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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

NO. 37845-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY GENE DUNN ,

Appellant.

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

The Honorable Barbara Johnson, Judge

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APPELLANT'S BRIEF

---

LISA E. TABBUT  
Attorney for Appellant  
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Longview, WA 98632  
(360) 425-8155

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**A. ASSIGNMENT OF ERROR**

**APPELLANT JEREMY GENE DUNN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL. HIS TRIAL ATTORNEY FAILED TO OBJECT TO BOTH THE COMPARABILITY OF THREE OREGON FIRST DEGREE THEFT CONVICTIONS AND THREE OREGON ATTEMPTING TO ELUDE A POLICE OFFICER CONVICTIONS AND TO THE CONVICTIONS INCLUSION IN DUNN'S OFFENDER SCORE.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**AN ATTORNEY PROVIDES INEFFECTIVE ASSISTANT OF COUNSEL IF HE FAILS TO CHALLENGE THE FACTUAL COMPARABILITY OF AN OUT-OF-STATE CONVICTION FOR A CRIME THAT IS NOT LEGALLY COMPARABLE TO A WASHINGTON CRIME. AN OREGON FIRST DEGREE THEFT IS NOT LEGALLY COMPARABLE TO A WASHINGTON FIRST DEGREE THEFT. AN OREGON ATTEMPTING TO ELUDING A POLICE OFFICER IS NOT LEGALLY COMPARABLE TO A WASHINGTON ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE. WHERE DUNN'S ATTORNEY FAILED TO OBJECT TO THE INCLUSION OF THREE OREGON FIRST DEGREE THEFT CONVICTIONS AND THREE OREGON ATTEMPTING TO ELUDE CONVICTIONS IN DUNN'S OFFENDER SCORE, AND THE STATE DID NOT PROVE FACTUAL COMPARABILITY, WAS DUNN DENIED EFFECTIVE ASSISTANCE OF COUNSEL?**

**C. STATEMENT OF THE CASE**

A Clark County jury found Dunn guilty of three crimes: possession of methamphetamine<sup>1</sup> (count I); driving without a

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<sup>1</sup> RCW 69.50.4013(1)

license and no valid identification<sup>2</sup> (count II); and bail jumping on a class C felony<sup>3</sup> (count III). CP 4-5, 31-33; 4RP<sup>4</sup> 205-06.

Post-conviction at Dunn's request, the court authorized a pre-sentence DOSA (Drug Offender Sentencing Alternative<sup>5</sup>) evaluation. 4RP 207-08, CP 34. The Department of Corrections prepared a DOSA Risk Assessment Report. CP 35-38. The report included a summary of Dunn's criminal history. All of Dunn's prior criminal history was from Oregon. CP 36. At sentencing, the court acknowledged receiving and reviewing the Risk Assessment Report. 5RP 214.

Before listening to the sentencing arguments, the court sought clarification of Dunn's criminal history and his sentencing range. Dunn's attorney responded:

Okay. I think the State – the State and I agree that he has a prior offender score of 8, so with the two new felonies he would have an offender score of 9 for sentencing.

And that is also what the – the PSI reflects is a – is a score of 9.

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<sup>2</sup> RCW 46.20.005  
<sup>3</sup> RCW 9A.76.170(1),(3)(c)  
<sup>4</sup> 1RP, 01/16/08, pages 1-3  
2RP, 02/07/08, pages 4-6  
3RP, 05/05/08, pages 7-112  
4RP, 05/06/08, pages 113-211  
5RP, 06/04/08, pages 212-238  
<sup>5</sup> RCW 9.94A.660

5RP 214-15. The prosecutor said nothing. No one addressed whether Dunn's Oregon convictions were legally comparable to any Washington crimes. The court asked Dunn if he agreed with the offender score calculation:

All right. Let me also clarify that for the record a number of the convictions that have counted towards the offender score are out-of-state convictions, if not all of them.

Is there an acknowledgment by the defendant here that the criminal history is as counted by counsel's representation here at previously 8 points and now 9 or more points for purposes of sentencing? Is that correct, Mr. Dunn?

5RP 216. After a brief in-court discussion with his attorney, Dunn agreed that the calculation was correct even though the legal and factual comparability of the Oregon convictions to Washington crimes was not addressed. 5RP 216.

The court declined to impose the DOSA sentence. 5RP 234-35. Even though there had been no determination that Dunn's Oregon history was legally or factually comparable to any Washington crimes, the court found that Dunn had eight prior sentencing points from Oregon. The court added an additional point for the current felony offense to the offender score calculation. On a score of nine, the court imposed the maximum standard range on each felony offense: 24 months on the methamphetamine

possession and 60 months on the bail jumping. 5RP 236; CP 41, 44, 52-53. See attached Appendix A, Declaration of Criminal History (from the judgment and sentence).

Dunn appeals. CP 66-67.

#### **D. ARGUMENT**

#### **JEREMY DUNN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO CHALLENGE THE LEGAL OR FACTUAL COMPARABILITY OF SIX OF DUNN'S OREGON CONVICTIONS AND THEIR INCLUSION IN DUNN'S OFFENDER SCORE.**

##### **1. Dunn has a constitutional right to effective assistance of counsel.**

A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. Amend 6<sup>6</sup>; Wash. Const. Art I, § 22<sup>7</sup>. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to afford defendants the 'ample opportunity to meet the

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<sup>6</sup> The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

<sup>7</sup> Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . ."

case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)).

An accused's right to be represented by counsel is a fundamental component to our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudices the defense. Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct 1029, 145 L. Ed. 2d 985 (2000); see

also, Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney’s decisions are treated with deference, his acts must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate grounds to conclude a reasonable probability of a different outcome exists, but need not show the attorney’s conduct altered the result of the case. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

**2. An out-of-state conviction may not be included in a defendant’s offender score unless the State proves that it is both legally and factually comparable to a Washington felony.**

The Sentencing Reform Act<sup>8</sup> (“SRA”) creates a grid of standard sentencing ranges calculated according to the seriousness level of the crime in question and the defendant’s

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<sup>8</sup> RCW 9.94A.020

offender score. RCW 9.94A.505, .510, .520, .525, .530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The offender score is the sum of points accrued as a result of prior convictions. RCW 9.94A.525. Out-of-state convictions are excluded from an offender score unless the convictions are both factually and legally comparable to a Washington crime. “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3). The State bears the burden of proving the existence and comparability of a defendant’s out-of-state convictions. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002).

Washington courts apply a two-part test to determine whether the State has satisfied its burden as to comparability. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the court compares the elements of the out-of-state crime with the comparable Washington crime. In re Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable, the sentencing court counts the defendant’s out-of-state convictions as an equivalent Washington conviction. Id. at 254. But where the elements of the out-of-state crime are different or broader, the State must prove that the defendant’s underlying conduct, as evidenced

by the undisputed facts in the record, violates the comparable Washington statute. Lavery, 154 Wn.2d at 255; Morley, 134 Wn.2d at 606. Even if the State presents additional evidence of conduct beyond the judgment and sentence, “the elements of the charged crimes must remain the cornerstone of the comparisons. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven at trial.” Lavery, 154 Wn.2d at 255 (quoting Morley, 124 Wn.2d at 606). Any comparison of the facts allegedly underlying the conviction is at best “problematic,” according to the Lavery court, given the practical consideration that a person who pled guilty to a prior foreign offense did not necessarily have any incentive to litigate the specifics of the allegations that the State of Washington now seeks to use against him. Lavery, 154 Wn.2d at 255.

**(a) *Oregon’s first degree theft is not legally comparable to Washington’s first degree theft.***

Oregon’s first degree theft is not legally comparable to Washington’s first degree theft. (See statutes immediately below.) Oregon’s definition of the crime is much broader than Washington’s definition. In other words, a defendant could commit an Oregon first

degree theft without committing a first degree theft in Washington. In fact, some Oregon first degree thefts are only equivalent to a Washington third degree theft because the value of the stolen property is less than \$250. Additionally, there are factual scenarios under Oregon's first degree theft, such as theft of anything of value during a riot, that has no comparability to a Washington first degree theft. A comparison of the Oregon and Washington statutes proves the non-comparability of the statutes.

### **Revised Code of Washington**

#### **RCW 9A.56.020 Theft — Definition, defense.**

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

**RCW 9A.56.030 Theft in the first degree — Other than firearm or motor vehicle.**

(1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010;

(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another; or

(c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.

**Oregon Revised Statutes**

**ORS 164.015 - "Theft" described.**

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof;

(2) Commits theft of property lost, mislaid or delivered by mistake as provided in ORS 164.065;

(3) Commits theft by extortion as provided in ORS 164.075;

(4) Commits theft by deception as provided in ORS 164.085; or

(5) Commits theft by receiving as provided in ORS 164.095.

**ORS 164.055 - Theft in the first degree.**

(1) A person commits the crime of theft in the first degree if, by other than extortion, the person commits theft as defined in ORS 164.015 and:

(a) The total value of the property in a single or aggregate transaction is \$200 or more in a case of theft by receiving, and \$750 or more in any other case;

(b) The theft is committed during a riot, fire, explosion, catastrophe or other emergency in an area affected by the riot, fire, explosion, catastrophe or other emergency;

(c) The theft is theft by receiving committed by buying, selling, borrowing or lending on the security of the property;

(d) The subject of the theft is a firearm or explosive;

(e) The subject of the theft is a livestock animal, a companion animal or a wild animal removed from habitat or born of a wild animal removed from habitat, pursuant to ORS 497.308 (2)(c); or

(f) The subject of the theft is a precursor substance.

**(b) Oregon's attempting to elude a pursuing police officer is not legally comparable to Washington's attempting to elude a pursuing police vehicle.**

Oregon's attempting to elude a police officer is not legally comparable to Washington's attempting to elude a pursuing police vehicle. (See statutes immediately below.) Oregon's eluding is much broader than Washington's eluding. In Oregon, unlike in Washington, eluding can be committed by running from a vehicle after being signaled to stop by a police officer. Also, in Oregon, eluding does not require reckless driving while reckless driving is an essential element under Washington's eluding law. A comparison of the following statutes proves the non-comparability of the statutes.

## Revised Code of Washington

### **RCW 46.61.024 - Attempting to elude police vehicle — Defense**

1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

## Oregon Revised Statutes

### **ORS 811.540 Fleeing or attempting to elude police officer; penalty.**

(1) A person commits the crime of fleeing or attempting to elude a police officer if:

(a) The person is operating a motor vehicle; and

(b) A police officer who is in uniform and prominently displaying the police officer's badge of office or operating a vehicle appropriately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren, and either:

(A) The person, while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer; or

(B) The person gets out of the vehicle and knowingly flees or attempts to elude the police officer.

(2) It is an affirmative defense to a prosecution of a person under this section that, after a police officer operating a vehicle not marked as an official police vehicle signaled the person to bring the

person's vehicle to a stop, the person proceeded lawfully to an area the person reasonably believed was necessary to reach before stopping.

(3) The offense described in this section, fleeing or attempting to elude a police officer, is applicable upon any premises open to the public and:

(a) Is a Class C felony if committed as described in subsection (1)(b)(A) of this section; or

(b) Is a Class A misdemeanor if committed as described in subsection (1)(b)(B) of this section.

**3. Dunn received ineffective assistance of counsel when his attorney failed to challenge the legal and factual comparability of Dunn's three Oregon first degree theft convictions and Dunn's three attempting to elude a police officer convictions to Washington crimes.**

Where a defendant's criminal history includes a legally incomparable out-of-state conviction, defense counsel is ineffective. The performance is both deficient and prejudicial if the attorney does not, as in Dunn's case, hold the State to its burden of proving legal and factual comparability. State v. Thieffault, 160 Wn.2d 409, 417, 158 P.3d 580 (2007). Dunn's attorney did not challenge the legal or factual comparability of Dunn's three Oregon first-degree theft convictions or Dunn's three Oregon attempting to elude a pursuing police officer convictions, but instead only agreed to their existence. Existence and comparability are entirely different

issues. Compare e.g., State v. Rivers, 130 Wn. App. 689, 698-99, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 127 S.Ct. 1882 (2007) (discussing proof of comparability). The State bears the burden of proving both the existence and comparability of prior foreign convictions. Ford, 137 Wn.2d at 479-80.

The Oregon first-degree thefts and eluding charges, as calculated, added five points to Dunn's offender score. See attached Appendix A. Without the required comparability as originally sentenced, Dunn's standard range on the most serious charge, the bail jumping, was 51-60 months on an offender score of nine. Without the six unchallenged and arguably not comparable Oregon crimes included in Dunn's offender score calculation, his standard range is 12+-16 months. RCW 9.94A.510. That is a big difference. Dunn's attorney failure to hold the State to its burden with respect to the comparability of the Oregon convictions constitutes ineffective assistance of counsel. Thiefault, 160 Wn.2d at 417. This is particularly applicable to Dunn's case because Oregon's first-degree theft and attempting to elude a police officer bear so little resemblance to Washington's first-degree theft and attempting to elude a pursuing police vehicle.

**E. CONCLUSION**

Dunn's case should be remanded for resentencing. He is entitled to effective assistance of counsel at his resentencing. Because Dunn did not challenge comparability at his original sentencing, the State can attempt, although it will be a difficult task, to prove legal and factual comparability at the resentencing. Thiefault, 160 Wn.2d at 417.

Respectfully submitted this 9<sup>th</sup> day of November, 2008.

  
LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

# APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
JEREMY GENE DUNN,  
Defendant

No. 07-1-01898-1

APPENDIX 2.2

DECLARATION OF CRIMINAL HISTORY

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.100 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	PTS.
THEFT 1	LINN/OR 97122731A	2/5/1998	7/2/1998	1
THEFT 1	LINN/OR 97102137A	10/8/1997	7/6/1998	1
THEFT 1	LINN/OR 97102137A	10/8/1997	7/6/1998	Same crim condu ct
THEFT 2	WEST LINN/OR C97002121	10/25/1997	7/21/1998	misdo
ATTEMPT TO ELUDE POLICE OFC-VEHICLE	CLACKAMAS/OR CR9802545	12/15/1998	1/26/1999	1
BURGLARY 1	CLACKAMAS/OR CR9701639	2/11/1998	12/16/1999	1
ATTEMPT TO ELUDE POLICE OFC-VEHICLE	CLACKAMAS/OR CR0001283	5/7/2000	10/25/2000	1
ATTEMPT TO ELUDE POLICE OFC-VEHICLE	MULTNOMAH/OR 010634432	6/12/2001	8/30/2001	1
CONTROLLED SUBST OFFENSE-POSSESS CONT SUBST 2 - METH	CLACKAMAS/OR CR0400524	7/18/2003	6/29/2004	1

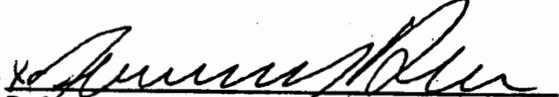
DECLARATION OF CRIMINAL HISTORY  
Revised 9/14/2000

CLARK COUNTY PROSECUTING ATTORNEY  
1013 FRANKLIN STREET  
PO BOX 5000  
VANCOUVER WA 98666-5000  
(360) 397-2261

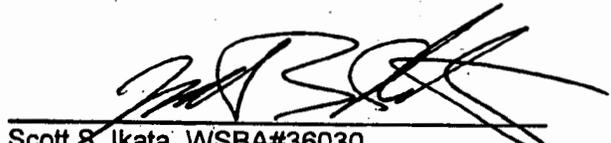
CONTROLLED SUBSTANCE OFFENSE-POSSESS - METH	CLACKAMAS/OR CR0401970	9/10/2004	4/12/2005	1
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The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

DATED this 30 day of May, 2008.

  
 Defendant

  
 George W Brintnall, WSBA#08090  
 Attorney for Defendant

  
 Scott S. Ikata, WSBA#36030  
 Deputy Prosecuting Attorney

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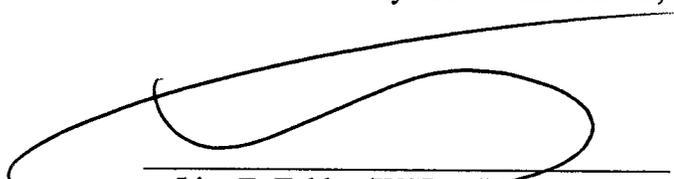


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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING (PA only)

Dated this 9th day of November 2008,

  
 \_\_\_\_\_  
 Lisa E. Tabbu/WSBA #21344  
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 9th day of November 2008.

  
 \_\_\_\_\_  
 Stanley W. Munger  
 Notary Public in and for the  
 State of Washington  
 Residing at Longview, WA 98632  
 My commission expires 05/24/12

