

NO. 34077-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SMITH,

Appellant.

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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 05-1-00585-6

BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

RANDALL AVERY SUTTON  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

ORIGINAL

SERVICE

Catherine Glinski  
P.O. Box 761  
Manchester, WA 98353

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED Sept. 5, 2006, Port Orchard, WA *[Signature]*  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly exercised its discretion in denying Smith's motion to withdraw his guilty plea even though the plea agreement and his statement of defendant on plea of guilty recited an incorrect standard range on Count II where his plea was not involuntary because the correct standard range was the same as that on Count I, which was required to run concurrently as a matter of law and Smith was therefore not misinformed as to any direct consequence of his plea?

2. Whether Smith's Class-C felonies properly counted in his offender score where he was released from prison less than two years before he committed the current offense because:

(a) The plain language of the Sentencing Reform Act requires an offender to remain in the community for five years without reoffense before the prior washes;

(b) There was no equal-protection violation because Smith, like every other Class-C felon who reoffends within five years of release, had his prior convictions counted in his offender score; and

(c) Equity does not demand that the courts ignore the fact that Smith failed to go two years without reoffending, particularly in light of the fact that his prior sentence was never held to be invalid but was amended to

bring an end to more than six years of appellate litigation?

## II. STATEMENT OF THE CASE

Kevin Smith was charged by information filed in Kitsap County Superior Court with forgery and unlawful possession of a payment instrument. CP 32.

Smith pled guilty pursuant to a plea agreement. CP 42. In his statement of defendant on plea of guilty, Smith asserted that he was entering an *Alford* plea. CP 41. Both the plea agreement and the statement of defendant noted that Smith's offender score was contested, with the statement of defendant specifically referring back to the plea agreement. CP 36, 44.

The plea agreement asserted Smith's offender score on Count I was 7, yielding a standard range of 14 to 18 months. CP 43. It specified no score for Count II, which was asserted to be an unranked offense, yielding a range of 0 to 12 months. CP 43. The State agreed to recommend a 14-month sentence. CP 43.

Under the agreement, Smith retained the right to challenge his criminal history, specifically including whether any of his prior offenses "washed" under the Sentencing Reform Act. CP 44. In the event that Smith's offender score was less than 7 the State would change its recommendation to "the top of the ranked standard range." CP 44.

The plea agreement further specified which offenses were disputed and which Smith was stipulating were proven by the State for sentencing purposes. RP (8/17) 8. Smith nevertheless reserved the right to challenge whether the offenses should “wash out” or be counted as same criminal conduct. RP (8/17) 9. The stipulated offenses consisted of three counts of burglary in Michigan, which occurred on three different dates, but were sentenced on the same date, and three counts of violation of Washington’s Uniform Controlled Substances Act (delivery). CP 42.

The court accepted Smith’s pleas of guilty. RP (8/17) 10-11. Sentencing was set over to allow briefing of the offender score issue. RP (8/17) 12.

Smith filed a sentencing memorandum. CP 47. As the sentencing hearing was commenced, Smith’s counsel informed the court that Smith wished to withdraw his guilty plea, against counsel’s advice. RP (9/20) 5, 6. Counsel asked that special counsel be appointed to advise Smith on the withdrawal issue. RP (9/20) 6. Smith’s primary motivation appeared to be that the State was not agreeing to his furlough to attend a funeral. RP (9/20) 6. Counsel nonetheless also asserted that he had determined, contrary to the terms of the plea agreement and statement of defendant, that Count II was indeed a ranked offense. RP (9/20) 7. The court appointed special counsel and set the matter over. RP (9/20) 13.

At the next hearing, special counsel reported that after a long discussion with Smith and his two attorneys, Smith had decided not to move to withdraw his plea and to proceed to sentencing. RP (10/11) 3. By the time of the hearing, however, Smith had again changed his mind and again asserted that he wished to withdraw his plea. RP (10/11) 3.

The matter was set over to hear the motion to withdraw Smith's plea, which was handled by Smith's primary counsel. RP (10/24) 2. Smith argued that his plea was involuntary because he was misadvised as to his standard range on Count II. RP (10/24) 3; CP 163. The State responded that regardless of whether Count II was ranked or not, it was subject to the same term of confinement as Count I, with which it was required to run concurrently. RP (10/24) 4-5. The misadvice, which the State conceded, RP (10/24) 4, therefore was not of consequence to the plea. RP (10/24) 5. Smith's plea was therefore voluntary. RP (10/24) 5. The Court read the plea agreement as binding the State to a maximum recommendation of 14 months. RP (10/24) 14. It therefore concluded that Smith could not demonstrate a manifest injustice, and denied his motion to withdraw his plea. RP (10/24) 14. CP 171.

Smith's special counsel thereafter filed another motion to withdraw. CP 176. This motion alleged four bases for withdrawing the plea. First, Smith did not realize he was agreeing to a 14-month concurrent exceptional

sentence to Count II. CP 178. Secondly, he thought he was pleading guilty in Count II in the amended information to the charges described in Count III of the original information, possession of stolen property (a Mervyn's credit card), when in fact the charge in the amended information was that charged in Count IV of the original information, unlawful possession of a payment instrument (a checkbook). CP 178; *see* CP 2-3. Thirdly, the plea was coerced because primary counsel threatened to have Smith's girlfriend arrested on a material witness warrant if Smith did not plead guilty, and also promised that the forgery charge would be dismissed before sentencing. CP 179. Finally, Smith alleged finally that the plea was involuntary because it was a stipulation to an exceptional sentence on Count II without a valid *Blakely* waiver. CP 179. At a hearing on the motion, the State argued that the Smith had already filed one motion to withdraw, the court had ruled on it, and the case should proceed to sentencing on the date previously set (12 days hence). RP (11/4) 4-5.

The matter was set over to that date, at which point Smith withdrew his second motion to withdraw. RP (11/16) 3. Counsel advised Smith on the record that he would be able to appeal the adverse ruling on the first motion, but would not be able to appeal the issues raised in the second, now withdrawn, motion. RP (11/16) 4. The court explained this also, adding that he could also appeal an adverse ruling on the offender score issue. RP

(11/16) 5. Smith asserted that he understood. RP (11/16) 5. After inquiry, Smith affirmed that he wished to withdraw the motion. RP (11/16) 6.

The case proceeded to sentencing, and at Smith's request, the court took judicial notice of the contents of its file in Kitsap County cause number 95-1-00998-9. RP (11/16) 9. Smith argued that although he had been released on the prior VUCSA offenses in 2003, less than five years before he committed the current offenses, they should nevertheless "wash" from his offender score because the "correct" release date, based in an amended judgment and sentence should have been no later than February 2000. RP (11/16) 11.

The trial court, without State objection, accepted for purposes of its sentencing determination that under the final judgment and sentence in the 1995 case, Smith would have been released no later than February 4, 2000. RP (11/16) 11-12. Smith was in fact released on April 28, 2003. RP (11/16) 11-12.

Smith argued because it had been more than five years since he "should" have been released in the 1995 case, those Class-C felonies should "wash" from his offender score. RP (11/16) 13-15. The State responded that the plain language of RCW 9.94A.525(2) provides that a Class-C offense only washes after an offender has been crime-free in the community for five

years, and therefore the 1995 offenses should count in Smith's offender score.

RP (11/16) 15-17.

The court agreed with the State:

The Court, however -- my view is this: The statute is unambiguous. A computation of offender scores is something that's the exclusive province of the Legislature. The Legislature has decided to extend the benefit of a wash-out for Class C's, only if the defendant lives five years crime free in the community after their confinement ends. That's the condition. And whether or not the Defendant accomplishes this is something that's exclusively within his control. The Legislature says five years after -- if you're clean for five years after you're out, then it doesn't count. That didn't happen here. So I'm going to find that the '95 convictions don't wash, should be included in the offender score.

RP (11/16) 19. The court therefore sentenced Smith based on offender score of 7. RP (11/16) 19. The court followed the State's recommendation, RP (11/16) 19, of 14 months, with the sentence for each offense to run concurrently. RP (11/16) 24.

### III. ARGUMENT

- A. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH'S MOTION TO WITHDRAW HIS GUILTY PLEA EVEN THOUGH THE PLEA AGREEMENT AND HIS STATEMENT OF DEFENDANT ON PLEA OF GUILTY RECITED AN INCORRECT STANDARD RANGE ON COUNT II WHERE HIS PLEA WAS NOT INVOLUNTARY BECAUSE THE CORRECT STANDARD RANGE WAS THE SAME AS THAT ON COUNT I, WHICH WAS REQUIRED TO RUN CONCURRENTLY AS A MATTER OF LAW AND SMITH WAS THEREFORE NOT MISINFORMED AS TO ANY DIRECT CONSEQUENCE OF HIS PLEA.**

Smith argues that because the plea agreement and his statement of defendant on plea of guilty recited an incorrect standard range on Count II, his plea was involuntary. This claim is without merit because the correct standard range was the same as that on Count I, which was required to run concurrently as a matter of law. Therefore Smith was not misinformed as to any direct consequence of his plea.

Criminal Rule 4.2(f) provides that the court shall allow a defendant to withdraw a plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. "Manifest injustice," in the context of the withdrawal of a guilty plea, is "an injustice which is only obvious, directly observable and not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The "manifest injustice" standard is "demanding"

because of the many safeguards built into the process when a defendant pleads guilty. *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983). The defendant bears the burden of proving that manifest injustice exists. *State v. Dixon*, 38 Wn. App. 74, 683 P.2d 1144 (1984).

*Taylor* recognizes four general area where “manifest injustice” may be found:

(1) the denial of effective counsel, (2) a plea ... not ratified by the defendant or one authorized [by him] to do so, (3) the plea was involuntary, (4) the plea agreement was not kept by the prosecution.

*Taylor*, 83 Wn.2d at 597. Smith alleges that his plea was involuntary. This Court reviews the trial court’s ruling on a motion to withdraw a plea for abuse of discretion. *In re Matthews*, 128 Wn. App. 267, ¶ 18, 115 P.3d 1043 (2005),

As Smith notes, in *Matthews* this Court applied the Supreme Court’s recent clarification of this area of the law. *Matthews*, 128 Wn. App. at ¶ 10 (discussing *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004)). “After *Isadore*, a defendant ‘need not make a special showing of materiality’ in order for misinformation to render a guilty plea invalid, but he must still show that the misinformation concerned ‘a *direct* consequence of [the] guilty plea.’”<sup>4</sup> *Matthews*, 128 Wn. App. at ¶ 10 (*quoting Isadore*, 151 Wn.2d at 296) (emphasis this Court’s). The Court noted that this requirement has long

been the law. *Matthews*, 128 Wn. App. at ¶ 10 (citing *State v. Ross*, 129 Wn.2d 279, 285, 916 P.2d 405 (1996), and *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353(1980).

In *Matthews*, the Court was required to determine whether under *Isadore*, being informed of an incorrect offender score and standard range involved a direct consequence of the plea agreement. *Matthews*, 128 Wn. App. at ¶ 11. In *Matthews*, the defendant was erroneously advised that his offender score and standard range were higher than they actually were. Rejecting the analysis of Divisions I and III in *State v. Murphy*, 119 Wn. App. 805, 81 P.3d 122 (2002), *review denied*, 152 Wn.2d 1005 (2004), and *State v. Moon*, 108 Wn. App. 59, 29 P.3d 734 (2001), the Court concluded that Matthews' plea was not involuntary:

[W]here the defendant enters a plea agreement under the erroneous belief that his offender score and standard range are higher than in fact they are, he is not entitled to withdraw that plea under a claim that it was invalidly entered. [Where the actual range is higher], the defendant suffers a manifest injustice because his sentence will be enhanced, but [where the range is lower] he does not similarly suffer because his sentence can only become less onerous.

*Matthews*, 128 Wn. App. at ¶ 15.

Here, Smith pled guilty believing his standard range on Count I was 14 to 18 months, and that on Count II was 0 to 12 months. In fact, Count II also carried a standard range of 14 to 18 months. However, by operation of

law, those sentences had to run concurrently. RCW 9.94A.589(1)(a). They could only run consecutively by imposing an exceptional sentence. *Id.* Under RCW 9.94A.537(1), however, an exceptional sentence could be imposed only if the State gave notice before entry of Smith's plea that it intended to seek such a sentence. No such notice was filed here. Thus the maximum penalty Smith could face was two concurrent 18-month sentences.

Thus, while Smith's sentence was not "less onerous" because of the misinformation, it also was not, and could not be, more onerous. The maximum penalty he faced was that of which he was advised when he entered his plea: 18 months. Thus, as in *Matthews*, there was no direct consequence of the misadvice he was given before he entered his plea. The trial court correctly determined that Smith failed to show a manifest injustice permitting the withdrawal of his plea.

Smith's reliance on *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), is thus misplaced. There, Walsh pled guilty to a single count and the State agreed to recommend the bottom of the standard range. *Walsh*, 143 Wn.2d at 4. Walsh was advised when he entered his plea that the standard range was 86 to 114 months. *Walsh*, 143 Wn.2d at 4. In fact, it was 95 to 125 months. *Walsh*, 143 Wn.2d at 4. The State and defense counsel recommended a sentence of 95 months. *Walsh*, 143 Wn.2d at 4-5. The trial court imposed an exceptional sentence of 136 months. *Walsh*, 143 Wn.2d at 5. The Supreme

Court held that Walsh was entitled to withdraw his plea because he was misinformed of a direct consequence of his plea. *Walsh*, 143 Wn.2d at 8. The Court rejected the State's argument that the point was moot because of the exceptional sentence: "The issue here is whether the defendant voluntarily pleaded guilty." *Walsh*, 143 Wn.2d at 9.

Contrary to Smith's argument, *Walsh* does not require the same result here. The State's argument below, and now, is not, as it was in *Walsh*, that the resulting sentence moots the original involuntariness of the plea. Walsh's plea was involuntary because even without the exceptional sentence it exposed him to a penalty greater than that which he contemplated when he entered his plea. Here, the error had no direct sentencing consequence because regardless of the error the potential penalty to which Smith was exposed remained the same. *Matthews*, not *Walsh*, controls.

The trial court did not abuse its discretion in denying Smith's motion to withdraw. Its ruling should be affirmed.

**B. SMITH'S CLASS-C FELONIES PROPERLY COUNTED IN HIS OFFENDER SCORE WHERE HE WAS RELEASED FROM PRISON LESS THAN TWO YEARS BEFORE HE COMMITTED THE CURRENT OFFENSE BECAUSE THE PLAIN LANGUAGE OF THE SENTENCING REFORM ACT REQUIRES AN OFFENDER TO REMAIN IN THE COMMUNITY FOR FIVE YEARS WITHOUT REOFFENSE BEFORE THE PRIOR WASHES; THERE WAS NO EQUAL-PROTECTION VIOLATION BECAUSE SMITH, LIKE EVERY OTHER CLASS-C FELON WHO REOFFENDS WITHIN FIVE YEARS OF RELEASE, HAD HIS PRIOR CONVICTIONS COUNTED IN HIS OFFENDER SCORE; AND EQUITY DOES NOT DEMAND THAT THE COURTS IGNORE THE FACT THAT SMITH FAILED TO GO TWO YEARS WITHOUT REOFFENDING, PARTICULARLY IN LIGHT OF THE FACT THAT HIS PRIOR SENTENCE WAS NEVER HELD TO BE INVALID BUT WAS AMENDED TO BRING AN END TO MORE THAN SIX YEARS OF APPELLATE LITIGATION.**

Smith next claims that his 1995 offenses should not have counted in his offender score. This claim is based on the fact that under sentences imposed in the final judgment and sentence entered in that case in 2003, his maximum release date would have been February 2000, which was more than five years before he committed the current offenses. He alleges that his post-2000 confinement was not "pursuant to a felony conviction," but pursuant to an invalid judgment and sentence, and therefore does not affect the statutory "wash" date; that including the offenses thus violates equal protection; and

also that equity demands that Smith be given credit for the time already served.

The plain statutory language predicates washing on a defendant's spending five consecutive years *in the community* without committing another crime. Smith did not do this, and as such the offenses properly counted in his offender score.

Likewise, like every other defendant who reoffends within five years of release, Smith's Class-C felonies were counted in his score. Thus no equal-protection violation occurred.

Lastly, this Court's final ruling in the third direct appeal of Smith's 1995 sentence *upheld* Smith's exceptional sentence of 171 months. The Supreme Court, however, accepted review. At that point, after three sentencings and three appeals, the parties agreed to resolve the matter without further litigation. This resolution was by no means on the merits, and thus no equitable consideration requires that Smith's prior convictions wash out.

- 1. The plain language of the Sentencing Reform Act requires an offender to remain in the community for five years without reoffense before a Class-C offense washes from the offender score.***

Smith argues that his post-2000 confinement was not "pursuant to a felony conviction," but pursuant to an invalid judgment and sentence, and therefore does not affect the statutory "wash" date. This contention, which

lacks citation to any supporting authority other than RCW 9.94A.525(2), is factually and legally incorrect.

The judgment and sentence under which Smith was held was never declared invalid, but instead was supplanted by negotiated agreement of the parties. Moreover, regardless of the ultimate validity of Smith's exceptional sentence, he was, under the plain language of the statute, held pursuant to an uncontestedly valid felony conviction. Finally, the plain language of the statute predicates washing on five years crime-free *in the community*. Smith reoffended in less than two years.

This Court reviews questions of law, including construction of the Sentencing Reform Act, de novo. *State v. Donery*, 131 Wn. App. 667, ¶ 4, 128 P.3d 1262 (2006). The Court looks to the statute's plain language in order to give effect to legislative intent. *Donery*, 131 Wn. App. at ¶ 4. When faced with an unambiguous statute, the Court derives the legislature's intent from the plain language alone. *Donery*, 131 Wn. App. at ¶ 4. While the Court may not look beyond the plain statutory language, the Court must read the statute as a whole and harmonize each provision. *Donery*, 131 Wn. App. at ¶ 4.

RCW 9.94A.525(2) provides in pertinent part:

Class C prior felony convictions ... shall not be included in the offender score if, since the last date of release from

confinement ... *pursuant to a felony conviction* ... the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(Emphasis supplied). “Conviction” is based on the determination of guilt, not the terms of the judgment and sentence:

“Conviction” means an adjudication of guilt pursuant to Titles 10 or 13 RCW and *includes a verdict of guilty*, a finding of guilty, and acceptance of a plea of guilty.

RCW 9.94A.030(12) (emphasis supplied).

For SRA purposes, Smith’s “conviction” was thus the jury’s 1996 finding that he was guilty. That finding was upheld in Smith’s first direct appeal. *State v. Smith*, 88 Wn. App. 1026, 1997 WL 709419 (Nov. 14, 1997), *review denied*, 135 Wn.2d 1014 (1998) (*Smith I*). In his second and third direct appeals, Smith only challenged his sentence. *State v. Smith*, 100 Wn. App. 1020, 2000 WL 358303 (Apr. 7, 2000) (*Smith II*); *State v. Smith*, 109 Wn. App. 1011, 2001 WL 1408648 (Nov. 9, 2001), *review granted*, 147 Wn.2d 1019 (2002) (*Smith III*).<sup>1</sup> Nor does he now challenge the validity of his 1995 convictions.<sup>2</sup> He was thus incarcerated during the entire period pursuant to a valid felony conviction. Smith’s argument is thus based on a false premise and must be rejected.

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<sup>1</sup> The opinions are attached as Appendices A-C.

<sup>2</sup> Indeed as noted above, he stipulated to their existence and validity for sentencing purposes.

Moreover, even if the Court were, despite the plain language, to read the term “valid judgment and sentence” into the statute, Smith fails to show that he was held pursuant to an invalid judgment and sentence. A judgment is presumed valid. *See State v. Manussier*, 129 Wn.2d 652, 683, 921 P.2d 473 (1996) (citing *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992)). And indeed this Court’s final opinion *affirmed* the judgment and sentence. *Smith III*, 2001 WL 1408648, at \*1. Although the Supreme Court accepted review, the parties resolved the case via stipulation before that Court considered the case on its merits. *See* CP 147, 159 (Stipulation Regarding Resentencing and Mandate of the Supreme Court).<sup>3</sup>

Smith was thus not held pursuant to an invalid judgment and sentence. That the parties subsequently decided to end the litigation after six years and three appeals via a stipulated agreement by no means establishes that the judgment and sentence was invalid. To the contrary, the last ruling of this Court on the merits upheld the validity of the judgment and sentence. That ruling was not vacated or reversed. Smith thus fails to show, even if this Court were disregard the plain language of the statute, that he was held pursuant to an invalid judgment and sentence.

Moreover, the literal reading of the statute is supported by the

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purposes of the SRA and sound public policy. The plain language of the statute predicates wash-out on five years of crime-free behavior in the community. Clearly, if an offender cannot go five years (in Smith's case, less than two years) without reoffending upon release, he presents a greater danger to the community. Counting the prior offenses in the offender score thus protects the community by removing the offender from the community for a longer period of time. That he may have served more time than he might otherwise have on the prior offense has no bearing on this consideration: regardless of when he should have been released, the fact is that Smith committed more crimes before he had even been free for two years. The trial court properly counted Smith's 1995 offenses in his offender score under RCW 9.94A.525.

2. ***There was no equal-protection violation because Smith, like every other Class-C felon who reoffends within five years of release, had his prior convictions counted in his offender score.***

Smith also argues he was denied equal protection because his situation is similar to that of a defendant who was acquitted of the prior offense. This contention is utterly absurd.

“Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *State v.*

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<sup>3</sup> Attached as appendices D and E, respectively.

*Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). But this does not guarantee criminal defendants complete equality. *Id.* It instead guarantees that the law will be applied equally to persons “similarly situated.” *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). The challenger must then show that he is “similarly situated” with other persons who have received different treatment. *Handley*, 115 Wn.2d at 289-90. “Similarly situated” means “near identical participation in the same set of criminal circumstances.” *Handley*, 115 Wn.2d at 290.

The wash-out period of a person charged but acquitted of a crime continues unabated because the accused in that situation has not “commit[ed] any crime *that subsequently results in a conviction.*” RCW 9.94A.525(2) (emphasis supplied). As discussed above, Smith’s *conviction* was upheld in 1997. Likewise, his *sentence* was upheld in 2001, but was amended by agreement of the parties. There is simply no comparison between Smith’s situation and that he posits. Because Smith is not similarly situated, his equal-protection claim fails.

3. ***Equity does not demand that the courts ignore the fact that Smith failed to go two years without reoffending, particularly in light of the fact that his prior sentence was never held to be invalid but was amended to bring an end to more than six years of appellate litigation.***

Smith finally contends that because he was “wrongfully incarcerated,” Brief at 11, equity demands that his wash-out period be deemed to have

begun running in 2000. This claim is based on the false premises that he was “wrongfully incarcerated” and that the failure of his offenses to wash out was caused by anything but his failure to conform his behavior to the law for even two years after his release.

Smith argues his wash-out period should have begun to run in 2000 by analogy to the doctrine of credit for time at liberty. That doctrine was adopted by the Supreme Court in *In re Roach*, 150 Wn.2d 29, 74 P.3d 134 (2003).

In *Roach*, the Court described the doctrine as follows:

[A] convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the State’s negligence, provided that the convicted person has not contributed to his release, has not absconded legal obligations while at liberty, and has had no further criminal convictions. Thus, an erroneously released prisoner’s subsequent conduct is relevant to whether equitable relief will be granted.

*Roach*, 150 Wn.2d at 37. Thus in *Roach*, where the Department of Corrections mistakenly released Roach unconditionally before his sentence was completed, where Roach did not abscond from any legal obligation while at liberty, and remained crime-free, he was entitled to credit against his sentence for the time he was at liberty. *Roach*, 150 Wn.2d at 37-38. The same conditions were met in *State v. Dalseg*, 132 Wn. App. 854, ¶¶ 36-38, 134 P.3d 261 (2006).

These situations are in no way similar to that presented here. First, Smith fails to show negligence on the part of the State. As noted above, Smith's sentence was upheld by this Court. The parties agreed to a stipulated resentencing to end six years of protracted appellate litigation.

Nor has Smith remained crime-free. Undoubtedly this aspect of the doctrine is intended to incorporate the basic maxim that equity does not serve those with unclean hands. *E.g., Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wash.2d 939, 949, 640 P.2d 1051 (1982). Thus, one of the reasons given for the doctrine of credit for time at liberty is that “a prisoner should have his chance to re-establish himself and live down his past.” *Roach*, 150 Wn.2d at 34 (quoting *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir.1930)). Plainly, Smith has not taken that opportunity. He fails to show that this equitable doctrine should apply in the present situation generally, or in his case specifically. *See In re Lopez*, 126 Wn. App. 891, ¶ 11, 110 P.3d 764 (2005). This contention should be rejected.

**IV. CONCLUSION**

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

DATED September 5, 2006.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', written over a horizontal line.

RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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# APPENDIX A

**H**

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.  
STATE of Washington, Respondent,  
v.

Kevin J. SMITH, Appellant.  
**No. 20510-6-II.**

Nov. 14, 1997.

Appeal from Superior Court of Kitsap County Docket No: 95-1-00998-9 Judgment or order under review Date filed: 03/25/96 Judge signing: Hon. William J. Kamps

Counsel for Appellant(s) James L. Reese III, Attorney At Law, 612 Sidney, Port Orchard, WA 98366

SEINFELD, P.J.

\*1 A jury found Kevin Smith guilty of three counts of delivery of a non-controlled substance in lieu of a controlled substance in violation of RCW 69.50.401(b). The trial court imposed an exceptional sentence upward. Smith presents 48 assignments of error that include issues related to speedy trial rights, particularity requirements for search warrants, evidentiary rulings, effective assistance of counsel, confrontation and compelling the attendance of witnesses, jury instructions, and sentencing issues. We affirm the convictions but conclude that the trial court miscalculated Smith's offender score. Thus, we remand for resentencing.

#### FACTS

In October 1995, Norma Jean Benjamin, who had recently been arrested for delivery of a controlled substance, agreed to work as a confidential informant for the police and to introduce undercover officers to three potential sellers and/or make three controlled buys. For buy number one, Benjamin contacted Roxanne Bryant about buying methamphetamine through an acquaintance, Kay Mandella. Bryant agreed to deliver methamphetamine at the Bremerton Ferry terminal. Smith and Bryant met undercover Police Detective Gregory Rawlins at the terminal and Rawlins gave Smith \$225 in exchange for an eighth

of an ounce of suspected methamphetamine.

For buy number two, Rawlins accompanied Benjamin to the Smith-Bryant residence. Rawlins stayed in the car while Benjamin met with Smith. Benjamin then returned to the car. A short time later, Bryant came to the car and asked for the money. Rawlins gave her \$100 and told her that he would pay the balance once he received the drugs. Half an hour later, Smith approached the car. In exchange for another \$125, Smith gave Rawlins a packet of suspected methamphetamine.

Six days later, Rawlins made a third purchase from Smith. During this transaction, Rawlins met Bryant and gave her \$225. Half an hour later, Smith appeared, entered Rawlins's car, and handed him a ziploc bag that contained what appeared to be methamphetamine.

After this transaction, Rawlins obtained a search warrant for Smith's residence. The search produced small baggies, a white powdery substance, and an eyeglass case containing nine packets of suspected methamphetamine. The eyeglass case, which also contained a syringe, was found in Bryant's pocketbook.

While other officers conducted the search, Officer Trogden advised Smith of his Miranda<sup>FN1</sup> rights. Smith then admitted to Trogden that he had sold methamphetamine to Benjamin and to Mandella.

<sup>FN1</sup>. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

The State charged Smith with one count of delivering methamphetamine. At his November 9, 1995 arraignment, the court set Smith's trial for January 2, 1996. Smith remained in custody pending trial.

Four different attorneys represented Smith during pretrial preparations. The first two withdrew due to conflicts of interest. Smith's third attorney represented him for three weeks. Eleven days before trial, this attorney also moved to withdraw, stating: "The attorney client relationship has broken down completely. I cannot reveal [t]he nature of our conversations due to the Rules of Professional

Conduct. In addition, Mr. Smith has filed a grievance against me.” Smith opposed the withdrawal, citing speedy trial concerns. The trial court granted the motion and appointed a new attorney the following day.

\*2 Shortly thereafter, Smith's fourth attorney moved for a continuance based, in part, on the short time period he had to prepare for trial. The trial court granted this motion over Smith's speedy trial objections and reset the trial for January 30, 1996.

Smith made various other pretrial motions, including motions to dismiss the charges with prejudice because of the alleged speedy trial violation; to disqualify the Kitsap County Prosecutor's Office because it had recently hired a deputy prosecutor in its civil division, who had formerly been employed by Smith's trial attorney; to disqualify the trial judge because he had allegedly violated Smith's speedy trial rights; and to dismiss because the State had allegedly violated its discovery obligation by not providing Benjamin's handwritten notes until shortly before trial. The trial court denied all these motions. Smith also moved to suppress his statement to Trogden and certain other evidence. Following a CrR 3.5/3.6 hearing, the trial court denied that motion also.

One week before trial, Smith's trial attorney asked the court to review possible conflicts between himself and Smith based upon the fact that Smith had filed a grievance with the Washington State Bar Association alleging ineffective assistance of counsel. Trial counsel also expressed concern that Smith had been named as a witness in a case involving another client. The trial court found no conflicts.

The case went to trial on the State's second amended information. It charged Smith with three counts of delivery of a noncontrolled substance in lieu of a controlled substance. Smith testified, admitting that he sold Rawlins and Benjamin counterfeit drugs but asserting entrapment. He concluded that Benjamin and Rawlins threatened to report him to Child Protective Services, thereby breaking up his family, unless he sold them drugs.

During deliberations, the jury asked the court to clarify the necessary elements for a guilty verdict. The court referred the jury back to its instructions. The jury then found Smith guilty as charged.

Smith filed several posttrial motions asking the court to overturn the verdict or, in the alternative, grant a

new trial. The trial court denied all of these motions.

The State sought an exceptional sentence. Smith moved to strike the presentence report, arguing that it was untimely; he refused the trial court's offer of a continuance. After determining that Smith had an offender score of 13, the trial court sentenced Smith to 57 months for each offense and ordered the sentences to run consecutively for a total sentence of 171 months. Speedy Trial Rights

Smith first argues that the trial court violated his right to a speedy trial when it granted his fourth attorney a continuance to prepare for trial.

We will not disturb a trial court's grant of a continuance or extension absent a manifest abuse of discretion—a decision that is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Bible*, 77 Wash.App. 470, 471, 892 P.2d 116, review denied, 127 Wash.2d 1011, 902 P.2d 163 (1995).

\*3 In determining whether trial delay violates constitutional guarantees, we consider the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *State v. Davis*, 69 Wash.App. 634, 639, 849 P.2d 1283 (1993). Further, an attorney may waive his client's CrR 3.3(c)(1) <sup>FN2</sup> procedural right to trial within 60 days of arraignment without the client's authorization. *State v. Campbell*, 103 Wash.2d 1, 14-15, 691 P.2d 929 (1984); *State v. Franulovich*, 18 Wash.App. 290, 292-93, 567 P.2d 264 (1977).

FN2. CrR 3.3(c)(1) provides in relevant part: A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail whether or not subjected to conditions of release pending trial shall be brought to trial not later than 90 days after the date of arraignment.

Smith cannot satisfy three of the Barker factors. The continuance was not excessive; it postponed Smith's trial for less than a month after the expiration of his 60-day speedy trial period. Smith's defense counsel stipulated to the continuance in the belief that it would be to Smith's benefit. Nor does Smith cite any prejudice he suffered because of the delay.

Although Smith asserted his right in a timely fashion, this factor is substantially outweighed by the other three.

Further, the trial court's decision to allow the third attorney to withdraw was reasonable considering the breakdown of the attorney/client relationship and Smith's filing of a grievance alleging ineffective assistance of counsel. As this was less than a week before the scheduled trial date, it was reasonable to grant Smith's newly appointed attorney a continuance to prepare for trial.

Finally, CrR 3.3(h)(2) allows a court to continue a trial, provided the continuance furthers the administration of justice and will not substantially prejudice the defendant. State v. Raper, 47 Wash.App. 530, 535, 736 P.2d 680 (1987). Here, the continuance was necessary to provide Smith with competent legal representation and there is no evidence of prejudice. Because a continuance pursuant to CrR 3.3(h)(2) postpones the running of the speedy trial period, CrR 3.3(d), (g)(3); Raper, 47 Wash.App. at 535, 736 P.2d 680, the short continuance here did not violate the 60-day speedy trial rule.

#### Motion to Suppress

##### The Search Warrant

Smith contends that the scope of the search warrant was overly broad because it authorized the police to enter Smith's residence and search for "any and all controlled substances." He contends that the warrant should have specified methamphetamines.

Search warrant particularly requirements exist to prevent general searches, to prevent "the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization," and to prevent "the issuance of warrants on loose, vague, or doubtful bases of fact." State v. Perrone, 119 Wash.2d 538, 545, 834 P.2d 611 (1992) (citing 2 Wayne LaFave, Search and Seizure sec. 4.6(a), at 234-36 (2d ed. 1987)). We determine the validity of a search warrant on a case-by-case basis; the constitutional requirements are met if the property is described with reasonable particularity under the circumstances. Perrone, 119 Wn.2d at 544. "[R]ules of practicality, necessity and common sense" govern the required degree of detail in describing the items seized. Perrone, 119 Wash.2d at 546, 834 P.2d 611.

\*4 We recently affirmed a nearly identical warrant in State v. Chambers, --- Wn.App. ---, --- P.2d --- (1997) (Slip Op. filed Nov. 7, 1997). In Chambers, we concluded that a warrant describing inherently illegal contraband requires a lesser degree of specificity than does a warrant for documents. We explained why a contraband search poses less potential for intrusion into personal privacy. State v. Stenson, 132 Wash.2d 668, 692, 940, 940 P.2d 1239 P.2d 1239 (1997). As in Chambers, a "hypertechnical reading would not further the purpose of the Fourth Amendment." Slip Op. at 8. For the reasons discussed in Chambers, this warrant also satisfies particularity requirements.

#### Probable Cause

Smith does not support this argument with legal argument or citation to the record. Accordingly, we do not consider it. State v. Lord, 117 Wash.2d 829, 853, 822 P.2d 177 (1991); State v. Dennison, 115 Wash.2d 609, 629, 801 P.2d 193 (1990); State v. Peerson, 62 Wash.App. 755, 778, 816 P.2d 43 (1991); RAP 10.3(a)(5).

#### Knock and Announce

Smith next contends that the police violated the knock and announce rule when they executed the warrant. Smith's argument, however, is based on a selective reading of the facts.

RCW 10.31.040 provides that a police officer must announce his office and purpose before entering a building after being refused admittance. At the CrR 3.5/3.6 hearing, Officer Trudeau, a member of the four-man entry team, testified that Officer Scott knocked on the door and loudly announced, "police, search warrant." A white male, later identified as Smith, answered the door. Officer McCluskey also testified that Scott knocked on the door before Smith answered.

Upon entering the house, the officers encountered Bryant's mother who testified that she was not aware of the police until they entered the living room. On cross-examination, however, she admitted that she was watching television at a "moderate level" and she attributed her failure to hear the police to "grandmother's selective hearing and that's probably the reason I didn't hear the police officers come in because I am so used to the kids in and out fourteen

times an hour.” She also admitted a hearing defect, particularly in her left ear. The trial court did not err in failing to find a violation of the knock and announce rule.

#### Inculpatory Statements

Smith also argues that the trial court should have excluded inculpatory statements Smith made to the police after his arrest, apparently on the theory that they were the product of an illegal search. This argument is not supported by legal argument, citation to the record, or citation to authority. Lord, 117 Wash.2d at 853, 822 P.2d 177; Dennison, 115 Wash.2d at 629, 801 P.2d 193; Peerson, 62 Wash.App. at 778, 816 P.2d 43; RAP 10.3(a)(5). Accordingly, we will not review it.

#### Amendment of the Information

\*5 Smith next argues that the trial court improperly denied argument on his motion opposing the entry of the first amended information. He contends that the State filed additional charges out of prosecutorial vindictiveness and that the court's ruling denied him an opportunity to prove prejudice.

CrR 2.1(d) allows the State to amend the information at any time before the close of its case, provided the amendment does not prejudice the substantial rights of the defendant. State v. Campbell, 78 Wash.App. 813, 820, 901 P.2d 1050, review denied, 120 Wash.2d 46 (1995). The State acts vindictively when it intentionally files a more serious charge in retaliation for a “defendant's lawful exercise of a procedural right.” State v. McKenzie, 31 Wash.App. 450, 452, 642 P.2d 760 (1981). To succeed on such a claim, however, the defendant must prove something more than the appearance of vindictiveness. McKenzie, 31 Wash.App. at 453, 642 P.2d 760. Because Smith presents neither argument nor citation to facts showing more than an appearance of vindictiveness, his claim fails.

#### Discovery Violations

Smith also contends that the State's dilatory production of the confidential informant's handwritten notes until the day before trial warrants reversal.

CrR 4.7 sets forth the respective discovery

obligations for parties in a criminal matter. The untimely disclosure of discoverable material by the State does not require reversal unless that evidence would have created a reasonable doubt that would not otherwise have existed. State v. Wall, 52 Wash.App. 665, 678, 763 P.2d 462 (1988).

One day before trial, the State disclosed written notes prepared by Benjamin that contained descriptions of two uncharged deliveries. Smith claimed that this late disclosure prejudiced his case because it undermined his entrapment defense by showing that he had a propensity for dealing drugs. Rather than declaring a mistrial, the trial court issued an order in limine prohibiting the State from introducing the evidence during its direct examination of Benjamin. The court reserved ruling on whether the State could introduce the evidence in rebuttal. After Smith denied being a drug dealer, the trial court reconsidered its ruling and determined that the content of Benjamin's notes was admissible to rebut Smith's testimony.

The trial court provided a remedy for the State's discovery violation and, at the same time, put Smith on notice that the notes could be introduced for impeachment purposes. The trial court's admission of this evidence for impeachment purposes was consistent with its order in limine. We find no error.

#### Mistrial Motions

Smith also challenges the admission of other evidence rebutting his testimony that he was not a drug dealer. He further contends that Benjamin's testimony violated his rights under the Fourteenth Amendment because he did not have an opportunity to investigate the uncharged deliveries. But again Smith fails to support these claimed errors with legal argument or citation to authority. Lord, 117 Wash.2d at 853, 822 P.2d 177; Dennison, 115 Wash.2d at 629, 801 P.2d 193; Peerson, 62 Wash.App. at 778, 816 P.2d 43; RAP 10.3(a)(5). Again, we decline to review these issues.

#### Syringe Photograph

\*6 Smith also challenges the admission of a photograph of items found in Bryant's purse: a syringe and an eyeglass case containing several packets of suspected methamphetamine. Earlier, the trial court had excluded any syringe evidence, presumably because of its prejudicial effect.<sup>EN3</sup>

Later, it allowed into evidence a photograph of several packets of drugs, which also showed the syringe, to rebut Smith's testimony that he and Bryant did not know where to obtain drugs in the quantity sought by Benjamin and Detective Rawlins.

FN3. Neither party provides a cite in the record for this ruling.

Generally, only relevant evidence is admissible. ER 402. Relevant evidence is evidence that tends to prove or disprove a material issue. ER 401. Even relevant evidence, however, may be excluded if its probative value outweighs its potential for creating undue prejudice. ER 403. Further, ER 404(b) prohibits the introduction of evidence showing prior bad acts to prove that the defendant acted in conformity therewith. ER 404(b), however, does allow bad acts evidence to be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

The photograph of several packets of drugs and a syringe was admissible under ER 404(b). The primary purpose for introducing the picture was to impeach Smith's testimony that he did not have access to large quantities of methamphetamine.

While acknowledging that evidence of a syringe might cause some prejudice, the trial court also recognized that the photograph was important rebuttal evidence for the State and that the syringe was not readily apparent in the photo. Based on these observations, the court concluded that the photo would not result in a substantial risk of unfair prejudice. The record supports this ruling.

#### Witnesses' Fifth Amendment Privilege

Smith contends that the trial court erred by refusing to allow him to call two witnesses in the jury's presence and have them invoke their Fifth Amendment right to refuse to answer questions. Smith had an opportunity to examine the two witnesses, Bryant and Mandella, outside the presence of the jury. They asserted their Fifth Amendment privilege against self-incrimination to each specific substantive question. The trial court determined that the majority of Smith's proposed questions raised legitimate Fifth Amendment concerns and that any testimony not subject to the privilege was not relevant to Smith's case. The court then refused

Smith's request to call the witnesses in the presence of the jury for the purpose of allowing the jury to hear them invoke the privilege.

Smith appears to raise two arguments. First, he contends that the trial court's rulings prevented him from presenting relevant testimony to the jury. Second, he contends that the trial court's ruling violated his Sixth Amendment right to compel a witness's attendance. See State v. Lougin, 50 Wash.App. 376, 382, 749 P.2d 173 (1988).

\*7 Upon recognizing a Fifth Amendment claim, the court must determine the scope of the immunity. Lougin, 50 Wash.App. at 381, 749 P.2d 173. Generally, a witness does not have an absolute right to remain silent. Rather, the privilege must be exercised in response to specific questions. Lougin, 50 Wash.App. at 381, 749 P.2d 173. Further, "unless the question would obviously and clearly incriminate the witness, a claim of privilege against answering it must be supported by facts which, aided by 'use of "reasonable judicial imagination" ', show the risk of self-incrimination." Lougin, 50 Wash.App. at 381, 749 P.2d 173 (quoting Eastham v. Arndt, 28 Wash.App. 524, 532, 624 P.2d 1159 (1981)(quoting Thoresen v. Superior Court, 11 Ariz.App. 62, 66, 461 P.2d 706 (1969))). If the court determines that the silence is not warranted, it must require the witness to answer. Lougin, 50 Wash.App. at 382, 749 P.2d 173. A witness who exercises his Fifth Amendment rights against self-incrimination by declining to testify provides no evidence; consequently, a jury should not draw inferences from observing a witness exercise these rights State v. Smith, 74 Wash.2d 744, 759, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972), overruled on other grounds, State v. Gosby, 85 Wash.2d 758, 539 P.2d 680 (1975); see WPIC 6.32 (directing the jury "not to draw any inference from the fact that a witness does not testify ... because of a claim of privilege sustained by the court").

The trial court followed the proper procedure in determining the scope of the witnesses' immunity. Smith does not claim that the trial court erred in determining that the questions he posed to the witnesses presented genuine hazards of self-incrimination. Where, as here, the witnesses have no substantive testimony to offer, the only purpose in requiring them to invoke the privilege in the jury's presence would be to allow the jury to draw improper inferences. Under these circumstances, the trial court did not abuse its discretion or violate Smith's

Sixth Amendment right to compel the attendance of witnesses by precluding the witnesses from testifying in the jury's presence.

#### Jury Instructions

Smith proposed six jury instructions on entrapment that the court refused to give. Smith claims this constituted reversible error.

A reviewing court looks to the jury instructions as a whole when determining whether a trial court's refusal to give an instruction constitutes reversible error. *State v. Schulze*, 116 Wash.2d 154, 167, 804, 804 P.2d 566 P.2d 566 (1991). Jury instructions are sufficient if they permit each party to argue his theory of the case; are not misleading; and, when read as a whole, properly inform the trier of fact of the applicable law. *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980). We review instructional issues involving factual matters for abuse of discretion; we review instructional issues touching on matters of law de novo. *State v. Lucky*, 128 Wash.2d 727, 731, 912 P.2d 483 (1996).

\*8 Smith first challenges the refusal of a proposed instruction on entrapment that lacked a description of the applicable burden of proof. Without setting forth the burden of proof, this instruction is incomplete and would have been likely to mislead the jury. The trial court did not err when it refused to give this instruction.

Smith next argues that the trial court impermissibly denied proposed instructions explaining that Bryant and Mandella were unavailable because they had exercised their Fifth Amendment rights and that the jury should not draw any conclusions based on their absence at trial.

The rejection of these instructions was not an abuse of discretion. As discussed above, the trial court ruled that Bryant and Mandella did not have to testify because they had exercised their privilege against self-incrimination and the exercise of this privilege was not evidence. Smith did not meet his burden of establishing that either witness could provide material evidence. *State v. Smith*, 101 Wash.2d 36, 41-42, 677 P.2d 100 (1984). Smith's proposed instruction would have provided information to the jury that the court had previously ruled was irrelevant, i.e., the witnesses intended to exercise their Fifth Amendment privilege. The trial court did not err by declining to give these instructions.

Finally Smith argues that the trial court erred when it refused to give a proposed instruction defining the term "inducement." This argument also lacks merit. As mentioned earlier, the instructions were sufficient. A specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. *Schulze*, 116 Wash.2d at 168, 804 P.2d 566.

#### Ineffective assistance of counsel

Smith also contends that he was denied his Sixth Amendment right to effective assistance of counsel because (1) his trial attorney "opened the door" to damaging rebuttal testimony when he asked Smith whether Smith was a drug dealer and (2) because an earlier attorney failed to properly prepare his case within the speedy trial period. Neither argument is persuasive.

A criminal defendant is denied effective assistance of counsel if the defense counsel's conduct falls below an objective standard of reasonable conduct and if there is a reasonable probability that the outcome would have been different but for the substandard performance of the attorney. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Ben*, 120 Wash.2d 631, 666, 845 P.2d 289 (1993). An act of alleged incompetence which may be fairly characterized as a tactical decision is not evidence of ineffective assistance of counsel. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994).

Smith's trial attorney was not ineffective. A defendant seeking to prove entrapment must produce evidence (1) that he committed a criminal act, (2) that he was lured or induced into committing this act by the State, and (3) that he lacked a predisposition to commit the act. *State v. Lively*, 130 Wash.2d 1, 9, 921 P.2d 1035 (1996). Smith's past involvement in dealing drugs was relevant to his alleged lack of a predisposition to commit the charged crime. Accordingly, the attorney's question can be characterized as a fair tactical decision.

\*9 The quality of pretrial work performed by Smith's third attorney is immaterial. The court allowed Smith's fourth attorney, who actually tried the case, adequate time to prepare for trial. There is no evidence that his trial performance was adversely affected by his predecessor.

### Motion for Posttrial Relief

Smith next raises two challenges related to the denial of his posttrial motions. First, he suggests that the evidence was insufficient to prove that the delivered substance “had been misrepresented as methamphetamine.” Smith, however, fails to supply any legal authority that this is an element of the crimes charged. State v. Lord, 117 Wash.2d 829, 853, 822 P.2d 177 (1991); State v. Dennison, 115 Wash.2d 609, 629, 801 P.2d 193 (1990); State v. Peerson, 62 Wash.App. 755, 767, 816 P.2d 43 (1991); RAP 10.3(a)(5). In any event, the following evidence was sufficient to prove that Smith lead Rawlins and Benjamin to believe that the substance delivered was in fact methamphetamine: Benjamin testified that she contacted Smith in order to buy this drug; Smith sold the substance for a price consistent with the going value of this drug and packaged in a fashion similar to packaging used for methamphetamine; and Smith selected a substance that looked like methamphetamine.

Second, Smith argues that the State's delay in providing Benjamin's written notes warrants reversal. He contends that he was unable to investigate these allegations because to do so would require a continuance and forfeiture of his right to a speedy trial. Further, he argues that the prejudice was compounded by the trial court's refusal to allow the witnesses who intended to exercise their Fifth Amendment privileges to testify. As discussed above, the trial court did not err when it refused to grant a mistrial on the discovery irregularity or when it refused to allow Bryant or Mandella to take the stand. For the same reasons, it did not err when it refused to arrest the jury's verdict or grant a new trial.

### Exceptional Sentence

#### Motion to Strike Sentencing Evidence

Smith also challenges the sentencing procedures and his exceptional sentence. First, he contends that the trial court should have stricken the presentence report because the State failed to provide it 10 days before the sentencing hearing as required by CrR 7.1(a)(3). The State filed its presentence report on the day of the scheduled sentencing hearing, but it provided Smith with a memorandum in support of its request for an exceptional sentence more than 10 days before the hearing. The memorandum contained the same

information as that contained in the presentence report.

At sentencing, Smith moved to strike the report. The trial court denied the motion but offered Smith a continuance instead. Smith rejected this offer, asserting that he did not want to sacrifice his right to speedy sentencing.

\*10 Under the Sixth Amendment and the Washington Constitution, if a delay is “purposeful or oppressive,” it violates speedy sentencing rights. Pollard v. United States, 352 U.S. 334, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); State v. Ellis, 76 Wash.App. 391, 394, 884 P.2d 1360 (1994). To determine whether a delay is “purposeful or oppressive,” the court balances the following: the length and reason for the delay, the defendant's assertion of his or her right, and the extent of prejudice to the defendant. Ellis, 75 Wash.App. at 394, 878 P.2d 474.

Smith fails to establish that the delay in this instance was either purposeful or oppressive. Accordingly, the potential violation of his speedy sentencing rights was not of constitutional proportion.

Further, CrR 7.1(a)(3) does not identify a remedy for a violation of the 10-day requirement. Thus, a defendant seeking relief for a violation must show prejudice. State v. Coppin, 57 Wash.App. 866, 876 n. 7, 791 P.2d 228 (1990). Smith claims prejudice based on the fact that he had to choose between sacrificing his right to speedy sentencing or having adequate time to respond to the tardy presentence report.

But Smith fails to show that he needed additional time to respond to the report. He had the State's memorandum, received sufficient notice to prepare his response, and thus sustained no prejudice due to the rule violation.

#### Sufficiency of Evidence Proving Prior Convictions

Smith next argues that the trial court miscalculated his offender score. The State concedes that this argument has some merit.

Smith's presentence report identified eight prior offenses committed in several states.

1978 Two counts of second degree burglary, one count of attempted second degree burglary (California).

1982 Forgery (California)

(Cite as: Not Reported in P.2d)

1983 Taking a vehicle without owner's consent/vehicle theft (California).

1987 Robbery (Florida)

1990 Burglary (Michigan)

Burglary (Michigan)

Attempted Burglary (Michigan)

1991 Possession of a controlled substance (California).

We review the calculation of an offender's score de novo. State v. Mitchell, 81 Wash.App. 387, 390, 914 P.2d 771 (1996).

Based on these prior offenses and Smith's three current convictions for delivery of a counterfeit substance, the court concluded that Smith had an offender score of "13." After determining that the offenses in 1978 and 1990 merged for sentencing purposes,<sup>FN4</sup> the court assigned Smith six points for his prior offenses. Smith' other current offenses for delivery of a non-controlled substance in lieu of a controlled substance added another six points. RCW 9.94A.360(16) and .400(1)(a). The trial court assigned another point because Smith committed the current offenses while on probation for his offenses in Michigan. RCW 9.94A.360(18).

FN4. Smith served concurrent sentences for his 1978 and 1990 offenses. Accordingly, the trial court assigned one point to each set of crimes. See RCW 9.94A.360(6)(a)(iii) (all adult sentences served concurrently prior to July 1, 1986 treated as one crime) and (6)(a)(i) (offenses constituting same criminal conduct assigned score attributable to most serious offense).

\*11 The State concedes that there was insufficient evidence to establish that the 1991 California possession conviction was analogous to felony possession in Washington. In California, a person is guilty of felony possession if he possesses more than 28 grams of marijuana. Cal. Health & Safety Code sec. 11357. In Washington, the defendant must possess more than 40 grams. RCW 69.50.401(e). Thus, Smith's correct offender score is 12.

For the first time on appeal, Smith argues that the State violated his due process rights because it did not show that Smith's past convictions were constitutional. Specifically, he contends that convictions or probation revocations obtained in violation of Gideon v. Wainwright, 372 U.S. 335, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d

733 (1963), i.e., without representation of an attorney, may not be used to enhance a sentence for a subsequent conviction. See State v. Holsworth, 93 Wash.2d 148, 607 P.2d 845 (1980) (addressing use of prior convictions in habitual conviction proceeding).

Under the Sentencing Reform Act of 1981(SRA), the State must prove past convictions by a preponderance of the evidence. In re Personal Restraint Petition of Williams, 111 Wash.2d 353, 368, 759 P.2d 436 (1988). The State does not have an affirmative duty to prove the constitutional validity of a facially valid prior conviction before relying upon it in an SRA proceeding. State v. Ammons, 105 Wash.2d 175, 186-88, 713 P.2d 719, 718 P.2d 796 (1986). Because Smith did not object to the inclusion of these felonies during the sentencing hearing, the trial court did not err in considering them. Williams, 111 Wash.2d at 368, 759 P.2d 436 (citing RCW 9.94A.370(2)).

Smith contends that the evidence of certain California convictions was not sufficient because the State relied, in part, on FBI Rap Sheets rather than certified judgments. This argument also lacks merit. Although certified judgments are preferable, certain other records and documents are sufficient evidence of convictions under the preponderance standard. Williams, 111 Wash.2d at 368, 759 P.2d 436 (driving record sufficient); Mitchell, 81 Wash.App. at 390, 914 P.2d 771 ("the State may use any documents of record or transcripts of prior proceedings to establish criminal history"). The evidence before the court satisfied the preponderance requirement.

#### Aggravating Factors

The trial court imposed a 57-month sentence for each offense, the high end of the standard range. But it then ran the three sentences consecutively for a total of 171 months, thereby imposing an exceptional sentence. On appeal, Smith challenges several of the aggravating factors provided by the court as support for the exceptional sentence.

\*12 In reviewing an exceptional sentence, an appellate court first determines whether the trial court's reasons are supported by the record. RCW 9.94A.210(4)(a). This is a question of fact, and the trial court will be upheld unless clearly erroneous. State v. Vermillion, 66 Wash.App. 332, 345, 832 P.2d 95 (1992). The appellate court next determines as a matter of law whether the trial court's reasons justify an exceptional sentence. Vermillion, 66 Wash.App.

at 345, 832 P.2d 95. “The reasons given must take into account factors other than those necessarily considered in computing the presumptive range for the offense.” *Vermillion*, 66 Wash.App. at 345, 832 P.2d 95. Finally, the reviewing court must determine whether the sentence imposed was “clearly excessive.” *Vermillion*, 66 Wash.App. at 345, 832 P.2d 95. This prong is reviewed for abuse of discretion. *State v. Sanchez*, 69 Wash.App. 195, 200 n. 4, 848 P.2d 735 (1993).

A trial court may impose an exceptional sentence when the standard sentence under the SRA would be “clearly too lenient.” RCW

9.94A.390(2)(j). “It is proper to rely on this aggravating factor when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range.” *State v. Fisher*, 108 Wash.2d 419, 428, 739 P.2d 683 (1987). This multiple offense policy is satisfied when the defendant’s high offender score, combined with multiple current offenses, results in a standard sentence that does not punish the offender or all of his crimes. *State v. Smith*, 123 Wash.2d 51, 54-55, 864 P.2d 1371 (1993).

Here, Smith had an offender score of 12.<sup>FN5</sup> This score is three points over the top of the sentencing grid. The trial court concluded that a standard range sentence would allow Smith to escape punishment for at least one of his crimes. To cure this deficiency, the court deviated from presumptive sentence and ordered Smith’s sentences to run consecutively. Because this reason alone is sufficient to support the imposition of an exceptional sentence, we need not address Smith’s contention that other grounds for imposing an exceptional sentence cited by the trial court were deficient.<sup>FN6</sup>

<sup>FN5</sup>. The trial court determined that Smith had an offender score of 13. As we discuss above, however, there was insufficient evidence to support one of Smith’s prior convictions. Thus, we use the corrected offender score of 12 in our analysis.

<sup>FN6</sup>. The trial court also relied upon the fact that (1) Smith was a sophisticated criminal who used a variety of birth dates, social security numbers, (2) Smith had engaged in serious criminal activity while on parole, and (3) Smith lacked remorse for his actions.

## Pro se Brief

### Entrapment as a Matter of Law

Pro se, Smith contends that there was insufficient evidence to support his conviction because he established entrapment as a matter of law. See *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). He argues that the evidence established that he did not have a propensity to sell drugs and that he supplied Rawlins with drugs only after Benjamin told him that she would report him to Child Protective Services if he did not fulfill her request.

\*13 The defendant has the burden of proving entrapment by a preponderance of the evidence. *Lively*, 130 Wash.2d at 17, 921 P.2d 1035. To establish the defense, Smith had to show (1) that he was induced into committing the crime by law enforcement agents, and (2) that he otherwise would not have committed the crime. *State v. Smith*, 101 Wash.2d 36, 43, 677 P.2d 100 (1984); see RCW 9A.16.070. “Entrapment occurs only where the criminal design originates in the mind of the police officer or informer and not with the accused and the accused is lured or induced into committing a crime he had no intention of committing.” *State v. Waggoner*, 80 Wash.2d 7, 10, 490 P.2d 1308 (1971). “A police informant’s use of a normal amount of persuasion to overcome” an “expected resistance” to sell drugs “does not constitute entrapment and will not justify an entrapment instruction.” *Waggoner*, 80 Wash.2d at 11, 490 P.2d 1308. Furthermore, the police may use deception, trickery, or artifice when affording a defendant an opportunity to violate the law. *Smith*, 101 Wash.2d at 42, 677 P.2d 100.

To determine whether a defendant has established entrapment as a matter of law, we ask whether a “rational trier of fact,” viewing the evidence in the light most favorable to the State, could have found that the defendant failed to prove entrapment by a preponderance of the evidence. *Lively*, 130 Wash.2d at 17, 921 P.2d 1035. Here, a rational trier of fact, considering Benjamin’s testimony in which she denied threatening Smith and the State’s evidence that Smith made other uncharged deliveries of a substance similar to methamphetamine, could have chosen not to believe Smith. Thus, Smith did not establish entrapment as a matter of law.

#### Jury Question During Deliberations

Smith contends that the trial court erred when, in response to questions from the jury during deliberations, it referred the jury to the jury instructions. As this issue is not adequately briefed, we do not address it. State v. Lord, 117 Wash.2d 829, 853, 822 P.2d 177 (1991); State v. Dennison, 115 Wash.2d 609, 629, 801 P.2d 193 (1990); State v. Peerson, 62 Wash.App. 755, 767, 816 P.2d 43 (1991); RAP 10.3(a)(5).

#### Disqualification of the Prosecutor's Office

Smith next argues that the Kitsap County Prosecutor's Office had a conflict of interest because it hired Kevin Hull as a deputy prosecutor in its civil decision 24 days after the trial court appointed Smith's trial attorney. Hull was a former member of the defense trial attorney's law firm.

Generally, a prosecuting attorney may not prosecute a defendant he personally represented or consulted with on the same or substantially the same criminal matter. State v. Stenger, 111 Wash.2d 516, 520, 760 P.2d 357 (1988); RPC 1.11(c)(1).

\*14 [W]here a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecutor is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

Stenger, 111 Wash.2d at 522-23, 760 P.2d 357. Accordingly, the Stenger court observed that the creation of a "Chinese wall" around the disqualified deputy prosecutor was an effective means of abating any conflict that might otherwise exist. RPC 1.10(b) and 1.11 also specifically endorse this practice.

In this case, the Kitsap County Prosecutor's Office created such a "Chinese Wall" around the disqualified attorney. Accordingly, Smith's claim is meritless. Prosecutorial Misconduct

Smith next argues that the prosecutor engaged in misconduct by knowingly presenting perjured testimony at trial. Specifically, he cites Benjamin's testimony in which she denied that she was testifying in exchange for favorable treatment in her own criminal prosecution.

A defendant seeking a new trial based on allegations

that the prosecution knowingly used perjured testimony must prove that (1) the testimony was perjured, (2) the prosecution knew that this was the case, and (3) there was a reasonable likelihood that the false testimony affected the outcome of the trial. State v. Nerison, 28 Wash.App. 659, 666-67, 625 P.2d 735 (1981).

At trial, Benjamin testified that she did not have criminal charges pending against her. She also denied that she was acting as an informant in exchange for favorable treatment by the prosecutor's office. On cross-examination, however, she acknowledged that she had a criminal trial date pending and admitted that she "was hoping" that she would receive favorable treatment in exchange for her work as an informant.

Because Smith retracted her initial incorrect statements, it is highly unlikely that this testimony negatively impacted the outcome of the trial. Further, there is no evidence that the State knew that Benjamin intended to perjure herself during her testimony. Thus, this claim lacks merit.

#### Handcuffs

At trial, the bailiff reported that a prospective juror saw two officers escort Smith while he was in handcuffs. The trial court questioned the prospective juror outside the presence of the juror pool. The prospective juror assured the court that she had not discussed what she had seen with other members of the pool. Ultimately, the court excused this person from jury duty based upon her claim of hardship.

The trial court should grant a mistrial only when a defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." State v. Mak, 105 Wash.2d 692, 701, 718, 718 P.2d 407 P.2d 407 (1986). There is no evidence that this incident affected the outcome of the trial.

\*15 We affirm the conviction and remand for correction of the offender score and resentencing in light of the corrected score.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Not Reported in P.2d

Not Reported in P.2d, 88 Wash.App. 1026, 1997 WL 709419 (Wash.App. Div. 2)

**(Cite as: Not Reported in P.2d)**

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HUNT, J., concurs. ARMSTRONG, J. (concurring)

For the reasons set forth in my dissent in *State v. Chambers*, Wn.App., P.2d (1997), I cannot join the majority's conclusion that the search warrant here described the items to be seized with sufficient particularity. Nonetheless, I find that admission of the illegally seized evidence was harmless, given the overwhelming admissible evidence of guilt at trial. See *State v. Myrick*, 102 Wash.2d 506, 515, 688 P.2d 151 (1984) (admission of evidence gathered during illegal search harmless in light of overwhelming evidence of guilt).

For these reasons, I concur with the result.

Wash.App. Div. 2, 1997.

State v. Smith

Not Reported in P.2d, 88 Wash.App. 1026, 1997 WL 709419 (Wash.App. Div. 2)

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# APPENDIX B

**H**

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.  
STATE of Washington, Respondent,

v.

Kevin J. SMITH, Appellant.

No. 23740-7-II.

April 7, 2000.

Appeal from Superior Court of Kitsap County, Docket No. 95-1-00998-9, judgment or order under review, date filed 08/31/1998; William J. Kamps, Judge.

Pattie Mhoon, Attorney At Law, Tacoma, WA, for appellant(s).

Randall A. Sutton, Kitsap Co Dep Pros Atty, Port Orchard, WA, for respondent(s).

## UNPUBLISHED OPINION

HUNT.

\*1 The Kitsap County Superior Court convicted Kevin J. Smith of three counts of delivery of a non-controlled substance in lieu of a controlled substance, RCW 69.50.401(c). The court imposed a sentence in excess of the Sentencing Reform Act standard range. Smith appealed, raising 48 assignments of error, including the calculation of his offender score. We affirmed Smith's convictions, but remanded the case to the trial court for correction of an erroneous offender score and resentencing. On remand, the trial court imposed the same sentence. Smith again appeals. Smith continues to challenge the calculation of his offender score. He contends we should not consider his first appeal as law of the case. We agree, vacate Smith's sentence, and remand for resentencing.

After a jury convicted Smith, the trial court held a sentencing hearing at which the State sought to include several out-of-state convictions as part of Smith's offender score. The State produced a certified judgment and sentence for only two of the six foreign convictions. For proof of an alleged 1987 Florida robbery conviction, the State relied on a Federal Bureau of Investigation (FBI) criminal history report. Smith objected to the use of the FBI report to prove

any of his out-of-state convictions, including the alleged 1987 Florida robbery conviction. Smith testified at sentencing. He acknowledged that he was charged with robbery in Florida. He declared that he had not been convicted.

The trial court concluded that the out-of-state convictions were established by a preponderance of the evidence and calculated Smith's offender score at 13. Smith received the top of the standard range for each count, 57 months. The trial court imposed the sentences to run consecutively, resulting in an exceptional sentence of 171 months. In its findings of fact and conclusions of law supporting the exceptional sentence, the trial court found Smith to be a sophisticated criminal, that he had an offender score of 9 or more, that he lacked remorse, and that he was involved in three separate drug offenses.

Smith appealed. Among other things, he argued that the State failed to prove the Florida conviction by a preponderance of the evidence. Although Smith's challenge to the proof supporting the Florida conviction was not a model of clarity, the State responded that it had produced ample evidence to meet its preponderance of the evidence burden of proof.<sup>FN1</sup>

<sup>FN1.</sup> In his pro se supplemental brief, Smith also challenged his Florida conviction referring to it as a 'fantom' conviction.

This conclusion is especially justified when Smith, who was placed under oath, only denied the existence of the fifth conviction, a strong armed robbery from the State of Florida. The trial court found the documentary evidence submitted by the State more credible on this point than Smith's testimony.

We affirmed Smith's conviction by an unpublished opinion that did not specifically address Smith's challenge to his Florida conviction. We concluded that the trial court erred in calculating Smith's offender score and remanded for sentencing in light of the corrected offender score.<sup>FN2</sup> *State v. Smith*, No. 20510-6-II (1997).

<sup>FN2.</sup> We concluded the State had failed to prove that a 1991 California conviction

constituted a felony in this state.

\*2 At the sentencing after remand, Smith asked for a continuance to conduct further discovery because he again wished to challenge the validity of the out-of-state convictions. The sentencing court denied a continuance, stating that Division Two had found that the State had proved the out-of-state convictions by a preponderance of the evidence and, thus, the sentencing court did not need to revisit that evidentiary portion of the sentencing.

The sentencing court then heard argument from the parties. Smith asked for a reduced sentence; the State again asked for an exceptional sentence. The sentencing court imposed the same 171 month exceptional sentence. The court stated that the offender score correction (a reduction to an offender score of 12) did not change the circumstances supporting the exceptional sentence. The sentencing court adopted the findings of fact and conclusions of law entered in the first sentencing. Again, Smith appeals.

The State contends that no appealable issues arise from this sentencing. Citing State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993), the State argues that the sentencing court did not exercise independent judgment when it again imposed sentence on Smith. But because our mandate instructed the superior court not only to correct Smith's offender score, but also to adjust the duration of the exceptional sentence if necessary in light of the corrected offender score, the sentencing court had discretion to change the duration of Smith's exceptional sentence.

Further, Smith correctly asserts that review is proper under RAP 2.5(c)(2), which provides:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the latter review.

The law of the case doctrine is a discretionary rule and should not preclude review when one party would suffer a manifest injustice from a clearly erroneous decision if the decision were not set aside. State v. Worl, 129 Wn.2d 416, 424-25, 918 P.2d 905 (1996).

Smith contends that this court erred by concluding the State proved his prior convictions by a preponderance of the evidence. The record indicates

that he did specifically challenge his Florida conviction.<sup>FN3</sup> Thus, the State could not rely solely on a FBI report to prove the conviction. Smith also claims that the trial court did not properly characterize his out-of-state convictions. The result of these failures, according to Smith, is an incorrect offender score calculation resulting in a sentence not authorized by the sentencing reform act. See State v. Smissaert, 103 Wn.2d 636, 639, 694 P.2d 654 (1985). We agree.

FN3. Smith argued in his first appeal that the State failed to prove the Florida conviction by a preponderance of the evidence. The State argued that even though Smith took the stand and specifically stated he was not convicted of that crime, the trial court was free to weigh the credibility of Smith against the FBI report.

According to Smith, two recent Supreme Court opinions affect our original analysis in this case and require us to revisit our earlier opinion.<sup>FN4</sup> Failure to object at sentencing does not relieve the State of its burden to prove by a preponderance of the evidence the propriety of using prior out-of-state convictions. State v. Ford, 137 Wn.2d 472, 478-82, 973 P.2d 452 (1999) and State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). The State is required to prove the existence and classification of prior out-of-state convictions. Ford, 137 Wn.2d at 482-83, 973 P.2d 452; McCorkle, 137 Wn.2d at 495, 973 P.2d 461; see also State v. Weiland, 66 Wn.App. 29, 831 P.2d 749 (1992). Thus, a defendant's failure to object in the trial court neither relieves the State of its burden to prove prior convictions nor precludes appellate court review. Ford, 137 Wn.2d at 476-78.

FN4. The two companion cases are State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999).

\*3 An FBI rap sheet may be sufficient evidence to substantiate prior out-of-state convictions; but once the defendant challenges the convictions, the State must produce additional evidence of the classification of out-of-state convictions. State v. Drummer, 54 Wn.App. 751, 757, 775 P.2d 981 (1989); see also State v. Mitchell, 81 Wn.App. 387, 390, 914 P.2d 1191 (1996) (use of prior Washington judgment and sentence insufficient when defendant challenges conviction); State v. Cabrera, 73 Wn.App. 165,

16869, 868 P.2d 179 (1994) (best evidence of prior conviction is a certified copy of the judgment, but other documents will suffice unless the defendant challenges the conviction).

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Here, the FBI rap sheet provided the only evidence of the Florida conviction. <sup>FN5</sup> Because Smith specifically challenged the validity of that conviction, it was incumbent upon the State to produce additional evidence showing that Smith had been convicted of that crime and how that crime would be classified in Washington. But instead of producing additional evidence, the State merely argued that the trial court should evaluate the credibility of Smith's statement against the FBI rap sheet. This was insufficient to prove the Florida conviction and its classification in Washington by a preponderance of the evidence. Ford, 137 Wn.2d at 482.

FN5. The State also submitted a Michigan pre-sentence report prepared in April 1990 when Smith was sentenced in that state. Noticeably absent from this report is any reference to the alleged 1987 Florida robbery Smith is contesting here.

Additionally, classification of out-of-state convictions is mandatory, and the record must show some comparison of the elements and support for any conclusions. Ford, 137 Wn.2d at 483. Here, the record contains no evidence of the elements that constitute the out-of-state convictions. These failures call into question the validity of Smith's offender score. Before a sentencing court can consider an exceptional sentence, it must first determine the correct offender score. State v. Collicott, 118 Wn.2d 649, 661, 827 P.2d 263 (1992). Thus, we are constrained to vacate Smith's sentence and to remand for a new sentence hearing. Consequently, we need not address Smith's additional claims or his pro se challenges.

Reversed and remanded for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

SEINFELD, J., and ARMSTRONG, A.C.J., concur.  
Wash.App. Div. 2, 2000.  
State v. Smith  
Not Reported in P.3d, 100 Wash.App. 1020, 2000  
WL 358303 (Wash.App. Div. 2)

# APPENDIX C

▷

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.  
STATE of Washington, Respondent,

v.

Kevin J. SMITH, Appellant.  
No. 26268-1-II.

Nov. 9, 2001.

Appeal from Superior Court of Kitsap County, Docket No. 95-1-00998-9, judgment or order under review, date filed 08/04/2000; William J. Kamps, Judge.

Pattie Mhoon, Attorney At Law, Tacoma, WA, for appellant(s).

Randall A. Sutton, Kitsap Co Dep Pros Atty, Port Orchard, WA, for respondent(s).

## UNPUBLISHED OPINION

BRIDGEWATER, J.

\*1 Kevin J. Smith appeals his exceptional sentence for three counts of delivery of a non-controlled substance in lieu of a controlled substance, arguing that on remand the trial court erred in calculating his offender score. We affirm.

Kevin J. Smith appeals for the third time after two remands from this court. See State v. Smith, No. 20510-6-II, 1997 WL 709419, (Wash.Ct.App. Nov. 14, 1997) (Smith I); State v. Smith, No. 23740-7-II, 2000 WL 358303, (Wash.Ct.App. Apr. 7, 2000) (Smith II). A jury found Smith guilty of three counts of delivery of a non-controlled substance in lieu of a controlled substance, RCW 69.50.401(c). At the sentencing hearing in 1996, the State supported its inclusion of two of Smith's out-of-state convictions as part of his offender score with a certified judgment and sentence. The trial court concluded that the out-of-state convictions were established by a preponderance of the evidence and calculated Smith's offender score at 13.

Although the court imposed a 57 month, top of the standard range, sentence for each count, it ran the sentences consecutively, which resulted in a 171 month exceptional sentence. In its findings of fact

and conclusions of law supporting the exceptional sentence, the trial court found that Smith was a sophisticated criminal, he had an offender score of 9 or more, he lacked remorse, and he was involved in three separate drug offenses. *Smith II*, at \*1.

Smith appealed, raising among other things, errors in the calculation of his offender score. In that first appeal, this court concluded that the State failed to prove that a 1991 California conviction constituted a felony in this state and held that Smith's offender score should be reduced from 13 to 12. We held that Smith's offender score of 12 effectively granted Smith at least one free offense and that this was sufficient to support the imposition of an exceptional sentence. *Smith I*, at \*12. We affirmed the conviction and remanded for 'correction of the offender score and resentencing in light of the corrected score.' *Smith I*, at \*15.

On remand, Smith asked for a continuance to conduct further discovery because he wished to challenge the validity of his out-of-state convictions. The sentencing court denied the continuance, stating that Division Two had found that the State had proved the out-of-state convictions by a preponderance of the evidence and, thus, the sentencing court did not need to revisit that evidentiary portion of the sentencing. The trial court corrected Smith's offender score according to this court's mandate and re-imposed the same 171 month exceptional sentence, adopting the findings of fact and conclusions of law from the first sentencing.

In Smith's second appeal, he continued to challenge the calculation of his offender score arguing that the State did not meet its burden of proving and classifying his prior out-of-state convictions under the recent Supreme Court's cases of State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999). We found that Smith specifically objected to an alleged 1987 Florida robbery conviction, noting that when placed under oath, Smith denied it existed. *Smith II*, at \*1. We held that it was incumbent upon the State to produce evidence, in addition to the FBI report, proving Smith's Florida conviction. The State did not produce additional evidence, and thus we held that the State failed to prove the Florida conviction by a preponderance of the evidence. *Smith II*, at \*3. We also held that the State and the court did not classify

the out-of-state convictions as required by statute. We vacated Smith's sentence, instructed the trial court to determine the correct offender score, and remanded for a new sentencing hearing. *Smith II*, at \*3.

\*2 On remand after the second appeal, the trial court determined that Smith had four points for his prior convictions:

Prior Convictions	State	Conviction Date	Points
2 counts Burglary and 1 count Attempted Burglary	California	1978	1
Robbery	Florida	1987	0
2 counts Burglary and 1 count Attempted Burglary	Michigan	1990	3

The trial court added one point for the 1978 California offenses, three points for the 1990 Michigan offenses, and six points for his other current offenses, totaling an offender score of 10 points.<sup>FN1</sup> Using an offender score of 10, the trial court again imposed an exceptional sentence of 171 months adopting its 1996 findings. Smith now appeals for the third time.

FN1. The trial court did not add one point for committing the current offense while on parole in Michigan as it had in previous hearings.

#### I. Offender Score

##### A. Prior Convictions

'In establishing the defendant's criminal history for sentencing purposes, the State must prove by a preponderance of the evidence that a prior conviction exists.' *State v. Gill*, 103 Wn.App. 435, 448, 13 P.3d 646 (2000) (citing *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994)). An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is equivalent to a felony in Washington. *State v. Weiland*, 66 Wn.App. 29, 31-32, 831 P.2d 749 (1992). 'Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.' RCW 9.94A.370. The best evidence of a prior conviction is a certified copy of the judgment. *Ford*, 137 Wn.2d at 480 (citing *Cabrera*, 73 Wn.App. at 168). However, a sentencing court may rely on other comparable documents or transcripts as long as they provide minimum indicia of reliability. *Ford*, 137 Wn.2d at 480. '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 State must provide reliable evidence establishing the accuracy of its offender score calculation. *Ford*, 137 Wn.2d at 482.

'Where a defendant specifically and timely objects that the evidence does not prove classification of prior out-of-state convictions used to calculate an offender score, the sentencing court should conduct an evidentiary hearing to allow the State to adduce additional evidence of classification. If the State then fails to prove the requisite felony classifications, the State will not have another opportunity to prove the classifications on remand following appeal.'

*State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490 (1999).

Smith contends that the trial court erred in allowing the State to submit additional evidence on the prior California convictions in the most recent resentencing hearing because he objected to them in previous hearings. Smith further contends that the State's additional evidence, which consisted of an FBI report and what the State characterized as a certified 'abstract of the judgment and sentence,' did not prove the existence of his prior California convictions by a preponderance of the evidence.

#### 1. Specific Objection

\*3 Smith argues that the trial court erred by allowing the State to submit additional evidence to prove his 1978 California convictions of two counts of burglary and one count of attempted burglary.<sup>FN2</sup> The court included the three convictions in Smith's offender score. At the first two sentencing hearings, the State submitted only the FBI rap sheet to prove the three 1978 California convictions. The State does not dispute that after a specific objection the FBI rap sheet, which is created from a database, alone

would be inadequate to prove the conviction. Instead, the State contends that Smith failed to timely and specifically object to the use of the 1978 convictions and thus it was properly permitted to introduce additional evidence. The record supports this contention.

FN2. Smith appears to make the same argument regarding his 1982 forgery and 1983 joyriding convictions. But the trial court determined that both convictions washed out and thus did not count them in Smith's offender score. Because the court did not count them, we need not address whether the trial court improperly admitted evidence for these two counts.

Although Smith initially objected to all out-of-state prior convictions at the first sentencing hearing, the record reveals that he 'withdrew his objection to that prior conviction' (the California convictions) in the first hearing. At the second sentencing hearing after remand from the first appeal, Smith did not object specifically to the existence of the California convictions. Smith claims he disputed the validity of all the prior convictions, but the record shows that he specifically disputed only a prior Florida conviction.<sup>FN3</sup> Smith's counsel stated, 'the alleged Florida conviction that's still an issue. The State has never shown any proof of that conviction. Mr. Smith continues to insist that was dismissed{'}' Report of Proceedings (RP Aug. 31, 1998) at 2. Smith's counsel also stated,

FN3. We found that Smith specifically objected to an alleged 1987 Florida robbery conviction, noting that when placed under oath, he denied its existence. *Smith II*, at \*1. We held that it was incumbent on the State to produce evidence, in addition to the FBI rap sheet, showing that Smith had been convicted of robbery in Florida. The State failed to produce the additional evidence, and thus failed to prove the Florida conviction by a preponderance of the evidence. *Smith II*, at \*3.

{I}n particular, the Court of Appeals when talking about the facial validity of the prior convictions stated that because Mr. Smith did not object to the inclusion of these felonies during the sentencing hearing the trial court did not {err} in considering them. So I don't know how much more I need to object to the inclusion of those prior felonies without certified copies but I do want to make it clear that is my objection.

*Id.* at 3. Smith's counsel later stated, I recall that we objected to everything at the first sentencing hearing, including facial validity. I am not entirely certain but if the Court of Appeals thinks that was

not done, if it wasn't we now challenge it.

*Id.* at 5. Smith's counsel's statements appear to refer to this court's holding in *Smith I* that Smith could not challenge the constitutional validity of his prior convictions because he raised the issue for the first time on appeal.

Smith essentially asserts that a general objection to the inclusion of prior felonies made at his first sentencing hearing is revived somehow and is sufficient to raise any specific objection including: the constitutionality of the prior offense; the admissibility of documents, i.e., rap sheets, to prove the prior conviction; the prior conviction's existence by a preponderance of the evidence; the defendant was the same individual convicted of the crime; and the characterization of the crime as a felony under Washington law.<sup>FN4</sup> But where, as here, a defendant makes only a general objection below and then withdraws the objection, neither the State nor the trial court is put on notice of the defendant's claimed defects. *McCorkle*, 88 Wn.App. at 500. Further, the insufficient objection is not revived by the general statements made at the second hearing which were general. A more specific objection is required and objecting to 'everything' is insufficient. The trial court found that Smith did not object to the 1978 California convictions until the most recent sentencing hearing. Under these circumstances, we conclude that the trial court did not abuse its discretion in determining that Smith did not specifically object to the 1978 California convictions. Accordingly, because Smith did not specifically object to the State's proof of the 1978 California prior conviction, we hold that the trial court properly permitted the State to present additional evidence of those prior convictions.

FN4. As to the identification of Smith as the person named in prior convictions, the identity of names is sufficient proof in the absence of rebuttal by the defendant declaring under oath that he is not the same person named in the prior conviction. *State v. Ammons*, 105 Wn.2d 175, 189-90, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986); *Cabrera*, 75 Wn.App. at 169. As already mentioned, Smith did not rebut the State's proof that he was the person named in the prior convictions, nor was any other evidence presented that he was not the individual named in the FBI report or the certified court documents.

## 2. Proof of the Prior Conviction by a Preponderance of the Evidence

\*4 Smith argues that the certified but unsigned 'abstract of the judgment and sentence' and the FBI rap sheet did not prove the prior convictions by a preponderance of the evidence. At the most recent sentencing hearing, the State submitted an FBI rap sheet and a certified 'abstract of the judgment and sentence' from California filled out by the court clerk during those proceedings where Smith pleaded guilty. The certified 'abstract of the judgment and sentence' was not from a database, it was a court form filled out by the court clerk in handwriting. It was the clerk's minute entries of: the arraignment, entering of a not guilty plea, withdrawal of not guilty plea and entering of guilty plea, and sentencing for two counts of burglary and one count of attempted burglary.

Smith argues that the certified documents from the California court were inadequate because the judge did not sign them, they were not the actual judgment and sentence, there was no testimony explaining the documents, and the words 'proceeding suspended' appeared on one page. The trial court, however, stated that testimony to explain the certified 'abstract of the judgment and sentence' was not required and noted that the Los Angeles County clerk certified the abstract of the judgment and sentence. The court further noted that after the words 'proceedings suspended,' the abstract went on to indicate that Smith pleaded guilty and was sentenced. The court found that the only reasonable inference from the document was that the trial proceedings were suspended in light of Smith's plea. Smith also objected that the FBI rap sheet was hearsay and unreliable. Over Smith's objection, the sentencing court admitted both the certified abstract and the FBI rap sheet.

The court did not err in finding that the State met its burden. As we stated in *McCorkle*:

The best evidence of a prior conviction is a certified copy of a judgment. *State v. Descoteaux*, 94 Wn.2d 31, 36, 614 P.2d 179 (1980), overruled on other grounds by *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). But the State may introduce other documents of record in a prior proceeding to establish the defendant's criminal history. *State v. Herzog*, 48 Wn.App. 831, 834, 740 P.2d 380 (1987). The court may also consider an FBI rap sheet, in conjunction with other evidence, for purposes of determining a defendant's offender score. *State v. Reinhart*, 77 Wn.App. 454, 891 P.2d 735, review denied, 127 Wn.2d 1014 (1995).

*McCorkle*, 88 Wn.App. at 493 (emphasis ours). Thus, the court could rely on the FBI rap sheet and the certified court documents to find that the State proved the prior California convictions by a preponderance of the evidence.

The sentencing court also performed the required comparison between the California crimes and Washington crimes and found that the California burglaries and attempted burglary counts were equal to class A felonies in this state. The sentencing court also found that those convictions were comparable to Washington crimes. As a result, the court properly assigned it 1 point.

#### B. Same Criminal Conduct

\*5 Smith also challenges the calculation of his offender score, arguing that the sentencing court should have maintained its original finding that his three 1990 Michigan prior convictions were the same criminal conduct and counted as one point. Smith's sole argument is that RCW 9.94A.360(6) (1995) prevents a sentencing court from reconsidering the same criminal conduct issue on remand. He contends that the trial court erred when it assigned him 3 points for his three 1990 Michigan offenses because the court failed to recognize its earlier conclusion that the Michigan convictions counted only as one offense.

We review a sentencing court's offender score calculation de novo. The general rule is that a sentencing court acts without statutory authority when imposing a sentence based on a miscalculated offender score. *State v. Jennings*, 106 Wn.App. 532, 542, 24 P.3d 430 (2001), review denied, 32 P.3d 284. Although the trial court initially allocated 1 point to the Michigan convictions, there is no evidence in the record that it exercised its discretion to find that they encompassed the 'same criminal conduct.' At the time Smith was sentenced, RCW 9.94A.360(6)(a)(ii) required the current sentencing court to determine 'with respect to other prior adult offenses for which sentences were served concurrently whether those offenses shall be counted as one offense or as separate offenses using the 'same criminal conduct' analysis found in RCW 9.94A.400(1)(a).' (emphasis added). In short, at the initial sentencing the court needed to exercise its discretion, but there is no record that it did. The sentencing court at the initial sentencing never 'determined' that the convictions were the same criminal conduct. The issue was not addressed at all in the 1998 resentencing. In the original 1996 sentencing there was no finding regarding 'same criminal conduct.' The failure to exercise discretion is a procedural error. Because there is no evidence that the prior courts exercised their discretion to make the required determination, the last sentencing court was required to exercise its discretion on resentencing. See *State v. Wright*, 76 Wn.App. 811, 827, 828, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Contrary to Smith's assertion, we did not determine that the sentencing court exercised its discretion by our footnote 4 in Smith I. Here, the current sentencing court held three sentencing hearings because the case was remanded twice. In the most recent remand from Smith II, we vacated Smith's sentence and remanded 'for a new sentence hearing.' *Smith II* at \*3. We did not decide any issues regarding same criminal conduct involving the 1990 Michigan convictions. There was no previous appellate court ruling preventing the sentencing court from making a same criminal conduct determination.

Furthermore, the sentencing judge properly determined that the Michigan convictions were not the same criminal conduct. 'Same criminal conduct' means 'two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.' RCW 9.94A.400(1)(a). The absence of any one of these elements precludes a finding of same criminal conduct, and the statute is generally construed narrowly to disallow most such claims. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This court reviews a trial court's same criminal conduct determination for an abuse of discretion. *State v. Young*, 97 Wn.App. 235, 243, 984 P.2d 1050 (1999). Because all three cases were filed under separate cause numbers, the trial court was entitled to presume they were not the same criminal conduct. Further, each of the offenses were committed on different dates, thus they were not the same criminal conduct. Therefore, the trial court did not abuse its discretion in finding that the 1990 Michigan convictions were not the same criminal conduct and counted as 3 points toward Smith's offender score.

## II. Exceptional Sentence

\*6 Smith contends that the trial court erred in running the sentences for his three current offenses consecutively as an exceptional sentence. Smith challenges the trial court's reasons, including that the operation of the multiple offense policy resulted in a sentence that was too lenient, arguing that they do not justify an exceptional sentence.<sup>FNS</sup> In order to impose a sentence outside the standard range, the sentencing judge must find that 'substantial and compelling reasons' justify an exceptional sentence. RCW 9.94A.120(2). Under RCW 9.94A.210(4), an appellate court must analyze the appropriateness of an exceptional sentence by addressing the following three questions under the indicated standards of review: (1) Does the evidence in the record support the reasons? The standard of review is 'clearly erroneous.' *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). (2) Do the reasons justify a departure from the standard range? The

standard of review is 'matter of law.' *Nordby*, 106 Wn.2d at 518. (3) Is the sentence clearly excessive? The standard of review is 'abuse of discretion.' *State v. Oxborrow*, 106 Wn.2d 525, 529-532, 723 P.2d 1123 (1986). As to the first factual inquiry, the analysis provided above shows that the record supports the offender score of 10 for each of Smith's current offenses, which was a reason for imposing the exceptional sentence.

<sup>FNS</sup> The trial judge also relied on the fact that Smith was a sophisticated criminal who used a variety of birth dates and social security numbers, that he engaged in serious criminal activity while on parole, that he lacked remorse for his actions, and that he was involved in three separate drug offenses. *Smith II*, at \*1. The State disputes that being a sophisticated criminal was one of the factors, but in its written findings of fact the sentencing court incorporated its original written findings and conclusions from 1996, which included this reason.

As to the question of law in the second inquiry, we hold, as we did in Smith I, that the multiple offense policy justifies the exceptional sentence. If the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is 'clearly too lenient,' the sentencing court may consider that as an aggravating factor for imposing an exceptional sentence. RCW 9.94A.390(2)(i); *State v. {Arthur} Smith*, 123 Wn.2d 51, 55, 864 P.2d 1371 (1993). 'It is proper to rely on this aggravating factor when there is some extraordinarily serious harm or culpability resulting from multiple offenses which would not otherwise be accounted for in determining the presumptive sentencing range.' *State v. Fisher*, 108 Wn.2d 419, 428, 739 P.2d 683 (1987). This multiple offense policy is satisfied when the combination of a defendant's high offender score and multiple current offenses results in 'free crimes' absent departure from the standard range. *{Arthur} Smith*, 123 Wn.2d at 55-56. A sentencing court may remedy a sentence that is 'clearly too lenient' by lengthening concurrent sentences and/or by imposing consecutive sentences. *{Arthur} Smith*, 123 Wn.2d at 57.

Here, the trial court sentenced Smith to 57 months on each current offense and ordered that they be served consecutively for a 171 month exceptional sentence. The trial court identified the multiple offense policy and Smith's offender score of 10 as bases for running the sentences for the three offenses consecutively. The trial court found that concurrent standard sentences for those crimes would be 'clearly too lenient' because Smith would receive a partial 'free crime' with no additional

penalty. Since Smith's offender score of 10 placed him one point over the sentencing grid's '9 or more' category and because each conviction for delivery of a non-controlled substance in lieu of a controlled substance counted for three points, he received one-third of a 'free' crime for each of his three offenses. Thus, the trial court's determination that the presumptive sentence was clearly too lenient was a substantial and compelling reason justifying the exceptional sentence as a matter of law. {Arthur} Smith, 123 Wn.2d at 56; see also State v. Stephens, 116 Wn.2d 238, 243-44, 803 P.2d 319 (1991) (when a defendant's high offender score is combined with multiple current convictions so that a standard sentence would result in 'free' or unpunished crimes, an exceptional sentence is justified). Accordingly, we affirm the trial court's reliance on the 'clearly too lenient' aggravating factor and its resulting imposition of an exceptional sentence.

\*7 Because a 'clearly too lenient' presumptive sentence is itself a 'substantial and compelling' reason justifying an exceptional sentence, we need not address Smith's contention that the court's other grounds for imposing an exceptional sentence were deficient. See Smith I, at \*12. We can affirm an exceptional sentence based on only one of the trial court's reasons for imposing an exceptional sentence where it is clear that the trial court would have imposed the same sentence based on the factor upheld. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Here, after each remand, the trial court continued to impose the same exceptional sentence, reiterating that the presumptive sentence was clearly too lenient. See Smith I, Smith II. Thus, we affirm Smith's 171 month exceptional sentence.

### III. Standard of Proof for Exceptional Sentence

Smith claims that the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), requires that the facts supporting an exceptional sentence be charged and proven to a jury beyond a reasonable doubt. The Washington Supreme Court has rejected this argument in State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001) (citing RCW 9A.20.021; RCW 9.94A.120(14); RCW 9.94A.420): 'We hold that the factual basis for an exceptional sentence upward need not be charged, submitted to the jury, and proved beyond a reasonable doubt.' There was no error.

### IV. Pro Se Arguments

Smith contends in his pro se brief that he received ineffective assistance of counsel and that the judge was

biased against him.<sup>FN6</sup>

FN6. In addition, Smith challenges his offender score repeating the same arguments that his appellate attorney presented. Smith contends that the trial court should not have counted any of his prior felonies in his offender score because the State was precluded from presenting additional evidence under Ford and McCorkle. We have sufficiently addressed this argument and decline any further review.

Smith maintains that he received ineffective assistance of counsel at sentencing because his counsel did not object to a continuance and his counsel withdrew. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court determines counsel's competency based on the entire record below and employs a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

Smith appears to claim that he suffered ineffective assistance of counsel when his counsel withdrew because she had a conflict of interest. Since counsel is required to render conflict-free representation, withdrawal for conflict cannot constitute deficient performance. See RPC 1.7.

Smith also argues that defense counsel's failure to object to a continuance constituted ineffective assistance of counsel. The decision of when or whether to object is a classic example of trial tactics. See State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. Madison, 53 Wn.App. at 763, (citing Strickland, 466 U.S. 668; State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980)). Smith has not shown that counsel's failure to object to a continuance was deficient performance.

\*8 Nor has Smith shown unfair prejudice from the State introducing more evidence into the record than was presented at the first sentencing hearing in 1996. As the

State notes, it is mere speculation to conclude that the trial court would have denied the State's motion for continuance even had defense counsel opposed it. In addition, after the continuance and withdrawal of counsel, Smith's next attorney objected to more evidence being admitted. From the foregoing, we conclude that Smith has not shown a reasonable probability that his sentence would have been different. Thus, his claim of ineffective assistance of counsel fails.

Finally, Smith claims that the court was biased against him when it denied his request for a continuance but later granted the State's request for a continuance. To show bias, Smith must produce evidence of actual or potential bias on the part of the judge. State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992). The trial court provided reasonable justification for denying Smith's motion for a continuance after the first appeal. The trial court found that on the first remand this court's instruction merely removed one improper point from Smith's offender score. But the trial court held a full resentencing on remand after the second appeal with instruction from this court to examine the evidence supporting Smith's prior convictions and recalculate the offender score. The trial court noted that the hearing after the second appeal could involve additional evidence on some of Smith's prior convictions and granted the State's request for a continuance. Smith has failed to show actual or potential bias by the judge against him. Thus, his claim has no merit.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG, C.J. and QUINN-BRINTNALL, J.,  
concur.

Wash.App. Div. 2, 2001.

State v. Smith

Not Reported in P.3d, 109 Wash.App. 1011, 2001 WL  
1408648 (Wash.App. Div. 2)

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# APPENDIX D

FILED  
KITSAP COUNTY CLERK  
2003 APR -9 P 4:00  
DAVID W. PETERSON  
BY \_\_\_\_\_ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
KITSAP COUNTY

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
KEVIN J. SMITH,  
Defendant.

No. 95-1-00998-9  
STIPULATION REGARDING  
RESENTENCING

The State of Washington through Deputy Prosecuting Attorney Randall Avery Sutton, Defendant Kevin J. Smith, and his attorney David B. Zuckerman, hereby stipulate as follows:

1. A jury found Mr. Smith guilty of 3 counts of delivery of a material in lieu of a controlled substance under RCW 69.50.401(c). The charges stem from three controlled buys from Mr. Smith within a two-week period by the same undercover agent and confidential informant. On each occasion, Mr. Smith received \$225 for an eighth of an ounce of suspected methamphetamine.
2. Mr. Smith has had three sentencing hearings and three appeals in this case. At the third sentencing hearing, the court found Mr. Smith to have an offender score of 10 and a standard

1 range of 43–57 months on each count. The court imposed an exceptional sentence of 171  
2 months by running the time on each count consecutively.

3 3. Mr. Smith's appeal was denied by the Court of Appeals in an unpublished opinion. He  
4 then filed a pro se petition for review to the Washington Supreme Court. The Court deferred  
5 ruling until it decided State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002). It then accepted  
6 review and appointed counsel.

7 4. The State does not wish to engage in unnecessary proceedings in the Washington  
8 Supreme Court.

9 5. The parties have asked the Washington Supreme Court to grant permission for this court  
10 to resentence Mr. Smith!

11 6. The parties agree that the new sentencing will be heard by a judge other than the  
12 Honorable William J. Kamps (retired).

13 7. For purposes of resentencing, the parties agree that the State can prove only three valid  
14 prior convictions: 2 counts of burglary and 1 count of attempted burglary in Michigan in 1990.  
15 This gives Mr. Smith a total of 3 points for prior convictions. As to each of the three current  
16 counts in this case, the other two counts contribute 6 points to Mr. Smith's offender score. The  
17 total offender score is therefore 9.

18 8. The sentencing chart indicates that the standard range for an offender score of 9 is 51–68  
19 months. However, because the offense is a Class C felony, the high end of the standard range is  
20 actually limited to 60 months. In view of the great increase in offender score due to the repeated  
21 buys from the defendant in this case, the parties agree that a sentence at the low end of the  
22 standard range is appropriate. The parties therefore jointly request that the Court impose a  
23 sentence of 51 months on each count, with the time to run concurrently.

24 9. The parties stipulate that there are no grounds for an exceptional sentence.  
25

1 10. At resentencing, the parties will jointly request an order for immediate release from  
2 custody, since Mr. Smith has already served considerably more than the standard range.

3 11. Upon receiving a sentence within the standard range, Mr. Smith will promptly move to  
4 dismiss his appeal in the Washington Supreme Court.

5  
6 Respectfully submitted:

7  
8 3/28/03

9 Date



Randall Avery Sutton, WSBA #27858  
Deputy Prosecuting Attorney

10  
11 3/28/03

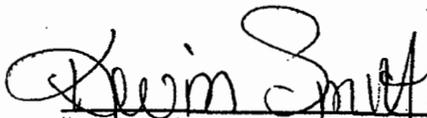
12 Date



David B. Zuckerman, WSBA #18221  
Attorney for Kevin J. Smith, Petitioner

13  
14 3-31-03

15 Date

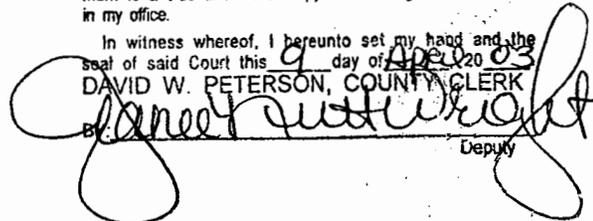


Kevin J. Smith

16  
17  
18  
19  
20 STATE OF WASHINGTON ss}  
COUNTY OF KITSAP

I, DAVID W. PETERSON, Clerk of the above-entitled County do hereby certify that the foregoing instrument is a true and exact copy of the original now on file in my office.

In witness whereof, I hereunto set my hand and the seal of said Court this 9 day of April 2003  
DAVID W. PETERSON, COUNTY CLERK

  
Deputy

# APPENDIX E

FILED  
COUNTY CLERK  
2003 MAY 30 P 12 33  
DAVID W PETERSON  
-----DEPUTY

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2003 MAY 29 A 10:05  
BY J. J. MERRITT  
CLERK

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON )

Respondent )

KEVIN J SMITH )

Petitioner )

MANDAFF

NO 72052 5

Kitsap County  
No 95 1 00998 9

C/A No 26268 1 II

THE STATE OF WASHINGTON TO

The Superior Court of the State of Washington  
in and for Kitsap County

This is to certify that the Supreme Court of the State of Washington considered and granted a joint motion to dismiss the appeal in the above entitled cause on May 28 2003. Accordingly this cause is mandated to the superior court from which this appeal was taken for further proceedings in accordance with the determination of that court.

116/61

MANDATE

Page 2

72052 5



I have affixed the seal of the Supreme Court of the State of Washington and filed this Mandate this 29<sup>th</sup> day of May 2003

A handwritten signature in black ink, appearing to read "C. J. Merritt". The signature is written over a horizontal line.

C. J. MERRITT

Clerk of the Supreme Court State of  
Washington

cc Mr Kevin Smith  
Mr David Zuckerman  
Ms Pattie Mhoon  
Mr Randall Sutton  
Court of Appeals Div II  
Reporter of Decisions