

71864-9

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NO. 71864-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER H. BRIGHTON,

Appellant.

BRIEF OF RESPONDENT

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A handwritten signature in black ink is written over a faint, circular official stamp. The signature is slanted and appears to be 'J. Albert'. The stamp is mostly illegible but seems to contain some text around the perimeter.

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I. ISSUES

1. When Montana's robbery and burglary statutes are broader than Washington's, can the court find them legally comparable without a record of stipulated, agreed, or proven facts?

2. The record does not contain a stipulation to the facts underlying the Montana convictions. Was it error for the court to make a factual comparability finding without that record?

3. When this case is remanded, should the court be permitted to consider all facts necessary to determine the defendant's correct offender score?

II. STATEMENT OF THE CASE

The defendant's opening brief correctly states the facts of the case.

Additionally, on March 10, the State said it had received and provided the court with a copy of an amended information in the defendant's Montana conviction. 2RP2 and 4. On March 17, the State said it had provided an affidavit of probable cause that supported the amended information. 3RP2. The court said it had read the document. 3RP 2. Defense referred to the amended information. 3RP 4. No amended information is contained in the court file or in the Clerk's Papers.

Defense argued that the plea agreement was a plea only to the charges listed in the plea agreement itself. He argued that the defendant had not stipulated to the underlying facts as described in what he called the amended information. 3RP 7, 9. Defense also argued that there may have been an additional amended information filed at a later date. 3RP9.

III. ARGUMENT

A. THE RECORD WAS INSUFFICIENT TO SUPPORT A FINDING THAT THE DEFENDANT'S MONTANA CONVICTIONS WERE COMPARABLE WHEN MONTANA'S STATUTES ARE BROADER THAN WASHINGTON'S AND WHEN THE FACTUAL BASES FOR THE MONTANA CONVICTIONS WERE NOT CLEARLY STIPULATED TO OR ADMITTED.

The State concedes that it failed to prove that the defendant's burglary and robbery convictions were comparable to Washington statutes. Montana's statutes are broader and the State did not produce sufficient evidence that the defendant had stipulated to or admitted the facts underlying the convictions. The case should be remanded for resentencing.

To determine an offender's score, Washington courts use a two-part test, legal and factual, to determine when to include a comparable foreign conviction. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The foreign offense is legally comparable when its elements are substantially similar to

Washington's. Id. If the foreign statute's elements are broader, the court engages in a second analysis, that is, whether the factual basis for the foreign conviction would have violated the comparable Washington statute. Id. The court can consider facts only if they are stipulated to, admitted, or proved beyond a reasonable doubt. Id. If the foreign conviction is neither legally nor factually comparable, it cannot be counted toward a Washington offender's score.

1. The Court Failed To Conduct An Analysis On The Legal Comparability Of Montana's Burglary And Robbery Statutes.

The State concedes that the court failed to conduct a legal comparability analysis of Montana and Washington's burglary and robbery statutes. It should do so on remand.

Montana's robbery statute is broader than Washington's. State v. Thiefault, 160 Wn.2d at 417.

Similarly, Montana's burglary statute is broader than Washington's. to commit a burglary in Washington, the person unlawfully entering must intend "to commit a crime against a person or property therein." RCW 9A.52.020(1). Montana's burglary statute requires no such intent. Mont. Code Ann. 45-6-204(1). In Montana, a person commits a burglary when he enters unlawfully

and intends to commit any offense in an occupied structure. Id. Thus, a person commits a burglary in Montana by breaking into an occupied structure to smoke methamphetamine. That behavior is not a crime in Washington. Montana's burglary statute is broader than Washington's and thus not legally comparable.

2. The State Did Not Prove That The Defendant's Montana Convictions Were Factually Comparable To Washington's.

The State bears the burden of proving the factual comparability of foreign convictions. Thiefault, 160 Wn.2d at 420. The State must demonstrate that the facts underlying the foreign conviction were stipulated to, admitted, or proved beyond a reasonable doubt. Id.

The State concedes that it did not meet that burden. In its comparability analysis, the court relied on language in an Amended Plea Agreement in which the defendant agreed to "enter plea(s) of guilty to the charge(s) specified" and waived "all objections to any substantive defects in said charge(s)". CP 102. The trial court interpreted that language as the defendant's agreement that the facts stated in the Amended Information were true. 3RP13. The plea agreement itself contained neither the statutory language of the charges nor any factual basis for the them. CP 98-102. The

record does not contain a copy of any amended information with statutory or factual allegations. There is simply in this record no factual basis to support the plea.

The State did not meet its burden of showing factual comparability on either charge. The case should be reversed for resentencing.

3. On Remand, Both Parties Have The Opportunity To Offer Additional Evidence Relevant To The Defendant's Offender Score.

The defendant argues that on resentencing the trial court should not be permitted to determine his correct offender score, citing State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997). That issue was settled by the Supreme Court in State v. Jones, ___ Wn.2d ___, 338 P.3d 278 (2014), an opinion issued just days after the defendant filed his brief.

Jones decided whether the State could offer additional evidence regarding out-of-state convictions on remand when it had not done so at a prior sentencing. The Jones court overruled the "no second chance" doctrine of State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997).

The legislature has authority over sentencing as codified in the Sentencing Reform Act of 1981 (SRA), RCW 9.94A. Jones at

____. The legislature amended the SRA in 2008 to provide that both parties on remand sentencing could present “all relevant evidence regarding criminal history... not previously presented. “ Id. at ___, quoting RCW 9.94A.530(2).

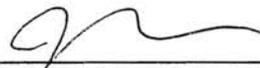
After Jones, there is no “no second chance” doctrine. Even when the State fails to meet its burden on comparability the first time around, on remand it may provide the court with additional evidence to assist the court in determining a defendant’s correct offender score. Id. at ____.

IV. CONCLUSION

The trial court did not conduct the proper comparability analysis on the defendant’s out-of-state convictions. The case should be remanded for resentencing.

Respectfully submitted on January 21, 2015.

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