count of first degree murder with a deadly weapon for an incident resulting in the death of Patrick Fleming on December 8, 2011. CP 1-8.

The State explained before trial it intended to impeach Nicholas with two California convictions if she testified. 1RP[1] 79-80. The prosecutor described the convictions as "theft embezzlement," and "grand theft," and maintained they were admissible under ER 609 for impeachment purposes. 1RP 79-80. Defense counsel noted the prosecutor

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – March 6, 2013; 2RP – March 11, 2013; 3RP – March 13, 2013; 4RP – March 14, 2013; 5RP – March 18, 19, 20, 25, 26, 27, 28, 2014 & April 1, 2, 3, 5, 2014; 6RP – April 4, 2013; 7RP – April 8, 2013; 8RP – August 9, 2013.

was "correct," but did not believe all the State's "paperwork" was admissible for impeachment purposes. 1RP 80. The court noted that if Nicholas admitted the crimes none of the documentation would be admissible. 1RP 80.

Defense counsel noted one of the California convictions was titled "theft for embezzlement from an elder." 5RP 1080-81. The parties agreed to redact the term "elderly" to prevent unfair prejudice from arising in the murder case, which also involved allegations of theft against elderly persons. 5RP 1081. During her trial testimony, Nicholas acknowledged having two California convictions from 2010 for "grand theft," and "theft and embezzlement." 5RP 1134, 1235-36.

A jury convicted Nicholas as charged. 7RP 4-7; CP 151-52. At a single hearing, Nicholas was sentenced for first degree murder. Nicholas, who pleaded guilty to two counts of first degree theft and one count of first degree identity theft in King County case no. 12-1-04126-8 SEA, was sentenced for those offenses at the same hearing. 8RP 2.

At the joint sentencing, the State calculated Nicholas' standard range sentence for murder based on an offender score of five. 8RP 3; Supp. CP __ (sub no. 101, State's Sentencing Recommendation, dated 8/7/13, at 2). The State argued the three guilty plea convictions and two 2010 California convictions, described in the prosecutor's sentencing

memorandum and appendix of Nicholas' criminal history as "theft of elder/dependent adult $400+" and "grand theft," each counted as point for offender score purposes. Supp. CP __ (sub no. 101, State's Sentencing Recommendation, dated 8/7/13, at 1); Supp. CP __ (sub no. 100, Presentence Statement of King County Prosecuting Attorney, dated 8/6/13, at 11). The State provided no documentation or details of the California convictions and offered no comparability analysis.

Defense counsel acknowledged the prosecutor's standard sentencing range but requested a sentence at the bottom of the range. 8RP 25-26. Defense counsel did not argue the California convictions were for crimes comparable to Washington felonies.

After the attorneys finished their arguments, the trial court calculated Nicholas' offender score as five and sentenced her to 388 months, the top of the standard range. The court also imposed a consecutive 24-month deadly weapon enhancement sentence. CP 155-63; 8RP 29-30. The sentencing court conducted no comparability analysis. Nicholas timely appeals. CP 166-75.

C. ARGUMENT

THE SENTENCE MUST BE REVERSED AND REMANDED BECAUSE THE SENTENCING COURT ERRED IN COUNTING OUT-OF-STATE CONVICTIONS IN THE OFFENDER SCORE WITHOUT ENGAGING IN THE REQUIRED COMPARABILITY ANALYSIS.

a. The State Did Not Prove the California Offenses Were Comparable to a Washington Felony for Purposes of Computing the Offender Score.

"[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). This Court reviews a sentencing court's offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citing In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005)). The State does not meet its burden through bare assertions. Mendoza, 165 Wn.2d at 929 (citing Ford, 137 Wn.2d at 482); see also State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (recognizing 2008 amendments to RCW 9.94A.500 and .530 unconstitutionally shifted to defendant burden of proof relating to defendant's prior history).

Under the Sentencing Reform Act, a foreign conviction is included in a defendant's offender score if it is "comparable" to a Washington felony. RCW 9.94A.030(11); RCW 9.94A.525(3). To determine whether there is comparability, a court must first consider whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the conduct underlying the foreign offense would have violated the Washington statute. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Thiefault, 160 Wn.2d at 415.

Classification of an out-of-state conviction is a mandatory step. Ford, 137 Wn.2d at 483. Illegal or erroneous sentences may be challenged for the first time on appeal. Ford, 137 Wn.2d at 484-85. This includes challenges to the comparability of out-of-state convictions. Ford, 137 Wn.2d at 485.

According to the criminal history submitted by the State, Nicholas had two 2010 California convictions for "theft of elder/dependent adult $400+" and "grand theft." Supp. CP __ (sub no. 101, State's Sentencing

Recommendation, dated 8/7/13, at 1); Supp. CP __ (sub no. 100, Presentence Statement of King County Prosecuting Attorney, dated 8/6/13, at 11). The State provided no evidence to show these convictions were comparable to any Washington felony. The State did not even provide the specific statutes under which Nicholas was convicted, the elements of either crime, or the judgment and sentences for the California convictions. No specific details of the underlying crimes appear in the record.

The trial court calculated Nicholas' offender score as five, with each California conviction counting as one point. CP 155-63. The court conducted no comparability analysis. The court therefore erred by including the California convictions in Nicholas' offender score.

Nicholas anticipates the State may assert any objection to the comparability of her out-of-state convictions was waived because of the plea documents filed in case no. 12-1-04126-8 SEA and defense counsel's acknowledgement of the prosecutor's calculated standard range prison sentence. This argument is not supported by the record here and should be rejected.

A defendant must affirmatively acknowledge the "*facts and information*" the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence.

Mendoza, 165 Wn.2d at 928-29 (emphasis added). Failure to object to the criminal history related by the State does not constitute such an affirmative acknowledgment. Mendoza, 165 Wn.2d at 928. And a defendant's silence on the issue is not sufficient to constitute such waiver. Cadwallader, 155 Wn.2d at 876.

Nor is a defendant deemed to have affirmatively acknowledged the State's asserted criminal history based on his or her agreement with the sentencing recommendation. Mendoza, 165 Wn.2d at 928. Counsel's agreement to an offender score calculation is also not affirmative acknowledgment of criminal history. State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). Here, Nicholas never affirmatively acknowledged the California convictions were comparable to Washington offenses.

Additionally, a waiver argument fails to take into account the content of the plea documents that must be interpreted against waiver in Nicholas' case. Plea agreements are contracts. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). To constitute a valid implied waiver under contract law, there must exist unequivocal acts or conduct evidencing an intent to waive; intent may not be inferred from doubtful or ambiguous facts. Cent. Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Thus, waiver of a comparability challenge cannot be

implied where plea documents show an ambiguity as to the defendant's intent to waive.

The plea documents are ambiguous as to whether Nicholas affirmatively acknowledged the criminal history put forth by the prosecutor and, thus, impliedly waived comparability challenges. Although the pre-typed language in the statement of defendant on plea of guilty states that the defendant accepts the prosecutor's statement of his or her criminal history, Nicholas' plea agreement shows otherwise. Supp. CP __ (sub no. 49, Statement of Defendant on Plea of Guilty, dated 5/24/13, at 3). The plea agreement included a specific check-box indicating Nicholas understood the offender score included convictions from other jurisdictions, and that she agreed these convictions were "properly included and scored according to the comparable offense definitions provided by Washington law." Supp. CP __ (sub no. 49, Statement of Defendant on Plea of Guilty, dated 5/24/13, at 42). Significantly, Nicholas did not check that box. Id. Given this important omission, the plea documents are inconclusive as to whether Nicholas acknowledged her criminal history as including the out-of-state convictions and, thus, cannot support a finding of waiver.

Although the plea agreement also includes a check-box indicating Nicholas agreed the sentencing scoring form, offender score, and prosecutor's understanding of her criminal history was "accurate and

complete," this is not an affirmative acknowledgement that the above mentioned California convictions were comparable to Washington offenses. Supp. CP __ (sub no. 49, Statement of Defendant on Plea of Guilty, dated 5/24/13, at 42).

Lucero is instructive in this regard. Lucero was convicted of second degree assault. Lucero, 168 Wn.2d at 787. At sentencing, Lucero recited a standard sentencing range based on the inclusion of a California burglary conviction in his offender score. He conceded his offender score was at least six, which included the burglary conviction, arguing only that a previous California conviction for possession of a controlled substance "washed out." The trial court did not conduct a comparability analysis of the California convictions, and imposed a standard range sentence based on an offender score of seven, which included the California convictions. Lucero, 168 Wn.2d at 787.

On appeal, Lucero argued the trial court erred in calculating his offender score. The State argued Lucero waived any error by acknowledging his offender score and standard range. The Court of Appeals agreed, holding Lucero affirmatively acknowledged the comparability of the California convictions when he argued the possession conviction had washed out, but acknowledged that, without counting that

conviction, he would have an offender score that necessarily included the California burglary conviction. Lucero, 168 Wn.2d at 787.

The Supreme Court reversed the Court of Appeals, concluding Lucero did not waive his challenge to his criminal history by acknowledging his offender score. Lucero, 168 Wn.2d at 789. The Court noted Lucero did not "affirmatively acknowledge" his California convictions were comparable to Washington crimes. Lucero, 168 Wn.2d at 789. The Court concluded that at most, Lucero acknowledged that without the challenged California drug possession conviction, his offender score would still include the California burglary conviction. That was not a sufficient "affirmative acknowledgment" to demonstrate waiver. Lucero, 168 Wn.2d at 789.

Like Lucero, Nicholas' agreement that the sentencing scoring form, offender score, and prosecutor's understanding of her criminal history were "accurate and complete," does not constitute an affirmative acknowledgement that her California convictions were for felonies comparable to Washington felonies.

Finally, defense counsel's acknowledgement of the prosecutor's calculated standard range prison sentence is also insufficient to support a finding of waiver. Lucero, 168 Wn.2d at 789; Mendoza, 165 Wn.2d at 928. Moreover, rather than supporting a finding of waiver, the

memorandum actually demonstrates defense counsel was ineffective for failing to object to the inclusion of the foreign convictions without a comparability analysis.

b. In The Alternative, Defense Counsel Provided Ineffective Assistance at Sentencing.

Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel's failure to object to the inclusion of the out-of-state convictions has, in similar circumstances, been held to be ineffective assistance. Thiefault is instructive here.

There, Thiefault's attorney failed to object to the comparability of Thiefault's attempted robbery conviction from Montana. Thiefault, 160 Wn.2d at 414. The Court of Appeals agreed Thiefault's attorney provided

deficient performance by failing to object, because the Montana offense was broader than its Washington counterpart. The Court further concluded it could not determine whether the offenses were factually comparable because the record provided by the state – including a motion for leave to file information, an affidavit from a prosecutor, and a judgment – did not include facts Thiefault admitted. Thiefault, 160 Wn.2d at 415-16.

Nevertheless, the Court of Appeals found Thiefault could not establish his counsel's failure to object to the comparability analysis prejudiced his case. The court reasoned that the superior court would likely have given the state the opportunity to obtain information properly establishing the facts underlying Thiefault's Montana conviction had his attorney objected. The court further reasoned that Thiefault did not demonstrate a reasonable probability that the facts underlying the Montana conviction would not have satisfied the Washington crime. The court therefore concluded Thiefault's counsel was not ineffective. Thiefault, 160 Wn.2d at 416.

The Supreme Court agreed counsel provided deficient performance by failing to object to the comparability of the Montana conviction, but disagreed that Thiefault had not established prejudice. Thiefault, at 417.

> The Court of Appeals improperly found that such deficient representation did not prejudice Thiefault. Although the state may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable[.]

Thiefault, 160 Wn.2d at 417.

The court vacated Thiefault's sentence and remanded the case to superior court to conduct a factual comparability analysis of the Montana conviction. Id. Cf. State v. Birch, 151 Wn. App. 504, 213 P.3d 63 (2009), (finding counsel was not ineffective for failing to object to the absence of a comparability analysis of a California robbery conviction where Birch did not dispute conviction and explicitly agreed in writing that California conviction was equivalent of a Washington felony offense for offender score purposes), rev. denied, 168 Wn.2d 1004 (2010).

Although Nicholas disputes that her counsel agreed to comparability, this Court should find that any agreement or acknowledgement was deficient as well as prejudicial under the rule set forth in Thiefault. As such, the memorandum and plea documents do not constitute evidence of waiver and, indeed, indicate another ground for challenging the sentence below since it is a constitutional defect that is apparent on the face of the documents.

c. Remand for Resentencing is Required.

The remedy for a miscalculated offender score is to remand for resentencing. Mendoza, 165 Wn.2d at 930. The State was not relieved of its obligation to prove the comparability of out-of-state convictions. This Court should remand for resentencing so the trial court may engage in the statutorily required comparability analysis.

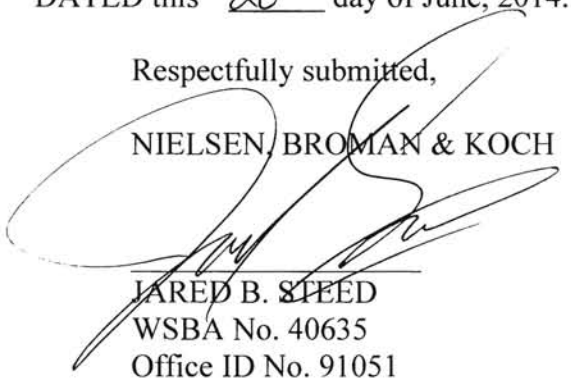
D. CONCLUSION

For the foregoing reasons, this Court should reverse Nicholas' conviction and remand for resentencing.

DATED this 20th day of June, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70857-1-I
	)	
BRENDA NICHOLAS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BRENDA NICHOLAS
DOC NO. 339217
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACICH ROAD NW
GIG HARBOR, WA 98322

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JUNE 2014.

X Patrick Mayovsky