No. 46124-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ILLYA NAPOLEAN WATKINS,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 13-1-01612-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court incorrectly calculated Watkins' offender score by including a current misdemeanor domestic violence conviction.

2. Whether defense counsel rendered ineffective assistance of counsel because he stipulated to a correct offender score of seven.

B. STATEMENT OF THE CASE.

The State accepts Watkins' statement of the case.

C. ARGUMENT.

1. Watkins' offender score was correctly calculated. By expressly agreeing that his criminal history was correct, he waived any challenge to the comparability of foreign convictions.

Watkins entered pleas of guilty to one count of first degree theft and one count of fourth degree assault, both domestic violence offenses. CP 26-34, 03/14/14 RP 12-13. Before he made those pleas, the parties presented the court with a stipulation, signed by the prosecutor, the defense attorney, and the defendant, setting forth Watkins' criminal history and his offender score. Attached to the stipulation was a score sheet from the Sentencing Guidelines Manual expressly detailing the prior and other current convictions that were counted in the offender score. CP 23-25. According to that score sheet, the score of seven was reached by

adding six prior felony convictions and the current domestic violence gross misdemeanor conviction. CP 25.

At the sentencing hearing held on March 14, 2014, the colloquy between the court and defense counsel was confusing.

> THE COURT: Are you confident, [defense counsel], that that's an accurate history here?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. Even though he may not have enough felony matters because this is charged as a domestic-violence offense, there are additional points from his misdemeanor history so we're stipulating to the score of seven.

03/14/14 RP 5. After Watkins expressed some disagreement with the point calculation, the court recessed the sentencing hearing to allow counsel to speak with him. 03/14/14 RP 5. When the hearing resumed, Watkins explained to the court that he had believed that a malicious mischief conviction was being counted as a strike offense, and now that he understood that it was not, he agreed with the criminal history. 03/14/14 RP 6. Defense counsel then said:

> We are—we're stipulating to the score being seven. As I mentioned, the points get up there quickly when we start taking into consideration domestic-violence convictions, and that includes his juvenile, I mean his misdemeanor history as well, so we are stipulating, Your Honor.

03/14/14 RP 6-7. The court, obviously miscounting the number of felonies listed on the stipulation, then said:

> The amended information, first amended information is not—does not contain any charges that are strike offenses, but you do have those two previous matters that are. You, in addition, have five other felonies, three misdemeanors, five gross misdemeanors, and the gross misdemeanors are the no-contact order violations that [defense counsel] is referring to that make your score in this matter pretty significant of a seven.

03/14/14 RP 7.

Despite the fact that the court and the defense counsel were less than precise about the criminal history, the documents filed as part of this plea and sentence were accurate and the offender score was correctly calculated as seven.

The State does not dispute that an erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d Wn.2d 472, 477, 973 P.2d 452 (1999). This sentence is not erroneous.

RCW 9.94A.525 sets forth the process for calculating an offender score. Generally speaking, each prior felony conviction that has not washed out counts as one point. RCW 9.94A.525(1)-(2). Out-of-state convictions are to be classified according to the comparable Washington offense. RCW 9.94A.525(3). If the

current conviction is for a felony domestic violence offense, in addition to prior felonies which have not washed out, one point is added for "each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011." RCW 9.94A.525 (21)(c).

a. Current conviction for Fourth Degree Assault, Domestic Violence.

Watkins argues that his current conviction for fourth degree assault, domestic violence, cannot be considered a "repetitive domestic violence offense" because it wasn't a prior conviction and it wasn't a felony. He asserts that RCW 9.94A.525(21)(c) is ambiguous and the rule of lenity should apply. Appellant's Opening Brief at 7.

Other current offenses are considered to be prior offenses for purposes of calculating the offender score.

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using *all other current and prior convictions as if they were prior convictions* for the purpose of the offender score. . . .

RCW 9.94A.589(a), emphasis added.

RCW 9.94A.030(44) defines a repetitive domestic violence offense as including any "domestic violence assault *that is not a felony offense*." RCW 9.94A.030(44)(a)(i), emphasis added. One domestic violence assault is, under this definition, "repetitive." It counts as a point in the offender score even though it is not a felony.

Under the rule of lenity, any ambiguity in the statute is construed against the State and in favor of the defendant. State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996). However, when there is no ambiguity identified in the pertinent statute, the rule of lenity does not apply. State v. Snedden, 149 Wn.2d 914, 922, 73 P.3d 995 (2003). The sentencing statutes here are not ambiguous. "Under the plain language of RCW 9.94A.525(1), [the defendant's] gross misdemeanor DV-VNCO is a prior conviction because it is an adjudication of guilt that existed prior to the sentencing on the felony DV-VNCO." State v. Rodriguez, No. 44417-8-II (October 7, 2014), *slip op.* at 8. "RCW 9.94A.030(41) does not qualify the definition of 'repetitive domestic violence offense' with anything other than the type of offense." Id, *slip op.* at 9.

It was correct to count the current gross misdemeanor conviction for fourth degree assault, domestic violence, as a point in the offender score.

b. Five prior gross misdemeanor domestic violence convictions.

Watkins argues that "it appears" as if his offender score of seven for the first degree theft conviction was reached by including his five prior domestic violence violations of no contact orders, his other current offense, and one unspecified felony. Appellant's Opening Brief at 4, 8. Despite the confusing colloquy, however, the stipulation of the parties and the accompanying score sheet make it clear that the score of seven was reached by counting the six prior felony convictions, which did not include the California conviction for petty (sic) theft with priors because it was not comparable to a Washington felony, and the current domestic violence assault conviction. CP 25. Watkins correctly argues that only prior repetitive domestic violence convictions plead and proven after August 1, 2011, could be counted in the offender score. RCW 9.94A.525(21)(c). All of Watkins' domestic violence violations of a no-contact order occurred in 2000 and 2010. CP 23-24. It was impossible for them to count in the offender score.

There are, however, six prior felony convictions which did not wash out and which did count. Along with the current "repetitive domestic violence offense," that comes to seven.

c. Comparability of out-of-state convictions.

In his statement of the case, Watkins seems to discount the possibility that his out–of-state convictions were counted in the offender score because there was no comparability analysis in the record. Appellant's Opening Brief at 4. Such analysis was unnecessary, however, because Watkins stipulated to the criminal history and the offender score and did not contest it at his sentencing.[1] CP 23-24.

If a defendant affirmatively acknowledges his criminal history, the State is not required to produce the evidence to support it. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

> 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.

[1] Because the parties noted in the stipulation that one of the California felonies was not comparable to a Washington felony, it is a reasonable inference that the parties themselves did a comparability analysis on all of the out-of-state convictions.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004), citing to Ford, 137 Wn.2d at 483 n.5. Mere failure to object to the State's summary of criminal history does not constitute an acknowledgment, even if the defendant agrees with the State's standard range calculation. Mendoza, 165 Wn.2d. at 928.

Watkins' stipulation is unquestionably an "affirmative acknowledgment" and not merely a failure to object. "[S]ince [the defendant] affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him due process." Ross, 152 Wn.2d at 233. Watkins has waived a challenge to the comparability of his foreign convictions.

A defendant cannot, however, waive a challenge to a miscalculated offender score. State v. Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). He can waive factual errors, or errors involving the trial court's discretion, but he cannot waive a legal error. Id. It is apparent, however, that Watkins' offender score was correctly calculated—six prior felonies and one current repetitive domestic violence offense. No comparability analysis was required regarding the California and Ohio felony convictions because he stipulated to their comparability and has thus waived any challenge

on that basis. There was no error and this matter should not be remanded for resentencing.

2. Even if defense counsel misstated the basis for the offender score of seven, the calculation was correct and Watkins was not prejudiced. Without prejudice there is no ineffective assistance of counsel.

The State agrees that, considering the statements of defense counsel at the sentencing hearing, it is not clear upon what he based his understanding of the offender score. He was very clear, however, that the score of seven was correct. 03/14/14 RP 6.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); McFarland, 127 Wn.2d at 334-35.

Even if defense counsel misunderstood or misstated how the score of seven was reached, that score is correct and thus Watkins has suffered no prejudice. Were he to be resentenced, the outcome would be exactly the same.

D. CONCLUSION.

Watkins' offender score was correctly calculated and his attorney's assistance was not ineffective. The State respectfully asks this court to affirm his sentence.

Respectfully submitted this 9th day of October, 2014.

Carol La Verne

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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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

Dated this 9th day of October, 2014, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

October 09, 2014 - 1:58 PM

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