74112-8

FILED
Apr 29, 2016
Court of Appeals
Division I
State of Washington

No. 74112-8-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,

MOTION TO WITHDRAW AND BRIEF IN SUPPORT THEREOF

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A. IDENTITY OF MOVING PARTY.

The Washington Appellate Project and Mick Woynarowski, appointed counsel for appellant, Brenda Nicholas, requests the relief requested in part B of this motion.

B. STATEMENT OF RELIEF SOUGHT.

Appointed counsel on appeal requests permission to withdraw as attorney of record in accordance with RAP 18.3(a)(2), Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997).

C. FACTS RELEVANT TO MOTION.

In State v. Nicholas, 185 Wn. App. 1019 (2015) (unpublished decision in Case No. 70857–1–I), review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015), this Court affirmed Ms. Nicholas' convictions, but remanded the case to the trial court to remedy a conceded sentencing error: "We remand for the sentencing court to conduct a comparability analysis and for resentencing. We otherwise affirm."

The resentencing took place in King County Superior Court on October 9, 2015. After the resentencing, Ms. Nicholas filed a notice of appeal and the Washington Appellate Project was appointed to

represent Ms. Nicholas.[1] In reviewing appellant's case for issues to raise on appeal from the resentencing, counsel has done the following:

1. Reviewed the verbatim report of proceedings from Ms. Nicholas' resentencing;

2. Reviewed the clerk's papers, including the sentencing memoranda and judgment and sentence;

3. Researched all pertinent potential legal issues; and

4. Conferred with other attorneys at the Washington Appellate Project concerning possible legal and factual bases for appellate review.

Counsel has "master[ed] the trial [court] record, thoroughly research[ed] the law, and exercise[d] judgment in identifying the arguments that may be advanced on appeal." McCoy v. Court of Appeals, Dist. 1, 486 U.S. 429, 438, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988).

Counsel's work on the case has been limited to the resentencing.

[1] A different law firm represented Ms. Nicholas in the appeal from her underlying convictions. Undersigned counsel's involvement has been limited to the record on remand for resentencing.

D. GROUNDS FOR RELIEF.

Based on the foregoing evaluation of the record, counsel has concluded there is no basis in law or fact upon which a claim for relief could be granted. Id.

Counsel requests this Court independently review the record in order to determine whether there is any further basis for appellate review. Hairston, 133 Wn.2d at 538. In the event the Court concurs, the undersigned seeks to withdraw as appointed counsel on appeal without prejudice to Ms. Nicholas' right to proceed pro se, raising any appellate issues she may wish to raise.[2]

E. STATEMENT OF THE CASE.

On January 12, 2015, this Court affirmed Brenda Nicholas's conviction for first degree murder and other offenses, but reversed and remanded for a resentencing. CP 20-31. In that appeal, the State conceded it was error to have included California convictions for "grand theft" and "theft and embezzlement" without first conducting a comparability analysis. A number of additional grounds raised by Ms. Nicholas pro se to challenge her conviction were rejected by the Court.

[2] Counsel has mailed to Ms. Nicholas the record of the resentencing proceedings for her to use in preparing any pro se brief.

At the resentencing, the State asked the trial court to count a 2010 California conviction for "grand theft" as a point toward Ms. Nicholas' offender score. CP 34-35. In support of this request, the State submitted a California judgment and sentence. CP 37-38. The State also submitted a California charging document and copies of relevant statutes. CP 39-48; 10/9/15 RP 5-6.

The State argued the out-of-state prior was "legally comparable to Washington's Theft in the Second Degree statute." CP 34. Defense counsel conceded the State's analysis was "correct." 10/9/15 RP6.

The trial court included the conviction in Ms. Nicholas's offender score. CP 50, 55. The corresponding standard range was calculated to be 281 to 374 months of incarceration. CP 50. The trial court sentenced Ms. Nicholas to the high end of this standard range, 374 months in prison to be followed by 24 months of deadly weapon enhancement time, for a total of 398 months of incarceration. CP 49-57 ("Corrected Judgment and Sentence Felony Following Reversal of Sentence.").

The trial court stated: "I'll explain to you that you have the right to appeal again, <u>just the sentence</u>." 10/9/15 RP19 (emphasis added). Ms. Nicholas appealed from the entry of this judgment. CP 58.

F. POTENTIAL ISSUES ON APPEAL.

RAP 18.3(a)(2) provides for the withdrawal of counsel on appeal where the appointed attorney can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders, supra; State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970); and State v. Pollard, 66 Wn.App. 779, 787-90, 825 P.2d 336, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992); counsel submits the following brief in satisfaction of these requirements.

1. On resentencing, did the court mete out a lawful sentence?

The SRA creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant's offender score. RCW 9.94A.505, .510, .520, .525; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. This Court reviews de novo the sentencing court's calculation of the offender score. State v. Rivers, 130 Wn.App. 689, 699, 128 P.3d 608 (2005).

"Out-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). A foreign conviction for a

crime that is *not* comparable to a Washington felony may not be included in the offender score. State v. Thomas, 135 Wn.App. 474, 477, 144 P.3d 1178 (2006); see also In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process. U.S. Const. amend. XIV; State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012). Furthermore, "fundamental 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).

To determine whether a prior out-of-state conviction may be included in a defendant's offender score, the sentencing court must compare the elements of the foreign crime with the elements of the similar Washington crime. If the elements are the same, or if the foreign crime is narrower than the Washington felony, the foreign conviction may be included in the offender score. Lavery, 154 Wn.2d at 255.

> Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have stated a defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements.

State v. Ross, 152 Wn. 2d 220, 230, 95 P.3d 1225 (2004) (emphasis added), citing Ford, 137 Wn.2d at 483 n. 5.

Finally,

> [i]f the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable 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, at 415, citing Lavery, 154 Wn.2d at 258; State v. Farnsworth, 133 Wn.App. 1, 22, 130 P.3d 389 (2006).

a. The State's argument that the California prior was legally comparable.

On resentencing, the State argued that Ms. Nicholas' grand theft conviction from California was legally comparable to Washington

State's Theft in the Second Degree. CP 34-35, 37-48. Defense counsel conceded the issue. 10/9/15 RP6.

The California prior was based on conduct allegedly occurring in 2006. CP 39-44. Contrary to the State's assertion below, the California Grand Theft statute then in effect is not legally comparable to the former Washington's Theft in the Second Degree. RCW 9A.56.040 in effect in 2006 read as follows:

> Theft in the second degree—Other than firearm.
>
> (1) A person is guilty of theft in the second degree if he or she commits theft of:
>
> (a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm as defined in RCW 9.41.010, but does not exceed one thousand five hundred dollars in value; or
>
> (b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or
>
> (c) An access device; or
>
> (d) A motor vehicle, of a value less than one thousand five hundred dollars.
>
> (2) Theft in the second degree is a class C felony.

In other words, for theft of property or services, the stolen property must be valued at least $250.

In contrast, the California Grand Theft statute read:

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), **except as provided in subdivision (b).**

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

> (1)(A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding one hundred dollars ($100).
>
> (B) For the purposes of establishing that the value of avocados or citrus fruit under this paragraph exceeds one hundred dollars ($100), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft avocados or citrus fruit of the same variety and weight exceeded one hundred dollars ($100) in wholesale value.
>
> (2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding one hundred dollars ($100).
>
> (3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates four hundred dollars ($400) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:

> (1) An automobile, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow, or pig.
>
> (2) A firearm.

In other words, "[i]n most cases the crime becomes grand theft when the property taken exceeds $400. In certain circumstances the unlawful taking of lesser valued property is [still] grand theft." People v. Brady, 234 Cal. App. 3d 954, 957, 286 Cal. Rptr. 19 (Cal. Ct. App. 1991). Specifically, theft of avocado, citrus, shellfish, and some domestic animals constitutes grand theft in California even when the value of the property is just over $100 or undefined altogether.

The Washington theft in the second degree has a firm value floor of $250. As such, the California statute is broader, and thus not legally comparable. Ms. Nicholas could argue this point on appeal. To the extent trial counsel conceded the issue, Ms. Nicholas could potentially argue that she did not receive effective assistance of counsel and ask this Court to reassess the scoring question nonetheless. To establish ineffective assistance of counsel, a party must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

b. Even if not legally comparable, Ms. Nicholas' California prior was factually comparable.

Setting aside trial counsel's agreement with the State's position that the California prior was legally comparable, the record suggests the prior was factually comparable. As such, scoring it as a point toward Ms. Nicholas offender score may not be error.

To support the prior conviction, the State provided the judgment and sentence from that California charge. CP 37-38. The document shows Ms. Nicholas was found guilty in Count II of violating PC 487(a), by way of a "nolo contendere" plea to the offense. CP 37. Count II alleged she "willfully, unlawfully and feloniously" took the property of Robert Pellascio, "to wit, $50,000.00, from Conseco Insurance Co." CP 41. There is no statement of defendant on plea of guilty in these records. Ms. Nicholas could argue about factual comparability of her California conviction.

However, under California law, a defendant who enters a "nolo contendere" plea "admits every element of the crime charged." State v. Olsen, 180 Wn.2d 468, 325 P.3d 187 (2014). Because of this rule, the charging document in a California conviction involving a "nolo contendere" plea may be considered in the analysis of whether a California prior is factually comparable to a Washington statute. Id.

2. Did trial counsel, at resentencing, operate under a conflict that implicated Ms. Nicholas Sixth Amendment right to counsel?

Ms. Nicholas, in her statement of additional grounds for her direct appeal, alleged that her trial counsel had been ineffective in withdrawing a mid-trial motion for mistrial and also "listed numerous additional ways in which she perceived counsel's performance to be deficient." State v. Nicholas, Op. at 3-4; CP 27-28. The Court ruled that Ms. Nicholas failed to show that trial counsel's decision to withdraw the mistrial motion was not a legitimate trial tactic. Id. The Court did not consider the additional assertions because they were not pled with sufficient specificity for appellate review.

The same counsel represented Ms. Nicholas on remand for resentencing. The record on remand lacks any discussion of a potential conflict of interest arising out of Ms. Nicholas's assertions of ineffective assistance or any motion for new counsel.

An accused has the right to be represented by conflict-free counsel and Ms. Nicholas could argue there was a problem there. However, it is not clear there was an actual conflict. In any event, the United States Supreme Court has held that in order to

demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance. Mickens v. Taylor, 535 U.S. 162, 162, 122 S. Ct. 1237, 1238, 152 L. Ed. 2d 291 (2002).

G. CONCLUSION

Based on the foregoing, appellate counsel for Brenda Nicholas requests this Court independently review the record and, in the event the Court determines there are no meritorious issues, grant this motion to withdraw as appointed counsel on appeal without prejudice to Ms. Nicholas' right to proceed pro se. If this motion to withdraw is granted, no appellate costs should be imposed against this indigent defendant. State v. Stump, __ Wn.2d ___, (No. 91531-8) (Apr. 28, 2016).

DATED this 29th day of April, 2016.

Respectfully submitted,

/s/ Mick Woynarowski

_____

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

STATE OF WASHINGTON, Respondent, v. BRENDA NICHOLAS, Appellant.	)))))))))	NO. 74112-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **COUNSEL'S MOTION TO WITHDRAW AND SUPPORTING BRIEF PURSUANT TO RAP 18.3** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] BRENDA NICHOLAS 339217 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF APRIL, 2016.

X_____

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