

FILED
Jun 30, 2016
Court of Appeals
Division I
State of Washington

NO. 74112-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRENDA NICHOLAS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE THERESA DOYLE

**STATE'S ANSWER TO MOTION TO WITHDRAW
PURSUANT TO RAP 18.3(a)(2)**

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A. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in Part B.

B. STATEMENT OF RELIEF SOUGHT

Grant of appellate counsel's motion to withdraw as the State agrees this case presents no non-frivolous issues.

C. FACTS RELEVANT TO MOTION

The defendant was convicted of one count of murder in the first degree with a deadly weapon enhancement for the killing of Patrick Fleming on December 8, 2011. In State v. Nicholas, 185 Wn. App. 1019 (2015) (unpublished decision in Case No. 70857-1-1), review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015), this Court affirmed her conviction, but remanded the case for resentencing due to a conceded error in the calculation of her offender score. CP 20-31. Specifically, the State conceded it was error to have included Nicholas' prior California convictions for "theft embezzlement" and "grand theft" without conducting a comparability analysis. The additional grounds raised by Nicholas pro se were rejected by the Court.

On October 9, 2015, Nicholas was resentenced in King County Superior Court. At the resentencing, the State asked the trial court to count one of Nicholas' two prior convictions from California as a point

toward her offender score. CP 34-35. Specifically, it asked the court to count Nicholas' prior for "grand theft." Id. The State provided the court with the judgment and sentence and charging documents for that conviction and the relevant statutes in support of its request. CP 37-48; 10/9/15 RP 5-6. The State argued that the prior was legally comparable to Washington's crime of theft in the second degree. CP 34. Counsel for Ms. Nicholas conceded that the State's analysis was correct. 10/9/15 RP 6.

In resentencing Nicholas, the trial court included the California conviction. CP 50, 55. Nicholas' new, lower standard range was determined to be 281 to 374 months. CP 50. The trial court sentenced her to the high end of the range--374 months in prison--followed by 24 months for the deadly weapon enhancement, for a total of 398 months. CP 49-57 ("Corrected Judgment and Sentence Felony Following Reversal of Sentence"). Nicholas appealed from the entry of this judgment. CP 58.

D. ARGUMENT

Counsel for appellant correctly cites the potential arguments that could be raised on appeal. All of them lack the basis for a good faith argument on appeal.

1. THE TRIAL COURT PROPERLY CALCULATED THE OFFENDER SCORE, AS THE CALIFORNIA CONVICTION IS FACTUALLY COMPARABLE TO WASHINGTON'S CRIME OF THEFT IN THE FIRST DEGREE.

The Sentencing Reform Act ("SRA") prescribes sentencing ranges for each felony offense based on a defendant's offender score, which is essentially a measure of the defendant's criminal history. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (citing State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994)). An out-of-state or federal conviction is included in a defendant's offender score if the offense is comparable to a Washington felony. RCW 9.94A.525(3); Wiley, 124 Wn.2d at 683. A challenge to a finding of comparability is reviewed de novo. State v. Thiefaul, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

To include a foreign conviction in a defendant's offender score, the State bears the burden of proving by a preponderance of the evidence both the existence of the prior conviction and its comparability to a Washington crime. Ford, 137 Wn.2d at 479-80; State v. Jackson, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005).

In order to determine whether two crimes are comparable, a court must undertake a two-part test:

[It] must first query 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. If 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 at 415 (citations omitted).

In undertaking a factual comparison, the key inquiry is under what Washington statute could the defendant have been convicted if he/she had committed the same acts in Washington. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (citations omitted). “. . . [U]nder the SRA, a defendant’s *acknowledgement* of the existence and comparability of his or her prior out-of-state convictions ‘allows the judge to rely on unchallenged *facts and information* introduced for the purposes of sentencing.’” State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225, 1231 (2004) (citing Ford, 137 Wn.2d at 482-83); RCW 9.94A.370(2). In making its determination, the court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Id. When, under California law, a defendant enters a “*nolo contendere*” plea, she admits to each element of the crime that is charged. State v. Olsen, 180 Wn.2d 468, 478, 325 P.3d 187 (2014).

Here, the State argued that Ms. Nicholas’ prior conviction for grand theft from California was legally comparable to Washington’s theft

in the second degree statute. CP 34-35, 37-48. In support of its argument, the State provided the court with the judgment and sentence and charging document from that conviction. CP 37-38, 41. Defense counsel conceded the issue. 10/9/15 RP 6.

California's grand theft statute in effect in 2006 provides:

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.

Cal. Penal Code § 487.

California defines "theft" as follows:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

Cal. Penal Code § 484.

Because the California statute contains provisions that make the crime applicable even when the value of the item taken is less than the \$250 floor of Washington's theft in the second degree crime, the State should not have argued that the two crimes are legally comparable. Rather, it should simply have argued that Ms. Nicholas' prior was factually comparable to Washington's crime of theft in the first degree.

That statute reads:

- (1) A person is guilty of theft in the first degree if he or she commits theft of:

- (a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;
 - (b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another;
 - (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty; or
 - (d) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed five thousand dollars in value.
- (2) Theft in the first degree is a class B felony.

RCW 9A.56.030.

The relevant definition of "theft" under Washington law is "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020.

Ms. Nicholas pled guilty "nolo contendere" to violating California's crime of grand theft, PC 487(a). CP 37. The charging document alleges that she "willfully, unlawfully, and feloniously" took the property of Robert Pellascio, "to wit, \$50,000.00 from Conseco Insurance Co." CP 41. No statement of defendant on plea of guilty is in the record.

In analyzing the charging document, it is apparent that Nicholas' prior of grand theft is factually comparable to Washington's crime of theft in the first degree. Thus, Ms. Nicholas was properly sentenced at her resentencing hearing.

2. TRIAL COUNSEL DID NOT ACTIVELY REPRESENT CONFLICTING INTERESTS AT THE RESENTENCING HEARING.

Ms. Nicholas filed a statement of additional grounds for direct appeal, in which she alleged that her trial counsel had been ineffective on a number of grounds. State v. Nicholas, Op. at 3-4; CP 27-28. One of these grounds was that her trial counsel was ineffective because he had withdrawn a motion for a mistrial during the trial. Id. This Court ruled that Nicholas had failed to show that her attorney's withdrawal of the motion was not a legitimate trial tactic. Id. The other grounds alleged by Nicholas were not considered by the Court because they were not pled with sufficient specificity for appellate review.

At her resentencing hearing, Ms. Nicholas was represented by the same counsel who had represented her at trial. There is no discussion on the record of any potential conflict of interest at the resentencing hearing.

To show a violation of a defendant's right to effective assistance of counsel, which includes a right to conflict-free counsel, a defendant must show that:

(a) defense counsel "actively represented conflicting interests" and (b) the "actual conflict of interest adversely affected" his performance. Possible or theoretical conflicts of interest are "insufficient to impugn a criminal conviction."

In re Gomez, 180 Wn.2d 337, 348-49, 325 P.3d 142, 148 (2014) (citations omitted). Here, Nicholas raises nothing more than a potential conflict of interest and fails to establish that such potential conflict adversely affected the performance of her counsel.


E. CONCLUSION

After an independent review of the record in this case, the State agrees that there are no non-frivolous issues presented. The State respectfully requests that counsel's motion to withdraw be granted.

DATED this 30th day of June, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Mick Woynarowski, containing a copy of the Brief of Respondent, in STATE V. BRENDA NICHOLAS, Cause No. 74112-8-I, in the Court of Appeals, Division I, for the State of Washington.

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


Name
Done in Seattle, Washington

06-30-16
Date