92132-6

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

ILLYAN N. WATKINS,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 46124-2-II
Appeal from the Superior Court for Thurston County
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01612-9

THOMAS E. DOYLE, WSBA NO. 10634
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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is ILLYAN N. WATKINS, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Ruling Granting Motion on the Merits of the Commissioner of the Court of Appeals, Division II, cause number 46124-2-II, filed April 14, 2015. A timely Motion to Modify Ruling Affirming Convictions was filed thereafter and was denied July 28, 2015.

A copy of the Ruling Affirming Convictions is attached hereto in the Appendix at A1 through A8. A copy of the Order Denying Motion to Modify is in the Appendix at A9.

C. ISSUES PRESENTED FOR REVIEW

01. Whether the sentencing court miscalculated Watkins's offender score by including his current gross misdemeanor conviction for assault in the fourth degree involving domestic violence where a concurrent gross misdemeanor conviction for domestic violence does not count toward the offender score as a prior conviction for a "repetitive domestic violence offense" under the Sentencing Reform Act?

02. Whether, based on this record, the State was relieved of its burden to prove the comparability of Watkins's out-of-state convictions solely because he stipulated to his prior criminal history and offender score of seven?

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D. STATEMENT OF THE CASE

On October 15, 2014, Watkins filed an Amended Brief alleging that the trial court erred in miscalculating his offender score and that he received ineffective assistance of counsel. On December 19, in response to the court's request for supplemental briefing as to the effect, if any, of State v. Rodriquez, 183 Wn. App. 947, 335 P.3d 448 (2014), review denied, 345 P.3d 785 (2015), Watkins filed a supplemental brief, alleging that a current gross misdemeanor for a domestic violence offense does not count toward an offender score as a prior conviction for a "repetitive domestic violence offense" under the Sentencing Reform Act (SRA). On May 13, 2015, Watkins filed a Motion to Modify Ruling Granting Motion on the Merits to Affirm, asserting that the sentencing court had miscalculated his offender score, and that the State was not relieved of its burden to prove comparability of his out-of-state convictions solely because he stipulated to his prior criminal history and offender score of seven. These briefs and motions set out facts and law relevant this petition and are hereby incorporated by reference. Division II disagreed. There are reasons to question this decision.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is

in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

01. THE SENTENCING COURT MISCALCULATED WATKINS'S OFFENDER SCORE BY INCLUDING HIS CURRENT GROSS MISDEMEANOR CONVICTION FOR ASSAULT IN THE FOURTH DEGREE INVOLVING DOMESTIC VIOLENCE WHERE A CONCURRENT GROSS MISDEMEANOR CONVICTION FOR A DOMESTIC VIOLENCE DOES NOT COUNT TOWARD THE OFFENDER SCORE AS A PRIOR CONVICTION FOR A "REPETITIVE DOMESTIC VIOLENCE OFFENSE" UNDER THE SENTENCING REFORM ACT.

In Rodriguez, Division II held that the SRA treats a concurrent gross misdemeanor conviction for a domestic violence offense as a "repetitive domestic violence" offense for purposes of determining a defendant's offender score, even where the gross misdemeanor and the current felony DV offense occurred at the same time and place and were adjudicated at the same time and were sentenced at the same time. State v. Rodrigues, 335 P.3d at 453-54.

Only a "prior conviction for a repetitive domestic violence offense" is included in an offender score under RCW 9.94A.525(21)(c). In Rodriguez, the court erred in concluding that her concurrent gross

misdemeanor conviction—the conviction "arising from the same incident as the felony DV-VNCO for which her offender score was being calculated"—counts as a "prior conviction" under RCW 9.94A.525(1) or RCW 9.94A.589(1)(a). Rodriguez, 335 P.3d at 452-53. This reasoning is unavailing, for it construes "prior conviction" under RCW 9.94A.525(1) in isolation to include any "conviction which exists before the date of sentencing for the offense for which the offender score is being computed." There is no limitation on this logic, given that every conviction precedes sentencing,[1] a "prior conviction" would thus include other current offenses, all of which would have necessarily occurred before sentencing.

In Rodriguez, the court ignored any meaningful distinction between "a prior conviction" and other "current" offenses addressed in RCW 9.94A.525(1): "Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Rodriguez's concurrent gross misdemeanor conviction for domestic violence was entered on the same date as her felony domestic violence

[1] "'Conviction' means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9).

offense and later sentenced on the same date as her felony conviction.[2] Rodriguez, 335 P.3d at 450. It is thus a current offense.[3]

In support of its analysis of RCW 9.94A.525(1), the court focused on the particular language of RCW 9.94A.589(1)(a), which states "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 purposes of the offender score." Rodriguez, 335 P.3d at 453. But the entirety of the language of RCW 9.94A.589(1)(a) precludes the conclusion that Rodriguez's concurrent gross misdemeanor should have been treated "as if" it were a prior conviction for scoring purposes, since the provision that controls the scoring in this regard applies only to felonies because the statute uses the clause "the sentence range for each current offense." RCW 9.94A.589(1)(a). (emphasis added). Such language, of course, presumes each current offense has a sentencing range to be determined by an offender score, and only felonies—not misdemeanors—have sentencing ranges determined by an offender score. RCW 9.94A.525. City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004) (SRA does not apply to sentencing of misdemeanors).

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[2] Watkins pleaded guilty to his felony DV offense and concurrent gross misdemeanor on the same date. [CP 26-34, 37-47].

[3] "Current" means "presently elapsing" an "occurring in or belonging to the present time." Webster's Third New Int'l Dictionary 1924 (1993).

RCW 9.94A.589(1)(a) thus applies only when both current offenses have a sentencing range, as directed by the legislature's use of the word "each." In Rodriguez, the court's reading of the statute gives slight to this and is thus flawed, for "a court must not interpret a statute in any way that renders any portion meaningless or superfluous." Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012).

The panel in Rodriguez incorrectly reasoned that Rodriguez's concurrent gross misdemeanor DV-VNCO must be treated as a prior conviction because "it is not the same criminal conduct as the felony DV-VNCO," Rodriguez, 335 P.3d at 453, further contending that "[t]he only time a current conviction is not counted as though it were a prior conviction under RCW 9.94A.589(1)(a) is if it is an 'other current offense' that is the same criminal conduct as the offense for which the offender score is being calculated." Id. But as no offender score attaches to misdemeanor convictions, they can never be part of the "same criminal conduct" with a felony offense, with the result that the court's reasoning is misplaced.

Only "repetitive" domestic violence offenses are subject to being included in the offender score, RCW 9.94A.525(21)(c), which includes any "[d]omestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense." RCW 9.94A.030(41)(a)(ii).

Rodriguez rejected the claim that the statute requires a repetitive pattern of domestic violence because "RCW 9.94A.030(41) does not qualify the definition of 'repetitive domestic violence offense' with anything other than the type of offense." Rodriguez, 335 P.3d at 454. But such a reading cavalierly erases "repetitive" from the statute and in the process violates the tenet that every word in a statute must be given significance. State v. Roggenkamp, 153 Wn.2d 624, 624, 106 P.3d 196 (2005).

The above is not, as characterized by the Commissioner, an implicit acknowledgment by Watkins that "Rodriguez controls. [Ruling 3]. To the contrary: it is respectfully tendered in support of his argument that his conviction in count II for assault in the fourth degree (domestic violence), a gross misdemeanor, cannot be construed, as happened here, as a "prior conviction for a repetitive domestic violence offense." It is not a prior conviction, it is not a felony, and it is not subject to the scoring provisions of the Sentencing Reform Act. City of Bremerton v. Bradshaw, 121 Wn. App. at 413.

> A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

RCW 9.94A.525(1).

And the rule of lenity applies here to the interpretation of the previously quoted RCW 9.94A.525(21)(c), thus requiring this court to construe the statute strictly against the State and in Watkins's favor. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Absent the existence of ambiguity, this court ascertains the meaning of a statute from its language alone. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Conversely, under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001).

02. BASED ON THIS RECORD, THE STATE WAS NOT RELIEVED OF ITS BURDEN TO PROVE THE COMPARABILITY OF WATKINS'S OUT-OF-STATE CONVICTIONS JUST BECAUSE HE STIPULATED TO HIS PRIOR CRIMINAL HISTORY AND OFFENDER SCORE OF SEVEN.

Watkins entered a "STIPULATION ON PRIOR RECORD AND OFFENDER SCORE" that included seven prior felony convictions, four of which were out of state, with one marked as not matching a Washington felony. [CP 23]. Since there was no comparability analysis, as required by State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005), and given his counsel's and the court's statements vis-à-vis the scoring of his five prior gross misdemeanors involving domestic

violence, it appeared Watkins was given 5 points for these latter offenses, 1 point for a prior unnamed felony, and 1 point for his other current gross misdemeanor offense involving domestic violence.

While acknowledging that Watkins's five prior gross misdemeanor convictions involving domestic violence cannot be included in his offender score [Ruling 5], the Commissioner, citing State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), ruled that given Watkins's aforementioned stipulation, the sentencing court could include his out-of state felonies in calculating his offender score without the State proving comparability:

> Mendoza provides that a defendant's affirmative acknowledgement that prior convictions are properly included in his offender score relieves the State from having to prove the existence and comparability of out-of-state convictions. 165 Wn.2d at 920; see also State v. Ross, 152 Wn.2d 220, 229-30, 95 P.3d 1225 (2004). Here, Watkins signed a stipulation as to his prior criminal history as well as an offender score of seven, thus, he cannot now contend that the State must also provide the existence and comparability of any of the six felony convictions contained in the stipulation.

[Ruling 6-7].

In State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010), this court rejected such analysis. Lucero was convicted of second degree assault and at sentencing conceded his offender score was at least six, which included California convictions for burglary and possession of a controlled

substance, arguing only that the possession charge "washed out." Id. at 787. The sentencing court failed to perform a comparability analysis and imposed a standard range sentence that included the California convictions. Id.

On appeal, the State, while acknowledging there was a valid comparability issue, successfully argued that Lucero had waived any error by acknowledging his offender score and standard range. Division I agreed. State v. Lucero, 140 Wn. App. 782, 788-89, 167 P.3d 1188 (2007). This court reversed:

> [T]he Court of Appeals here attempted to distinguish Mendoza on the basis that Lucero waived his challenge to his criminal history by acknowledging his offender score. (citation omitted). But Mendoza is not so easily distinguished. Lucero did not "affirmatively acknowledge" that his California convictions were comparable to Washington crimes. At most, he acknowledged that without the challenged California drug possession conviction, his offender score would still include the California burglary conviction. That is not the "affirmative acknowledgment" of comparability that Mendoza requires.

State v. Lucero, 168 Wn.2d at 789.

Similarly, Watkins never acknowledged the comparability of his out-of-state convictions. At his change of plea hearing, his counsel informed the court that Watkins was stipulating to his offender score because of consideration of his prior misdemeanor convictions involving domestic violence:

> 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.

[RP 03/14/14 6-7]. The sentencing court agreed with this analysis. In directly questioning Watkins about his stipulation to his prior record and offender score, the court informed him that his five prior gross misdemeanors involving domestic violence, which his attorney had referenced, would count in determining his score of "seven." [RP 03/14/14 7].

Like Lucero, this record does not demonstrate that Watkins's agreement that his offender score was seven constitutes an affirmative acknowledgement that all of his out-of-state convictions were comparable to Washington felonies, with the result that the State was not relieved of its burden to prove the comparability of his out-of-state convictions. Remand is required since the sentencing court failed to address the comparability of the out-of-state convictions on the record. State v. Labarbera, 128 Wn. App. at 350.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and remand for resentencing consistent with the arguments presented herein.

//

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DATED this 21st day of August 2015.

Thomas E. Doyle
THOMAS E. DOYLE
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above petition on this date as follows:

Carol La Verne
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Illya N. Watkins #791683
WSP
1313 North 13th Avenue
Walla Walla, WA 99362-8817

DATED this 21st day of August 2015.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

ILLYA NAPOLEON WATKINS,

Appellant.

No. 46124-2-II

RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Illya Watkins appeals his sentence for first degree theft with domestic violence, arguing that the trial court miscalculated his offender score and he received ineffective assistance of counsel. Pursuant to RAP 18.14(a)[1] and RAP 18.14(e)(1),[2] this court affirms his conviction.

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[1] RAP 18.14(a) provides, in relevant part:

> The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule.

[2] RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

FACTS

On March 14, 2014, Watkins entered guilty pleas to first degree theft with domestic violence and fourth degree assault with domestic violence. The pleas included a stipulation as to his criminal history and offender score of seven. Listed as felonies in the stipulation were seven adult felonies from Washington and other states: from California, burglary in the first degree and petty theft (with the annotation that this crime does not match a Washington felony); from Washington, two malicious mischief convictions; and from Ohio, aggravated robbery and receiving stolen property. The stipulation listed three California misdemeanors and five Washington gross misdemeanors. All five Washington misdemeanors were for violation of a no contact order—domestic violence (VNCO-DV) occurring prior to 2010.

At the start of the plea hearing, Watkins's counsel set out, in response to a question from the court:

> THE COURT: Mr. Watkins and Mr. Pilon, the first document I want to go over with you is the stipulation on Mr. Watkins' prior record and his offender score. There's a large number of matters on here, some felonies, some misdemeanors, some gross misdemeanors. Are you confident, Mr. Pilon, that that's an accurate history here?
>
> MR. PILON: 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.

Report of Proceedings (RP) Mar.14, 2014 at 5. After this, the court recessed to clarify a sentencing question from Watkins regarding a strike offense. After the court reconvened, the following exchange occurred:

> THE COURT: 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 to

> that, have five other felonies, three misdemeanors, five gross misdemeanors, and the gross misdemeanors are the no-contact order violations that Mr. Pilon is referring to that make your score in this matter pretty significant of a seven.
>
> THE DEFENDANT: Yes, ma'am.
> THE COURT: So you went through all of them with him?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: And that's your understanding and agreement?
> THE DEFENDANT: That's my understanding.

RP Mar. 14, 2014 at 7.

At sentencing, he received a 29 month sentence for the theft conviction and 364 days for the assault conviction. Watkins appeals his sentence for first degree theft with domestic violence, arguing the sentencing court miscalculated his offender score by: (1) including his current gross misdemeanor conviction for fourth degree assault with domestic violence and (2) including five prior gross misdemeanor convictions involving domestic violence. He adds that he was prejudiced as a result of his counsel inviting the sentencing errors.

ANALYSIS

Current Non-Felony Conviction for Fourth Degree Assault

This court requested supplemental briefing as to the effect of *State v. Rodriguez*, 183 Wn. App. 947, 335 P.3d 448 (2014), *review denied*, ___ P.3d ___ (Apr. 3, 2015), on the inclusion of a criminal history point for the concurrent fourth degree assault conviction. In *Rodriguez*, this court held that with respect to sentencing for a felony domestic violence conviction, a prior non-felony domestic violence offense counts as one point pursuant to RCW 9.94A.525(21)(c), even if the non-felony offense is a current, not a previous, conviction. *Rodriguez*, 183 Wn. App. at 951. Watkins responds and implicitly acknowledges that *Rodriguez* controls, but argues that it was wrongly decided. Following

Rodriguez,[3] this court concludes that Watkins correctly received one point in his offender score for the concurrent fourth degree assault with domestic violence conviction. RAP 18.14(e)(1)(a).

Additional Criminal History Points

Watkins, in reviewing the sentencing hearing, contends that "it appears Watkins[] was given five points for [five prior misdemeanors involving domestic violence], 1 point for a prior unnamed felony, and 1 point for his other current gross misdemeanor offense involving domestic violence." Amended Appellant's Br. at 4. With respect to the five prior misdemeanors, Watkins argues that because they were not "plead and proven after August 1, 2011," they should not have been included in the offender score. RCW 9.94A.525(21)(c). Am. Br. of Appellant at 8. He asserts that the conviction date for the five prior offenses was August 8, 2000. The State agrees that these offenses cannot be counted in the offender score. Thus, under Watkins's view of which prior convictions were included in the offender score, he was given five points that should not have been included. The State, however, highlights that there are "six prior felony convictions which did not wash out and which did count."[4] Br. of Resp't at 7.

This court reviews a sentencing court's calculation of an offender score *de novo*. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "[I]llegal or erroneous

[3] And further assuming for this analysis that Watkins's stipulation to the crime and an offender score of seven does not preclude this court's review of this issue. *See* discussion of *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009), herein.

[4] The scoring sheet counts six adult felony convictions to reach a score of seven. It states there are zero repetitive domestic violence convictions that were plead and proven after August 1, 2011.

sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

At sentencing, the State bears the burden of proving a defendant's prior criminal history by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Bare assertions unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the judgment. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). "This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence." *Mendoza*, 165 Wn.2d at 920. A defendant's "mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement." *Hunley*, 175 Wn.2d at 912. But when defense counsel affirmatively acknowledges a defendant's criminal history, the court is entitled to rely on such acknowledgement. *Bergstrom*, 162 Wn.2d at 97-98.

Because Watkins stipulated to the existence of six includable prior felony convictions (the seven listed in the stipulation, minus the one marked as not matching a Washington felony), the trial court properly could include them in his offender score. Although Watkins seems to indicate that the out-of-state felonies should not count unless the State proves the crimes are comparable to Washington felonies, the State correctly points out that it did not have to prove comparability due to Watkins's stipulation. *See Mendoza*, 165 Wn.2d at 920.

Mendoza provides that a defendant's affirmative acknowledgement that prior convictions are properly included in his offender score relieves the State from having to

prove the existence and comparability of out-of-state convictions. 165 Wn.2d at 920; *see also State v. Ross*, 152 Wn.2d 220, 229-30, 95 P.3d 1225 (2004). Here, Watkins signed a stipulation as to his prior criminal history as well as an offender score of seven, thus, he cannot now contend that the State must also provide the existence and comparability of any of the six felony convictions contained in the stipulation.

Ineffective Assistance of Counsel

To prove ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, i.e., that the representation "fell below an objective standard of reasonableness based on consideration of all the circumstances" and (2) that deficient performance prejudiced him, i.e., "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We determine whether counsel was competent based upon the entire trial record. *McFarland*, 127 Wn.2d at 335.

This court does not address both prongs of the ineffective assistance test if the defendant's showing on one prong is insufficient. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). This court gives great judicial deference to trial counsel's performance and begins any analysis with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335.

Watkins asserts that he received ineffective assistance of counsel because his five prior gross misdemeanors should not have been included in his offender score. The State argues that because Watkins was not prejudiced by counsel's alleged misunderstanding

that the five prior misdemeanors contributed to his offender score, he cannot show that his counsel was ineffective. Although Watkins, in his recitation of the facts, notes that the trial court did not perform a comparability analysis of his out-of-state felonies, he does not argue that his counsel was ineffective for not objecting to their inclusion in the stipulation absent a comparability analysis. Neither does he present any argument that the out-of-state felonies are, in fact, not comparable.

In *State v. Foster*, this court addressed a similar circumstance involving a criminal history stipulation. Although in *Foster*, and unlike here, the specific "basis of [Foster's] ineffective assistance of counsel claim is that his counsel failed to challenge comparability and wash-out." 140 Wn. App. 266, 274, 166 P.3d 726 (2007). Because on appeal, Foster "provided no analysis of the comparability of the Kansas crime to a Washington felony nor d[id] he analyze how it might have washed-out" he fell "short in his attempt to assert an incorrect offender score, which underlies his claim of ineffective assistance of counsel." Consequently, the *Foster* court declined to hold he received ineffective assistance of counsel at sentencing. 140 Wn. App. at 277 ("[W]e do not remand for resentencing nor do we hold that his counsel was ineffective in providing Foster's stipulation to the court for sentencing purposes."). As Watkins similarly fails to present any analysis as to how including the six out-of-state felonies in his stipulation actually prejudiced him, this court follows *Foster* and declines to conclude that Watkins received ineffective assistance of counsel.

Statement of Additional Grounds

Watkins, in a Statement of Additional Grounds, contends that his offender score was miscalculated and he requests an expedited appeal. For the reasons set out herein,

the trial court did not commit a sentencing error. And because this matter has been referred to the commissioner as a motion on the merits, it is being handled by this court in an expedited manner. Accordingly, it is hereby

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 14th day of April, 2015.

Aurora R. Bearse
Court Commissioner

cc: Thomas E. Doyle
Carol La Verne
Hon. Anne Hirsch
Illya N. Watkins

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ILLYA N. WATKINS,

Appellant.

No. 46124-2-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated April 14, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 28th day of July, 2015.

PANEL: Jj. Johanson, Lee, Sutton

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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DOYLE LAW OFFICE

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