

COA NO. 66918-4-I

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

REC'D
MAY 02 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALLAN PARMELEE,

Appellant.

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

The Honorable Sharon Armstrong, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 MAY -2 PM 4:29

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE EXCEPTIONAL CONSECUTIVE SENTENCES BASED ON AN AGGRAVATING FACTOR THAT WAS NOT AMONG THE LIST OF EXCLUSIVE FACTORS IN EFFECT AT THE TIME OF RESENTENCING.	1
2. THE STATE FAILED TO MEET ITS BURDEN OF PROVING PRIOR FEDERAL CONVICTIONS SHOULD BE SEPARATELY COUNTED IN COMPUTING THE OFFENDER SCORE.....	3
3. THE STATE DID NOT PROVE PRIOR ILLINOIS CONVICTIONS WERE COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE.....	9
B. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Detention of Cross,</u> 99 Wn.2d 373, 662 P.2d 828 (1983).....	9
<u>State v. Alvarado,</u> 164 Wn.2d 556, 192 P.3d 345 (2008).....	2, 3
<u>State v. Batista,</u> 116 Wn.2d 777, 808 P.2d 1141 (1991).....	2
<u>State v. Bergstrom,</u> 162 Wn.2d 87, 169 P.3d 816 (2007).....	9
<u>State v. Bunting,</u> 115 Wn. App. 135, 61 P.3d 375 (2003).....	5
<u>State v. Crockett,</u> 118 Wn. App. 853, 78 P.3d 658 (2003).....	9
<u>State v. Fisher,</u> 108 Wn.2d 419, 739 P.2d 683 (1987).....	2
<u>State v. Ford,</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	12
<u>State v. Larkins,</u> 147 Wn. App. 858, 199 P.3d 441 (2008).....	12
<u>State v. McCraw,</u> 127 Wn.2d 281, 898 P.2d 838 (1995).....	3
<u>State v. McNeair,</u> 88 Wn. App. 331, 944 P.2d 1099 (1997).....	6
<u>State v. McNeal,</u> 156 Wn. App. 340, 231 P.3d 1266, <u>review denied</u> , 169 Wn.2d 1030, 241 P.3d 786 (2010)	1, 2

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Mutch,
171 Wn.2d 646, 254 P.3d 803 (2011)..... 1, 2

State v. Parker,
132 Wn.2d 182, 937 P.2d 575 (1997)..... 13, 14

State v. Smith,
123 Wn.2d 51, 864 P.2d 1371 (1993)..... 2

State v. Stephens,
116 Wn.2d 238, 803 P.2d 319 (1991)..... 2

State v. Talley,
83 Wn. App. 750, 923 P.2d 721 (1996),
aff'd, 134 Wn.2d 176, 949 P.2d 358 (1998)..... 6, 9

State v. Thiefault,
160 Wn.2d 409, 158 P.3d 580, 583 (2007)..... 11

State v. Tornngren,
147 Wn. App. 556, 196 P.3d 742 (2008)..... 4

State v. Werneth,
147 Wn. App. 549, 197 P.3d 1195 (2008)..... 12

State v. Young,
89 Wn.2d 613, 574 P.2d 1171 (1978)..... 6

FEDERAL CASES

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).. 1

United States v. Parmelee,
42 F.3d 387 (7th Cir. 1994) 4, 5

TABLE OF AUTHORITIES (CONT'D)

Page

STATUTES, CONSTITUTIONS AND OTHERS

Former IL ST CH 720 § 5/17-1(B)(d) (P.A. 84-897, § 1)..... 10, 11, 12

Former RCW 9A.56.060(1) (Laws of 1982, ch. 138 § 1)..... 10, 12

RCW 9.94A.530(2)..... 6-9

RCW 9.94A.535(2)(c) 2, 3

A. ARGUMENT IN REPLY

1. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE EXCEPTIONAL CONSECUTIVE SENTENCES BASED ON AN AGGRAVATING FACTOR THAT WAS NOT AMONG THE LIST OF EXCLUSIVE FACTORS IN EFFECT AT THE TIME OF RESENTENCING.

The State asserts the sentencing court properly relied on the "clearly too lenient" aggravator that existed at the time of Parmelee's offenses because felony sentences are based on the substantive law in effect at the time of an offense. Brief of Respondent (BOR) at 35. The State fails to grasp which statute applies at resentencing in a post-Blakely¹ world.

Parmelee committed the offenses before the post-Blakely legislation took effect, but his sentence was subsequently vacated and his case remanded for resentencing, by which time the post-Blakely legislation was in effect. CP 636. Mutch and McNeal applied the post-Blakely statutory scheme to an offender who committed his crimes before that legislation took effect and was then subject to resentencing after it took effect. State v. Mutch, 171 Wn.2d 646, 651-52, 656, 658, 254 P.3d 803 (2011); State v. McNeal, 156 Wn. App. 340, 351-54, 231 P.3d 1266, review denied, 169 Wn.2d 1030, 241 P.3d 786 (2010). The State

¹ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

altogether ignores the significance of Mutch and McNeal in this regard. If those cases are right, then the State is wrong that the "clearly too lenient" statutory aggravator in effect at the time the offenses were committed could lawfully be applied to Parmelee at resentencing.

The State claims that even if the court improperly based Parmelee's exceptional sentence on the former "clearly too lenient" factor, imposition of an exceptional sentence based on the current "free crimes" aggravator on remand would not violate the prohibition against ex post facto laws because that current aggravator existed at the time of Parmelee's crimes. BOR at 26. According to the State, RCW 9.94A.535(2)(c) merely codified existing case law without altering its parameters. BOR at 39.

The existing case law, however, recognized the presence of additional factual findings that needed to be made as part of the "clearly too lenient" aggravator that are not part of the current "free crime" aggravator under RCW 9.94A.535(2)(c). See, e.g., State v. Batista, 116 Wn.2d 777, 787-88, 808 P.2d 1141 (1991); State v. Stephens, 116 Wn.2d 238, 242-45, 803 P.2d 319 (1991); State v. Smith, 123 Wn.2d 51, 55-56, 864 P.2d 1371 (1993); State v. Fisher, 108 Wn.2d 419, 428, 739 P.2d 683 (1987).

Alvarado recognized there is a difference between the "clearly too lenient" language in former "free crimes" provision and the mathematical

calculation that allows an exceptional sentence under RCW 9.94A.535(2)(c). State v. Alvarado, 164 Wn.2d 556, 566, 192 P.3d 345 (2008). The current aggravator under RCW 9.94A.535(2)(c) does not require a "clearly too lenient" finding. Alvarado, 164 Wn.2d at 566-67. RCW 9.94A.535(2)(c) "was designed to codify the 'free crimes' factor as an automatic aggravator *without the need for additional fact finding as to whether the existence of 'free crimes' results in a 'clearly too lenient' sentence.*" Id. at 567 (emphasis added). In other words, the codification was not a complete importation of the former factor. The current "free crime" aggravator codified at RCW 9.94A.535(2)(c) omits the "clearly too lenient" standard under the former "free crime" aggravator. The State's argument that no ex post facto violation would occur if the current "free crime" aggravator were relied upon on remand rests on the false premise that the aggravator under RCW 9.94A.535(2)(c) is no different than what previous law recognized.

2. THE STATE FAILED TO MEET ITS BURDEN OF PROVING PRIOR FEDERAL CONVICTIONS SHOULD BE SEPARATELY COUNTED IN COMPUTING THE OFFENDER SCORE.

In the opening brief, Parmelee cited State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995) for the proposition that a trial court's calculation of an offender score is reviewed de novo. Amended Brief of

Appellant at 29; see also State v. Torngren, 147 Wn. App. 556, 562, 196 P.3d 742 (2008) (applying de novo standard of review to same criminal conduct determination). The State claims the sentencing court's same criminal conduct determination is reviewed for abuse of discretion absent misapplication of the law. BOR at 8-9. The issue of which standard of review applies is currently pending in the Supreme Court in State v. Graciano (No. 86530-2). The sentencing court here erred under either standard.

The State contends the court properly relied on the federal opinion in United States v. Parmelee, 42 F.3d 387 (7th Cir. 1994) as a basis for determining the prior federal convictions should be counted separately for a total of eight points. BOR at 10-12. Its argument focuses exclusively on different offense dates as a basis for concluding the convictions should be counted separately. BOR at 6. The State cites to that portion of the federal opinion stating, "the investigation revealed eight instances between February 12, and April 21, 1991, in which illegal Polish aliens were smuggled into this country." BOR at 11 (quoting Parmelee, 42 F.3d at 389). The results of that "investigation" are not reflected in federal judgment. The federal judgment only shows an end date of "4/21/91" for all seventeen offenses to which Parmelee pled guilty. CP 722. The judgment does not show separate offense dates.

The State also relies on the concurring/dissenting opinion, which states "eight smuggling trips formed the basis of the indictment" and listed eight discrete dates. BOR at 11; Parmelee, 42 F.3d at 397 n.4. Again, the federal judgment lists an end date of "4/21/91" for *all* seventeen counts to which Parmelee pled guilty, not just the conspiracy count. CP 722. It therefore makes no sense to argue, as the State does, that the federal judgment is consistent with the dates set forth in the federal decision. If, as the State contends, Parmelee pled guilty to eight sequential smuggling offenses that occurred on "discrete dates" between February 12, 1991 through April 21, 1991, then there is no way those eight offenses could all have the same end date of April 21, 1991. The eight smuggling trips, under the State's argument, were completed on different days. The date of the offenses set forth in the federal decision cannot be reconciled with the single date of offense set forth in the federal judgment.

The State does not even address the significance of the fact that Parmelee pled guilty. CP 722. The federal opinion does not show Parmelee specifically admitted to committing eight offenses on eight different dates. The court did not know what facts Parmelee admitted as part of his plea agreement. See State v. Bunting, 115 Wn. App. 135, 141, 61 P.3d 375 (2003) (where facts alleged in charging document are not

directly related to the elements, courts may not assume those facts have been proved or admitted).

The State asserts, "courts routinely rely on the facts of a case as stated in the opinion." BOR at 12. Yet the State is unable to cite to a single case where a sentencing court properly relied on facts set forth in an appellate decision as the basis for determining same criminal conduct. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that where no authority is cited, counsel has found none after diligent search); State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit).

The State also contends the court held an evidentiary hearing to resolve the question of same criminal conduct and therefore no error occurred in failing to hold one. BOR at 9-10. The State is mistaken. The court did not hold an evidentiary hearing and thereby violated RCW 9.94A.530(2).

The record shows the March 29, 2011 hearing was a sentencing hearing, not the evidentiary hearing required by RCW 9.94A.530(2). First, an evidentiary hearing under RCW 9.94A.530(2) entails the taking of sworn testimony. State v. Talley, 83 Wn. App. 750, 758, 923 P.2d 721

(1996), aff'd, 134 Wn.2d 176, 949 P.2d 358 (1998). That did not happen here.

Second, an "evidentiary hearing" by definition entails a hearing at which evidence will be admitted. No evidence was admitted at the sentencing hearing. The court did not even take judicial notice of the federal opinion upon which the State relied to make its scoring argument.

Third, the court at no time signaled what was taking place at the March 29, 2011 sentencing hearing constituted an evidentiary hearing under RCW 9.94A.530(2). Context is important. On March 7, 2011, the court told Parmelee that the offender score issue was "not before us" and the "only issue is really a legal one." RP 5. With reference to Parmelee's argument that the offender score was incorrect, the court said, "that issue has gone by." RP 15. The court described the upcoming March 29 hearing as a "sentencing date." RP 22. At the outset of the March 29 sentencing hearing, the State represented the "only issue" before the court was whether the sentences could run consecutive. RP 24. This is the contextual background in which the court actually addressed Parmelee's same criminal conduct argument. It allowed Parmelee to present argument on the issue and then sided with the State's argument. RP 29, 31, 34. The court heard legal argument. It did not preside over an evidentiary hearing.

Furthermore, RCW 9.94A.530(2) commands the court to "grant" an evidentiary hearing on disputed facts relied on for sentencing. The language of the statute envisions a hearing separate from the sentencing hearing. Otherwise, the legislature would have simply directed disputed facts be resolved at the sentencing hearing rather than an evidentiary hearing. A defendant should not have to guess at whether an evidentiary hearing is taking place.

The State incorrectly maintains the facts set forth in the federal opinion are undisputed. BOR at 12. Parmelee disputed the "facts" set forth in the federal decision and those alleged at sentencing in support of a total offender score of eight for the federal convictions. RP 31-34; CP 411, 427-29. Parmelee specifically argued, "the State hasn't established any separate offense dates" while pointing out that the federal judgment lists only one offense date. RP 33. The dispute is obvious.

The purpose of an evidentiary hearing in this case would be to resolve that dispute after allowing both sides to present evidence on the question, including any relevant testimony from Parmelee or other witnesses. Instead, the court heard legal argument on the same criminal conduct issue and sided with the State's calculation. In doing so, the court presumed the facts underlying the State's argument were true. Those are the very facts that Parmelee disputed.

If the defendant disputes material evidence upon which the court intends to rely, the court must hold an evidentiary hearing to resolve the dispute. State v. Bergstrom, 162 Wn.2d 87, 97, 169 P.3d 816 (2007). It is the trial court's responsibility under RCW 9.94A.530(2) to hold an evidentiary hearing if it wants to consider disputed facts, regardless of whether the defendant requests such a hearing. State v. Crockett, 118 Wn. App. 853, 858, 78 P.3d 658 (2003) (citing Talley, 83 Wn. App. at 759). The court erred as a matter of law in failing to hold an evidentiary hearing to resolve disputed facts on the same criminal conduct issue.

3. THE STATE DID NOT PROVE PRIOR ILLINOIS CONVICTIONS WERE COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE.

The State concedes Parmelee's prior Illinois convictions for deceptive practice are not comparable to the Washington offenses of forgery and theft. See In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it."). For the first time on appeal, the State contends Parmelee's prior Illinois convictions for deceptive practice are comparable to the Washington felony of unlawful issuance of checks. BOR at 19-20. The contention fails.

Again, the Illinois deceptive practice statute provides:

A person commits a deceptive practice when, with intent to defraud: . . . With intent to obtain control over property or to pay for property, labor or services of another, or in satisfaction of an obligation for payment of tax under the Retailers' Occupation Tax Act 1 or any other tax due to the State of Illinois, he issues or delivers a check or other order *upon a real or fictitious depository* for the payment of money, *knowing that it will not be paid by the depository*. Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is prima facie evidence that the offender knows that it will not be paid by the depository, and that he has the intent to defraud.

Former IL ST CH 720 § 5/17-1(B)(d) (emphasis added).

The Washington unlawful issuance statute, in effect when Parmelee committed the Illinois offenses, provides:

Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or draft, *on a bank or other depository* for the payment of money, *knowing at the time of such drawing, or delivery*, that he or she has not sufficient funds in, or credit with the bank or other depository, to meet the check or draft, in full upon its presentation, is guilty of unlawful issuance of bank check.

Former RCW 9A.56.060(1) (Laws of 1982, ch. 138 § 1) (emphasis added).

The Illinois indictment to which Parmelee pled guilty alleges in count I that Parmelee "with the intent to defraud and the intent to obtain control over certain property of Advanced Receiver Research . . . knowingly delivered a certain bank check, dated March 26, 1989, drawn on First Illinois Bank of LaGrange, payable to Advanced Receiver in the

amount of \$492.00, and signed as maker Johnathon Marx, knowing said check would not be paid by the depository." CP 700. Count II of the indictment contains identical language except the owner of the property and check amount are different. CP 701.

The State acknowledges a factual analysis is required to determine comparability. BOR at 22. The State, however, cannot prove factual comparability for two reasons.

First, the Illinois statute does not specify that a person who delivers the check must know *at the time of delivery* that there are insufficient funds to meet the check. The Illinois statute is broader, simply stating "*knowing that it will not be paid by the depository.*" Former IL ST CH 720 § 5/17-1(B)(d). The temporal element of the Washington statute is not included in the Illinois statute. Under the Illinois indictment and statute, Parmelee could be guilty of a crime even if he did not know at the time of delivery that there were insufficient funds to cover the check.

"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." State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580, 583 (2007). Parmelee did not admit nor was it proven beyond a reasonable doubt that he knew *at the time of delivery* that there were insufficient funds to cover the check. "Absent a sufficient record, the

sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Such is the case here.

No factual inference that Parmelee knew *at the time of delivery* that there were insufficient funds to cover the check can be drawn here. Such inference is prohibited. State v. Larkins, 147 Wn. App. 858, 865-66, 199 P.3d 441 (2008). In determining comparability, courts "cannot assume the existence of facts that are not in the record." State v. Werneth, 147 Wn. App. 549, 555, 197 P.3d 1195 (2008). That Parmelee knew there were insufficient funds at the time of delivery is not specified in the Illinois indictment is an assumption of fact that is not in the record.

Factual comparability cannot be established for a second reason. Under the Illinois statute, a person is guilty if he delivers a check upon a "*real or fictitious depository*" for the payment of money, knowing that it will not be paid by the depository. Former IL ST CH 720 § 5/17-1(B)(d). In Washington, a person is guilty if he delivers a check "*on a bank or other depository*" for the payment of money, knowing he lacks sufficient funds to meet the check. Former RCW 9A.56.060(1). The Washington statute does not criminalize delivery of a check on a fictitious depository.

In Illinois, Parmelee could be guilty of delivering a bad check upon a fictitious depository. There is no comparable crime in Washington. The language of the Illinois indictment does not specify whether the First Illinois Bank of LaGrange — the depository — is real or fictitious. CP 700-01. For that reason, the State cannot prove factual comparability. Parmelee did not admit or stipulate that the First Illinois Bank of LaGrange was real, nor was that fact proven beyond a reasonable doubt by anything in the record.

Contrary to the State's contention, the sentencing court therefore erred in calculating Parmelee's offender score as "13." Even if the court correctly calculated the prior federal offenses as eight points total, the offender score must still be reduced to "11" because the Illinois offenses are incomparable.

Parmelee has the right to be sentenced with a correct offender score. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). The record is not expressly clear that the sentencing court would have imposed the same sentence had Parmelee's offender score been properly calculated. RP 43. Remand for resentencing is

therefore the appropriate remedy even if the prior federal offenses were correctly calculated. Parker, 132 Wn.2d at 192-93.

B. CONCLUSION

Parmelee requests that this Court vacate the exceptional sentence and remand for entry of a non-consecutive, standard range sentence on both counts.

DATED this 24 day of May 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

