

COA No. 64163-8-1

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

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STATE OF WASHINGTON,

Respondent,

v.

RENWICK RANDUN,

Appellant.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 JAN 4 AM 11:12

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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Sharon Armstrong  
The Honorable Michael Hayden  
The Honorable Julie Spector

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. In Mr. Randun's sentencing hearing in King County Superior Court, the sentencing court improperly determined his criminal history for purposes of sentencing.

2. Defense counsel provided ineffective assistance of counsel in connection with the defendant's offender score calculation.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. At sentencing following Renwick Randun's entry of an Alford<sup>1</sup> plea to charges of first degree theft and possession of stolen property in the first degree, his offender score was erroneously calculated to include a foreign conviction obtained in Florida under a criminal statute that defined the offense in question as being committed under facts that would amount to the Washington misdemeanor crime of third degree theft. Was the State required to prove the factual comparability of the foreign conviction in order to establish that it was comparable to a Washington felony?

2. Was there inadequate proof before the sentencing court to conclude that the defendant's actual foreign conduct would amount to guilt under a Washington felony statute?

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

3. Where Mr. Randun's counsel failed to object or agreed to the inclusion of the foreign conviction, did he provide ineffective assistance of counsel?

### **C. STATEMENT OF THE CASE**

Renwick Randun was charged by an information filed in King County Superior Court with first degree theft and possession of stolen property in the first degree. CP 1-6. He entered an Alford plea of guilty on August 7, 2009. CP 8-31; 8/7/09RP at

At sentencing, Mr. Randun's counsel did not dispute the State's calculation of the offender scores on the theft and stolen property offenses as "2." 8/14/09RP at 9-10; CP 37. These scores included a point for a Florida offense identified in Appendix B to the judgment and sentence as "grand theft 3." 8/14/09RP at 9-10; CP 37.

Mr. Randun timely appealed. CP 41.

## D. ARGUMENT

THE SUPERIOR COURT ERRED IN CALCULATING MR. RANDUN'S OFFENDER SCORE WHEN IT INCLUDED A FLORIDA CONVICTION FOR GRAND THEFT THIRD DEGREE THAT WAS OBTAINED UNDER A FOREIGN STATUTE DEFINING THE OFFENSE MORE BROADLY THAN A WASHINGTON FELONY CRIME.

1. The State is required to prove the defendant's criminal history. Under the Sentencing Reform Act (SRA) (Chapter 9.94A RCW), the sentencing court calculates the defendant's offender score based on his criminal history in order to determine the standard sentencing range. RCW 9.94A.525(3); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). On appeal, the Court of Appeals reviews a challenge to the sentencing court's offender score calculation de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

2. The inclusion of foreign convictions in a defendant's offender score is subject to statutory requirements of comparability and constitutional constraints of due process.

The State failed to prove the comparability of Mr. Randun's Florida conviction for grand theft third degree. Where the State alleges that a defendant's criminal history contains out-of-state felony convictions, the SRA requires the State to score those convictions

“according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3); Ford, 137 Wn.2d at 479. To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements are identical, the foreign conviction may be included, without more. State v. Stockwell, 129 Wn. App. 230, 234, 118 P.3d 395 (2005) (citing Morley, at 606); In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

However, if the foreign statute is different or broader than the Washington statute, the sentencing court must look to the defendant’s actual conduct in committing the foreign crime. State v. Jackson, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006); Lavery, 154 Wn.2d at 258. This is a factual question that the State must prove. State v. Stockwell, 129 Wn. App. at 234. Although facts at sentencing need not be proved beyond a reasonable doubt, 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.” Ford, 137 Wn.2d at 481.

The SRA expressly places this burden on the State because it is “inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.”

Ford, 137 Wn.2d at 480 (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). Where a foreign statute is broader, and the defendant did not plead guilty in the prior proceeding to facts that would amount to the offense in Washington, comparability would require the trial court to find new facts that were never subjected to any of the traditional due process safeguards.

Shepard v. United States, 544 U.S. 13, 24-26, 125 S. Ct. 1254, 161 L.Ed.2d 205 (2005); Lavery, 154 Wn.2d at 257-58. Therefore, in the context of foreign convictions under broader offense definitions,

any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. Lavery thus held that the defendant’s prior federal robbery conviction was not comparable to Washington robbery where Lavery had “neither admitted nor stipulated to facts

which established specific intent” to deprive, and such intent was necessary for the offense of Washington robbery. Lavery, at 258.

**3. The State failed to prove that the grand theft third degree conviction from Florida, which was obtained under a broader foreign statute, involved facts that would amount to guilt of a felony in Washington.** Where a foreign conviction was obtained by plea, the sentencing court may consider facts conceded by the defendant in his foreign guilty plea, but not facts not admitted by the defendant in that plea, where the foreign statute is broader than Washington’s. Lavery, 154 Wn.2d at 258. Where the conviction followed a trial, the trial court cannot look beyond the facts “proved to the finder of fact beyond a reasonable doubt.” Lavery, 154 Wn.2d at 258.

According to Appendix B to the judgment and sentence, Mr. Randun's criminal history included a Florida conviction for "Grand Theft 3." CP 37. Under Washington law, third degree theft is a gross misdemeanor. RCW 9A.56.050(2). However, misdemeanors do not count in the offender score calculation under the SRA. See RCW 9.94A.505 (1); RCW 9.94A.525; see also State v. Snedden, 149 Wn.2d 914, 922, 73 P.3d 995 (2003) (SRA applies only to felonies).

Further inquiry into the definition of "Grand Theft 3" under Florida law indicates that the law is so broad as to include conduct that would be a misdemeanor in Washington. The Florida statute entitled "Theft", F.S.A. sec. 812.014, first mentions "grand theft of the third degree" at section 2(c). F.S.A. sec. 812.014(2)(c). That section indicates that the crime is committed, inter alia, where the property stolen is "[valued at \$300 or more[.]" F.S.A. sec. 812.014(2)(c), subsection 1.

The foreign offense is compared to Washington crimes at the time the prior crime was committed. Lavery, 154 Wn.2d at 255. In 2000, the offense of third degree theft in Washington was defined as follows under RCW 9A.56.050(1)(a): "A person is guilty of third degree theft if he or she commits theft of property which does not exceed \$250 in value." The offense of second degree theft in Washington, which was a felony crime, was theft of property valued at above that amount. RCW 9A.56.040(1)(a).

Therefore, upon this limited inquiry, Mr. Randun's Florida offense is equivalent to a Washington felony. However, F.S.A. sec. 812.014 also indicates that "grand theft of the third degree" is committed, inter alia, where the property stolen is a "fire extinguisher" or a "stop sign." F.S.A. sec. 812.014(2)(c), subsections

8, 11. Such items might well be valued at \$250 or less, and thus amount to the misdemeanor of third degree theft in Washington. See RCW 9A.56.050(1)(a). In addition, in Washington, theft of any item is third degree theft unless the value of the item proves a higher degree of the crime. State v. Tinker, 155 Wn.2d 219, 222, 118 P.3d 885 (2005). By statute, property having a value that cannot be ascertained pursuant to the statutory standard is deemed to be of a value not exceeding \$250. RCW 9A.56.010(18)(e).

Therefore, absent a reliable statement of the admitted or proved factual circumstances of the defendant's Florida crime, it could not be included in Mr. Randun's offender score. Lavery, 154 Wn.2d at 258.

Although even less is known here about the Florida offense than was known about the foreign conviction in State v. Bunting, 115 Wn. App. 135, 140-41, 61 P.3d 375 (2003), that case is analogous. There, a defendant's prior offense was proffered in the form of his plea of guilty to armed robbery in Illinois under a statute broader than Washington's. State v. Bunting, 115 Wn. App. at 135. The Court ruled it would be improper to rely on the facts alleged in the Illinois complaint and the "official statement of facts" (similar to the affidavit of probable cause) to establish the element of specific intent

to deprive that was necessary to make the offense comparable to armed robbery in Washington, because the allegations in these documents had not been proven or conceded by the defendant. State v. Bunting, 115 Wn. App. at 143.

In the present case, the State failed to show how the Florida conviction was obtained, much less provide documentation of facts found or admitted by the defendant. Where foreign convictions were obtained under criminal statutes broader than Washington's, some proof of the defendant's actual conduct is required. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). For all of the above reasons, absent that proof that Mr. Randun's actual Florida conduct amounted to a felony offense in Washington, the sentencing court in this case lacked authority to increase his sentence based on the alleged prior crimes of grand theft from Florida.

**4. Mr. Randun's counsel provided ineffective assistance.**

The statement of criminal history in Mr. Randun's case had originally been printed by the State as erroneously including a Texas conviction, which the parties agreed was not the correct prior conviction discussed in plea negotiations, but the document was corrected by defense counsel at sentencing. 8/14/09RP at 9-10; CP 37. Defense counsel was ineffective for allowing the Florida offense

to be included in the defendant's offender score absent proof of comparability.

The recent case of State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007) is instructive. There, the Supreme Court found defense counsel's performance deficient when counsel mistakenly failed to object to the sentencing court's incorrect conclusion that the defendant's prior conviction from Montana was legally comparable. Further, as in Mr. Randun's case, the record was deficient and did not contain sufficient facts for a court to determine whether the defendant's Montana conviction was factually comparable. State v. Thiefault, 160 Wn.2d at 415-16.

The Thiefault Court held that counsel's failure to hold the State to its burden of proving comparability before it waived any objections to the inclusion of the prior out-of-state conviction was prejudicial. Thiefault, 160 Wn.2d at 414-16 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); U.S. Const. amend. 6 (right to effective assistance)

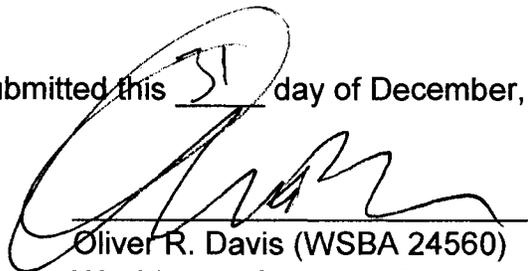
Here, similarly, there is no legal comparability. The offense was plainly incomparable to any Washington felony crime at all. There is no hint whatsoever in the record that the conviction's

comparability, whether legal or factual, was considered by defense counsel before he agreed generically to the defendant's offender score. Following the reasoning of Thiefault, such conduct constitutes ineffective assistance of counsel. Thiefault, 160 Wn.2d at 414-16. This Court should remand for an evidentiary hearing and resentencing. Thiefault, 160 Wn.2d at 417.

#### **E. CONCLUSION**

Mr. Randun respectfully requests this Court remand his case for resentencing without inclusion of the challenged Florida conviction.

Respectfully submitted this 31 day of December, 2009

A handwritten signature in black ink, appearing to read "O. R. Davis", is written over a horizontal line. The signature is fluid and cursive.

Oliver R. Davis (WSBA 24560)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64163-8-I
v.	)	
	)	
RENWICK RANDUN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> RENWICK RANDUN 32630 GORDON SIDE ST FULSHEAR, TX 77441	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_ 

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