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INTRODUCTION

Defendant Ryan Anderson disputes enforcement of the written Drug Court Contract he accepted and signed. On November 24, 2004, defendant Anderson chose to enter Drug Court in Jefferson County rather than face trial on an eight-count Information. Under the Drug Court Contract,

if defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charges solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending charges.

The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements, and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charges.

(Drug court contract ¶ 19; Supp. CP 4). Defendant Anderson twice ran away from the drug treatment facility, and the Superior Court finally terminated him from the program. (VRP 57-59).

On October 28, 2005, the Jefferson County Superior Court held a stipulated facts bench trial, finding Anderson guilty of seven of the eight charged offenses. (VRP 68). Defendant now appeals from these convictions, arguing that the Drug Court Contract was

not a valid waiver of his right to trial, and that the trial court miscalculated his criminal history and offender score. Because defendant Anderson understood the consequences of signing the Drug Court Contract, he waived his right to trial and his convictions are valid. Furthermore, the trial court correctly calculated defendant's offender score and sentenced him to the midpoint of the sentencing range. The State respectfully requests this court to affirm defendant Anderson's judgment and sentence and dismiss this appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant's appeal presents three issues:

A. "In general, constitutional rights may only be waived by knowing, intelligent, and voluntary acts." State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994). As the written Drug Court Contract recites, defendant Anderson waived his rights to a jury trial after previously reading the contract and discussing its contents with his attorney. Did defendant Anderson knowingly, intelligently and voluntarily waive rights to a jury trial?

B. Both this Court and the Washington Supreme Court enforce drug court contracts, analogizing them to deferred prosecution agreements. State v. Colquitt, ___ Wn. App. ___, 137

P.3d 892 (2006). On appeal, defendant challenges the “opt-out” provisions of the contract; but while in Drug Court, defendant never attempted to lawfully exit the program. Does defendant’s alleged confusion over the opt-out provisions invalidate an otherwise enforceable contract?

C. To calculate an offender score, the trial court may “rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.” RCW 9.94A.530(2). After two hearings on defendant’s criminal history, the trial court concluded that defendant had two prior felonies -- first degree theft in Jefferson County, and Grand Theft in Benewah, Idaho. (VRP 86). Defense counsel did not contest the first degree theft conviction and agreed that the State provided a certified copy of the Idaho conviction. (VRP 84-85). Did the trial court correctly calculate defendant’s offender score by including the two prior felonies?

II. STATEMENT OF FACTS

A. Defendant Anderson’s Crimes

This is a case of identity theft and residential burglary. On New Years’ day, 2004, Deputy Sheriff Brett D. Anglin was off-duty,

working as a caretaker on a farm in Jefferson County, Washington. (Affidavit for Search Warrant at 2, Attached as B to Amended Affidavit for Search Warrant, Supp. CP 20) He noticed two strangers walking past the farm. "I felt that this was odd because I am acquainted with the entire neighborhood and rarely are there unknown people walking along the road." (Affidavit at 2, Supp. CP 20). Deputy Anglin later noticed an unfamiliar car parked near the farm.

This...is a farm that includes several barns, no houses, and is rather concealed from traffic. To have a vehicle at that address, which is not owned by one of the caretakers, is unusual.

(Affidavit at 2, Supp. CP 20).

Deputy Anglin looked in the car, saw that the dashboard had been disassembled, and noticed a letter addressed to Christian Goodwin on the front seat. Anglin called in the car's license plates and after learning the car was not reported stolen, he had it towed as an abandoned vehicle. (Affidavit at 3, Supp. CP 21). Defendant Ryan Anderson later recovered the car, explaining it had electrical problems and that he parked it in the secluded spot to keep it from being stolen. (Affidavit at 3; Supp. CP 21).

On January 10, 2004, the owner of the farm, Fire Chief Charles Boggs, called Deputy Anglin and asked to meet him there.

I arrived on the scene and was led to a shed. Inside the shed were several pieces of mail that had been initially covered by hay. Chief Boggs stated that his wife, Julie, located the mail while stepping on it. I looked through the mail and noticed that all of it was addressed to several residents on West Valley Road.

(Affidavit at 3; Supp. CP 21). The source of this mail became clear when deputies interviewed Amanda Iardella about a party she went to at defendant Anderson's house.

Amanda said she wished to report a Mail Theft that she had observed about 2 or more weeks ago. Amanda went on to explain that she was with her friend Natisia Abbot, and had gone to a party at Ryan Anderson's house. At Ryan's house were Patricia Sullivan, Jennifer Durham, and Shane Sodano. A short time later Ryan stepped into the living room with a cardboard box and dumped the contents of the box on the living room floor. The box contained mail. Ryan, Patricia, Jennifer and Shane all started opening the mail. From the pile of mail Patricia Sullivan apparently had taken a credit card, belonging to a Brenda Bowers and called activating it.

* * * *

Amanda observed Ryan open and sort the mail into sections, bank slips, L&I Statements, W-4 forms, Unemployment statements, Credit Cards, overdue bills, personal letters, Christmas Cards and cash.

Amanda made the comment to the group "I'm happy I have a locked mail box", to which the group responded "Oh, we get into those too."

(Affidavit at 4; Supp. CP 22).

The Sheriff's Office received a warrant to search defendant Anderson's house in Port Hadlock, and on January 17, 2004, investigators discovered a backpack there with more stolen mail.

I recovered a backpack (partially hidden by clothing) containing numerous pieces of mail addressed to persons not residing at the residence, numerous papers containing names of other persons and personal information relating to them, and several checks drawn on different banks by various persons not connected with the residence...Additionally, the backpack contained a print out explaining how to commit financial fraud.

(Attachment C to Amended Affidavit of Probable Cause; Supp. CP 25). After waiving his rights, defendant Anderson told investigators the backpack was his, but "some other person must have put the contents in to frame him." (Attachment C; Supp. CP 25).

On May 19, 2004, the Sheriff's Office received a second report about defendant Anderson, this time involving a residential burglary.

On 5-19-04 Gary Jensen reported that sometime during the previous night someone entered his home, stole key rings of keys and a purse belonging to his wife, Colleen Jensen. The purse contained identification, bank cards, and credit cards belonging to Colleen Jensen. The suspect then entered Jensen's business, Sony's RV, took all of the RV keys and other keys from the business. Jensen's 1993 Dodge pickup truck...was taken from the rear of the

business. Colleen's credit card was used that morning at a Chevron store/gas station in Poulsbo by a male subject...

Ryan Anderson was arrested by Benewah County Deputy Sheriff Levy Reynolds in Benewah County, driving a different vehicle, and found to be in possession of Jensen's keys and credit cards, among other goods and a hand gun...Through investigation Deputy Reynolds contacted Annie R. Tracey who stated that Anderson had given her a ride from Port Townsend to Idaho in a Dodge pickup, and had done a lot of shopping along the way using Anderson's "Aunt's" cards to pay for the goods. Tracy gave Deputy Reynolds a key for the Dodge pickup they left in Rathdrum, Idaho. Rathdrum Police and a Benewah County Deputy Sheriff recovered Jensen's stolen Dodge pickup in Rathdrum and found that the key given to them by Tracy belonged to that vehicle.

(Attachment A to Amended Affidavit of Probable Cause; Supp. CP 14).

The Jefferson County Prosecuting Attorney initially charged defendant Anderson with one count of residential burglary and one count of second degree taking a motor vehicle without permission. On October 24, 2004, the Prosecuting Attorney filed an amended information, adding charges of third degree possession of stolen property, first degree possession of stolen property, two counts of second degree identity theft, unlawful possession of payment instruments, and second degree burglary. (Amended Information; CP 1).

B. Defendant's Admission To and Termination From Drug Court

Rather than face trial on the eight-count information, defendant Anderson petitioned the Superior Court to enter Jefferson County's Drug Court. On November 4, 2004, when the Superior Court arraigned defendant Anderson on the amended information, Anderson's counsel stated "my client and I have met, and I've talked with the prosecutor. He really wants to get into drug court." (VRP 22). Later in the hearing, defense counsel clarified that Anderson would have two weeks to opt out after signing the Drug Court Contract.

MR. SURYAN: Now, is – by signing the Contract – I hate to take up the court's time, but, by signing the Contract before we know if they would even let him in, does that obligate him to one side of it without having the benefit of the other? I'm kind of concerned about that.

THE COURT: The Contract is a prerequisite to admission to Drug Court. If he decides not to do it or he's not admitted, the Contract –

MR. SURYAN: Alright-

THE COURT: He wouldn't-

MR. SURYAN: Do you understand that, Ryan?

MS. DALZELL: He has two weeks to opt out.

MR. SURYAN: Okay. Alright? Is that clear?

MR. ANDERSON: Yes.

(VRP 26-27).

On November 24, 2004, the Superior Court accepted defendant Anderson's contract and ordered his case transferred. (Drug Court Contract at 7; Supp. CP 7) As part of the Contract, defendant Anderson agreed in writing to waive his rights to trial.

Defendant acknowledges an understanding of, and agrees to waive the following:

1. The right to a speedy trial;
2. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
3. The right to hear and question any witnesses testifying against the defendant;
4. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
5. The right to testify at trial.

My attorney has explained to me, and we have fully discussed all of the above paragraphs. I understand them all and wish to enter into this Drug Court Contract. I have no further questions to ask the Judge.

(Drug Court Contract at 6; Supp. CP 6).

The trial court noted that defendant had previously read the Contract and that his attorney had read it to him. (Drug Court Contract at 7. Supp CP. 7)

Over the next year, defendant Anderson twice violated the Contract by dropping out of the program. First, in December 2004, Anderson left an intensive outpatient treatment program and was missing until March 2005 when officers picked him up on a warrant. (VRP 49). Second, in June 2005, Anderson left SeaDruNar Treatment Center in Seattle without permission. As the Drug Court evaluator testified, "the Drug Court team met and recommended and decided that we'd given Mr. Anderson all the chances that we felt that he was worth giving, and referred him back to Superior Court." (VRP 50).

On September 30, 2005, the Superior Court held a due process hearing on terminating defendant Anderson from Drug Court. After taking testimony from the Drug Court evaluator and defendant Anderson, the court found sufficient grounds to end Drug Court and to remand defendant to the Superior Court for trial on stipulated facts.

You violated the Drug Court Contract, there's no question about that, in – a number of different times and a number of different ways. And we're not going to give you another chance to say 'please send me to treatment again', and have you leave treatment again without permission and commit more crimes.

(VRP 59).

On October 28, 2005, the Superior Court held trial on stipulated facts as agreed in the Drug Court Contract. Defendant Anderson did not contest counts one through five. (VRP 62) ("Counts One, Two, Three, Four and Five are counts that he has no issue with, and would not argue against what's in the police report on those at all"). Defendant disputed counts six through eight only on the reliability of Annie Tracy's statements.

[Mr. Anderson] has contended to me all along that she [Tracy] was using, they were both using, and that she picked him up and he didn't even have any idea that the truck was stolen. When he got to Idaho, and they got out in the mall, he came back and saw on the side of the truck what it said and had no idea until then that it wasn't her truck.

(VRP 66).

The trial court had no difficulty finding defendant guilty of counts six, seven and eight.

[W]hen you read that on May 24th he was in possession of the Jensen credit cards in Idaho and the key ring for the house, he also had connection with the Jensens prior to the burglary, and that, coupled with the flight, is enough to find him guilty of both Count Six, Residential Burglary on the 19th of May, and Count Seven, Burglary in the Second Degree in the outbuilding, because the back door of the building had been broken, the keys were missing, the blue velvet key bag, and also taking the motor vehicle, just based on the statements of Tracy. That's certainly sufficient to find guilt of Counts Six, Seven, and Eight.

(VRP 68).

C. Calculation of the Offender Score

On November 4, 2005, the trial court held a sentencing hearing, and at issue was the calculation of defendant's offender score. The Court began by consolidating count five, unlawful possession of payment interests, because it overlapped with count two, possession of stolen property. (VRP 72). The dispute then centered on defendant's past felonies – first degree theft in Jefferson County and Grand Theft in Idaho. (VRP 73).

At the second sentencing hearing, November 10, 2005, defendant's criminal history became clear. First, defendant did not contest his conviction for first degree theft in Jefferson County.

THE COURT: And then you say he's got two priors.

MS. DALZELL: Correct.

THE COURT: What are those exactly?

MS. DALZELL: Theft First Degree out of Jefferson County.

THE COURT: What was the date of that?

MS. DALZELL: 9/2/00.

THE COURT: Is that contested?

MR. SURYAN: *That one is not.*

(VRP 84) (emphasis added).

Second, the State provided a certified copy of defendant's Idaho conviction that proved his prior felony in Idaho. This was sufficient for the Judge to include it on defendant's offender score.

THE COURT: We'll return to Mr. Anderson's matter. I've been handed, Mr. Anderson, a certified copy of a Judgment and Sentence that does find you guilty of Grand theft in Idaho...

MR. SURYAN: Yes. We've reviewed it as well, your honor.

THE COURT: Alright. So, I'm satisfied that you have an offender score of seven. The State has met its burden of proving that by a preponderance of the evidence for purposes of sentencing. And I say the offender score of seven for the Residential Burglary.

(VRP 86). Although defendant Anderson contested the offender score, he presented no evidence contradicting the two prior felonies.

The trial court sentenced defendant to the midpoint of the standard range under the sentencing grid – 50 months. (VRP 94). Defendant now appeals, arguing the Drug Court Contract was unenforceable and that the trial court miscalculated his offender score.

ARGUMENT

III. STANDARD OF REVIEW

This court reviews defendant's waiver of rights in the Drug Court Contract *de novo*. See State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994) (requirements of waiver); State v. Colquitt, ___ Wn. App. ___, 137 P.3d 892, 894 (2006) (interpreting Drug Court Contract).

The court reviews calculation of defendant's offender score *de novo*. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

IV. DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHTS.

No dispute should exist that defendant Anderson wanted to enter Drug Court and signed the Contract willingly. Yet on appeal, defendant argues he did not know what he was doing.

This record does not establish that Mr. Anderson fully understood the state constitutional right to a jury trial; there is nothing to show that he was aware that he could participate in the selection of the jury, that he had the right to a jury of twelve, that the jurors would be required to presume him innocent unless proven guilty beyond a reasonable doubt, or that a guilty verdict required a unanimous jury.

(Opening Brief at 10). Defendant's new assertion is incorrect for three reasons.

A. Defendant Knew What He Was Doing.

First, defendant Anderson signed the Drug Court Contract after discussing the consequences with his attorney. (Drug Court Agreement at 6; Supp CP 6). He represented to the trial court that he understood the significance of the Contract, and the Contract itself was clear on the effects of entering Drug Court. Rather than accepting defendant's criticism of the Contract in hindsight, the Court should view defendant's waiver as the trial court did in November 2004. Defendant Anderson had no hesitation entering Drug Court and gave the trial court no hint of being confused or hesitant.

As the Supreme Court ruled in State v. Stegall, a written agreement is sufficient to waive a right to jury trial.

The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Moreover, the inquiry by the court will differ depending on the nature of the constitutional right at issue. For example, when a defendant wishes to waive the right to counsel, and proceed pro se, the trial court must usually undertake a full colloquy with the defendant, on the record, to establish the defendant knew the relative advantages and disadvantages of proceeding pro se. See Acrey, 103 Wn.2d at 211, 691 P.2d 957 ("only rarely" will the record contain sufficient

information to support a waiver of the right to counsel in the absence of a colloquy with the defendant). A guilty plea, which involves waiving numerous trial rights, is valid only if the record shows not only a voluntary and intelligent waiver, but also an understanding of the waiver's direct consequences. State v. Smissaert, 103 Wn.2d 636, 643, 694 P.2d 654 (1985).

By contrast, no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; all that is required is a personal expression of waiver from the defendant. Acrey, 103 Wn.2d at 207-08, 691 P.2d 957; State v. Wicke, 91 Wash.2d 638, 591 P.2d 452 (1979); State v. Brand, 55 Wn. App. 780, 785 n.5, 780 P.2d 894 (1989) (citing additional cases), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990).

Stegall, 124 Wn.2d at 725-26.

Furthermore, this court recently enforced a drug court contract by its terms, with no question of its enforceability. State v. Colquitt, ___ Wn. App. ___, 137 P.3d 892, 895 (2006) (defendant "waived his right to testify or call any witnesses on his behalf"). By signing the Contract, defendant Anderson knowingly, intelligently and voluntarily waived his rights to trial.

Under the plain language of the stipulation he signed, appellant agreed to have his "guilt determined by the court on the basis of the police report herein." This was a knowing and intelligent waiver of all subsequent factual, legal, or procedural issues the appellant might raise.

State v. Shattuck, 55 Wn. App. 131, 133, 776 P.2d 1001 (1989).

B. The State Constitution Does Not Require A Different Standard For Waiver

Second, the Washington Constitution does not impose a more stringent standard for waiver. Defendant argues that Article I sections 21 and 22 of the Washington Constitution imposes a broader and more highly valued right to jury trial. “A waiver of the state constitutional right must be examined more carefully than a waiver of the corresponding federal right.” (Opening Brief at 4) (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)).

The flaw in defendant’s argument appears in the third and fourth Gunwall factors – State constitutional history, state common law history, and pre-existing state law. In 1994, the Washington Supreme Court carefully examined State and federal law regarding waiver of the right to jury trial. State v. Stegall, 124 Wn.2d at 725. The Court did not hint at, let alone suggest, that Washington’s state constitution imposes any additional requirements for waiver beyond the federal standard. Nothing in the development of Washington statutory or constitutional law suggests that the State must prove more than knowing, intelligent and voluntary waiver.

Defendant’s proposed State standard – that “the record shows that the defendant is fully aware of the meaning of the state

constitutional right” – has no support in Washington caselaw or statutes. (Opening Brief at 5). It is insufficient grounds for this court to create a new, undefined state standard for waiver.

C. The Opt Out Provision Is Clear

Third, defendant expressed no confusion over the opt out provision when he signed the Drug Court Contract. As reprinted above, the trial judge, defense counsel and defendant had a short conversation about the two-week period to opt out of the Contract. (VRP 26-27). Defendant in hindsight now argues that “an accused who signs the contract has an expectation that he will be able to change his mind without penalty.” (Opening Brief at 11).

This argument is unpersuasive for two reasons. First, the Contract clearly spells out what happens after the opt-out period expires. “The defendant agrees that this ability to withdraw from the terms of this contract will cease after the period of two weeks following the effective date of this contract and thereafter the defendant shall remain in the Program until graduation unless his/her participation is terminated by the court.” (Drug Court Contract at 3; Supp. CP 3).

Second, after leaving the program once in December 2004, defendant Anderson petitioned the Court to return in March 2005.

Had defendant intended to opt out of the program, he had the opportunity to raise this argument early on. He did not because he wanted to be in the Drug Court.

Defendant signed a binding Drug Court Contract. Because he understood what he was signing, and what he was doing, the trial court appropriately held him to the Contract terms and ordered a stipulated facts trial.

V. THE TRIAL COURT CORRECTLY CALCULATED DEFENDANT'S OFFENDER SCORE

Defendant challenges the trial court's use of an Idaho conviction to calculate defendant's offender score.

Despite the absence of any evidence, the judgment and sentence included a finding that Mr. Anderson had two prior felony convictions, including an out-of-state conviction. CP 6. There is no indication in the record of how the court arrived at this finding. RP 71-94.

(Opening Brief at 14). Yet as detailed above, the trial court carefully reviewed defendant's criminal history to arrive at the offender score. No reasonable grounds exist to resentence defendant.

First, the State provided ample proof of defendants' criminal history. At the November 4, 2005 sentencing hearing, the Prosecutor had a certified copy of the Idaho conviction and copies

of the Idaho statute, showing it was comparable to Washington's. (VRP 72) ("here's the Idaho statutes; it's the same law that we have in this State"). Other than complaining that he did not have a copy of the judgment and sentence, defense counsel did not object to the comparability of the Idaho conviction. (VRP 72-73).

Second, as detailed above, defendant did not contest his conviction for first degree theft in Jefferson County.

Third, defendant did not raise any substantial objection to his Idaho conviction. Defendant faults the State for not placing the certified copy of the Idaho judgment in the record, but defendant cannot argue that the certified conviction did not exist. Both the trial judge and defense counsel acknowledged on the record that it did. (VRP 85). If this Court requires a copy of the certified conviction, the State respectfully requests permission under RAP 9.10 to file the conviction in the trial court and supplement the record.

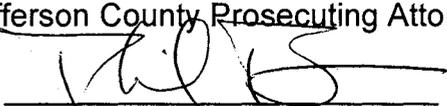
The trial court had sufficient evidence to conclude the Idaho conviction was comparable to a felony conviction under Washington law. The court's calculation of the offender score was correct.

CONCLUSION

By twice violating the terms of his Drug Court Contract, defendant Ryan Anderson lost his chance to participate in the program. Clearly spelled out in the Contract were the consequences of failing Drug Court: a bench trial on stipulated facts. Defendant knew the risks and benefits of choosing Drug Court, and the trial court appropriately held him responsible for his decisions. Because the trial court did not err in convicting and sentencing defendant, the State respectfully requests this court to affirm defendant's judgment and sentence and dismiss this appeal.

DATED this 5th day of September, 2006.

Juelanne Dalzell
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Amended Brief of Respondent** to:

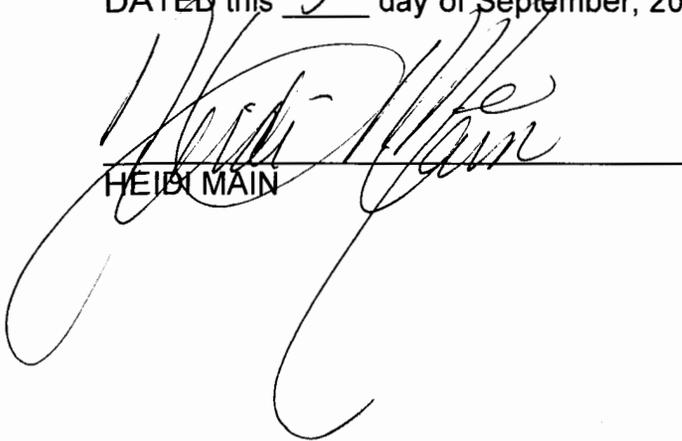
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STATE OF WASHINGTON

DATED this 5th day of September, 2006.


HEIDI MAIN