

No. 43021-5-II  
(Consol. with 42396-1-II)

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

vs.

THOMAS LEE FLOYD,

Respondent.

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On Appeal from the Pierce County Superior Court  
Cause No. 11-1-02808-1  
The Honorable Garold E. Johnson, Judge

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BRIEF OF RESPONDENT

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## **I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Did the trial court properly exercise its discretion when it adopted a prior Superior Court Judge's ruling regarding the constitutionality and comparability of two of Thomas Floyd's prior offenses, and then conducted an independent calculation of Floyd's offender score?
2. May a trial court rely on the doctrine of collateral estoppel in regards to the constitutional validity and comparability of a defendant's prior offenses?
3. Where the Sentencing Reform Act allows a trial court to exercise discretion in determining who may speak at a sentencing hearing, and where standby counsel is authorized to make legal arguments to the court outside the presence of the jury, did the trial court properly exercise its discretion when it allowed standby counsel to present arguments to the court regarding the proper calculation of Thomas Floyd's offender score?
4. Has the State established that the three disputed offenses were improperly excluded from Thomas Floyd's offender score calculation?

## **II. STATEMENT OF THE CASE**

Respondent Thomas Lee Floyd accepts the Statement of the Case contained in the State's Corrected Opening Brief of Appellant, and adds the following additional facts. On April 6, 2011, Floyd was convicted in Pierce County Superior Court of one count of second degree assault and six counts of violation of a no-contact order (Cause Number 10-1-00019-6). (CP 15, 34)

Judge John McCarthy presided over sentencing in that case, held on July 15, 2011. (01/13/12 RP 47-48; CP 66) Based on the record presented at the sentencing hearing and arguments of counsel, Judge McCarthy found that Floyd's 1972 robbery conviction was unconstitutional on its face and therefore could not be counted as a "strike" for purposes of determining whether Floyd was a persistent offender; and that Floyd's 1972 assault conviction was comparable under current law to a third degree assault, which is not a "strike" offense. (01/13/12 RP 47-48) However, Judge McCarthy still included both offenses in Floyd's offender score in that case. (01/13/12 RP 47-48) Floyd appealed his conviction and sentence in that case (Appeal No. 42396-1-II).

On August 23, 2012, the State filed an Amended Information in Pierce County Superior Court charging Floyd with one count of

violation of a domestic violence court order and one count of stalking (Cause Number 11-1-02808-1). (CP 5-7) Floyd represented himself at trial, and was convicted as charged. (01/13/12 RP 2; CP 4, 10-11) At sentencing, Floyd and his standby counsel both urged the trial court to adopt Judge McCarthy's rulings regarding the constitutionality and comparability of the 1972 offenses, but asked the court to make its own offender score calculation because Judge McCarthy mistakenly included the two offenses in Floyd's offender score. (01/13/12 RP 4, 30, 47-51)

The trial court accepted the defense position, found that Floyd's offender score is two, and imposed a sentence within the standard range. (01/13/12 RP 64; CP 38, 67-68) The State appealed Floyd's sentence. (CP 46)

### **III. ARGUMENT & AUTHORITIES**

The State asserts that the trial court abused its discretion at sentencing because it: (1) applied the doctrine of collateral estoppel and adopted Judge John McCarthy's analysis of the constitutionality and comparability of Floyd's 1972 robbery and assault convictions; (2) did not conduct an independent analysis of Floyd's offender score; (3) heard argument from standby defense counsel; and (4) failed to include all of Floyd's prior felony offenses

in his offender score.

The State is incorrect on all four points because: (1) collateral estoppel can be applied to rulings regarding constitutionality and comparability of prior offenses; (2) the trial court did not adopt Judge McCarthy's offender score calculation and instead conducted an independent calculation; (3) input from standby counsel that aids a sentencing court in correctly identifying and calculating a defendant's offender score is permitted; and (4) Judge McCarthy's rulings regarding the constitutionality and comparability of Floyd's prior offenses were correct, and the State did not establish the comparability of Floyd's 1981 California offense, so these three offenses were also properly excluded.

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AT SENTENCING

The doctrine of collateral estoppel is embodied in the United States Constitution's guaranty against double jeopardy. U.S. Const. amd. V; State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003) (citing Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). "Collateral estoppel (or issue preclusion) 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again

be litigated between the same parties in any future lawsuit.” Tili, 148 Wn.2d at 360 (quoting Ashe, 397 U.S. at 443). Collateral estoppel “precludes the retrial of issues decided in a prior action.” State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992); State v. Peele, 75 Wn.2d 28, 30, 448 P.2d 923 (1968).

The doctrine of collateral estoppel applies in criminal cases and bars relitigation of issues actually adjudicated. Peele, 75 Wn.2d at 30. “Washington courts have adopted the perspective of federal decisions that collateral estoppel in criminal cases is not to be applied with a hypertechnical approach but with realism and rationality.” Tili, 148 Wn.2d at 360-61 (citing Ashe, 397 U.S. at 444; State v. Harris, 78 Wn.2d 894, 896-97, 480 P.2d 484 (1971), State v. Kassahun, 78 Wn. App. 938, 948-49, 900 P.2d 1109 (1995)).

Collateral estoppel applies to the question of whether prior convictions are included in the offender score. For example, in State v. Blakey, 61 Wn. App. 595, 811 P.2d 965 (1991), the doctrine of collateral estoppel barred the defendant from challenging a previous sentencing court’s determination that his offenses were not the same criminal conduct at a later sentencing hearing.

But before collateral estoppel will apply to preclude the

relitigation of an issue in a particular case, the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue will not work an injustice on the party against whom the doctrine is applied. State v. Harrison, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (citing Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)).

In this case, the issue in both proceedings was identical (whether Floyd's 1972 robbery conviction is unconstitutional on its face and whether Floyd's 1972 assault conviction is comparable to a class B or class C felony), and the parties were identical (the State of Washington, represented by the Pierce County Prosecutor's Office, and Thomas Floyd).

As for the third requirement, contrary to the State's assertion, the judgment in Floyd's prior case was final for the purposes of the collateral estoppel doctrine. (See Appellant's Brief at 8) That is because "the act of 'an appeal does not suspend or

negate. . . collateral estoppel aspects of a judgment entered after trial in the superior courts[.]” Harrison, 148 Wn.2d at 561 (quoting Nielson, 135 Wn.2d at 264); see also Riblet v. Ideal Cement Co., 57 Wn.2d 619, 621, 358 P.2d 975 (1961) (the possibility of an appeal does not affect finality for collateral estoppel purposes). Finally, the State has made no argument or showing that applying the doctrine in this case would work an injustice. Thus, all of the prerequisites for application of the doctrine are present here.

The State correctly asserts that, under RCW 9.94A.345, a sentencing court cannot rely on the doctrine of collateral estoppel to simply adopt a prior court’s offender score calculation. That statute dictates that: “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” This means that “a future sentencing court may not simply rely on a criminal history from a previous judgment but must compute the offender score anew at any future sentencing hearing.” State v. Harris, 148 Wn. App. 22, 28, 197 P.3d 1206 (2008).<sup>1</sup>

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<sup>1</sup> This is because the frequent amendments to the SRA often alter whether or how prior offenses are included and scored. See Harris, 148 Wn. App. at 28 (noting that between 1981 and 2008, the SRA had been amended approximately 200 times).

However, the trial court in this case only relied on collateral estoppel to avoid relitigation of the issue of whether Floyd's 1972 robbery conviction is unconstitutional on its face, and whether his 1972 assault conviction was comparable to a class B or class C felony. (01/13/12 RP 25, 36) This issue was thoroughly briefed, argued, and litigated in Floyd's prior sentencing hearing before Judge McCarthy.

When it came time to calculate Floyd's offender score, the current trial court actually rejected Judge McCarthy's offender score calculation of four, and instead determined that Floyd's offender score was two.<sup>2</sup> (01/13/12 RP 64) This decision was made after the court heard argument from both the prosecution and the defense, reviewed the criminal history packet submitted by the State in both the current and former sentencing hearings, and read the briefing filed by all parties in both cases. (01/13/12 RP 24-64, 72-73) Therefore, the State's assertion that the trial court "categorically refused to conduct its own analysis of defendant's offender score" is without merit. (Appellant's Brief at 7) The trial court did "compute the offender score anew" as required by the

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<sup>2</sup> Standby defense counsel actually discouraged the trial court from applying collateral estoppel to the offender score calculation because he believed that Judge McCarthy's ultimate calculation was incorrect. (01/13/12 RP 47-48)

SRA.

The State also argues that the trial court abused its discretion when it allowed standby defense counsel to speak to the court about his understanding of what Floyd's offender score ought to be. (Appellant's Brief at 8) However, the SRA does not limit who may speak at a sentencing hearing; rather, the SRA has been interpreted as allowing a trial court some discretion in determining who may be heard before pronouncing sentence. See RCW 9.94A.500; State v. Hixson, 94 Wn. App. 862, 866, 973 P.2d 496 (1999) (list of those who may speak at a sentencing hearing is inclusive not exclusive; statute does not limit court's discretion in hearing from others).

Furthermore, "[t]he right to proceed pro se exists to promote the defendant's personal autonomy, rather than to promote the convenience or efficacy of the trial[.]" State v. Bebb, 108 Wn.2d 515, 525, 740 P.2d 829 (1987). Thus, the purpose of limiting the involvement of standby counsel is to avoid infringement on a defendant's right to self-representation, and also to avoid turning standby counsel into a paralegal assistant or errand runner for an "opportunistic or vacillating" defendant. See State v. Silva, 107 Wn. App. 605, 627-29, 27 P.3d 663 (2001).

It is not improper for standby counsel to participate in proceedings outside the presence of the jury, and counsel may even make legal arguments to the court that are contrary to the defendant, as long as the pro se defendant is allowed to address the court freely on his own behalf. McKaskle v. Wiggins, 465 U.S. 168, 179, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (citing AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 6-3.7. (2d ed. 1980); UNIFORM RULES OF CRIMINAL PROCEDURE § 711 (1974) (same); Mayberry v. Pennsylvania, 400 U.S. 455, 467-468, 91 S. Ct. 499, 27 L. Ed. 2d 539 (1971)).

But the primary role of standby counsel is “one of alerting the accused to matters beneficial to him and providing the accused with legal advice or representation upon request.” State v. Silva, 107 Wn. App. at 629-30. And in this case, both the court and Floyd requested that standby counsel address issues relating to the calculation of Floyd’s offender score. (01/13/12 RP 47-51) Allowing standby counsel to speak was well within the trial court’s discretion and did not infringe on Floyd’s right to self-representation.

Finally, if the sentencing court’s goal is to accurately classify offenses and calculate a defendant’s offender score, it is difficult to

understand how input from standby defense counsel is detrimental or prejudicial to the State, whose goal also is, or ought to be, accuracy.

The trial court properly exercised its discretion when it applied the doctrine of collateral estoppel, in a limited fashion, to the question of the constitutionality and comparability of Floyd's 1972 convictions, when it solicited argument from standby counsel regarding the correct offender score calculation, and when it engaged in its own independent calculation of Floyd's offender score.

**B. THE STATE HAS NOT SHOWN THAT THE TRIAL COURT'S OFFENDER SCORE CALCULATION WAS INCORRECT**

Finally, the State argues that the court should have included the two 1972 convictions and a 1981 California conviction in Floyd's offender score. The State asserts that it proved the existence of all three convictions, and therefore all three should be counted in Floyd's offender score. (Appellant's Brief at 6-7)

The State presents no argument or authorities to suggest that Judge McCarthy's initial determination on the constitutionality and comparability of the two 1972 offenses, which the current trial court adopted, is incorrect. The State simply argues that because it

proved their existence, they should be counted. (Appellant's Brief at 6-7) However, a review of the documents submitted to prove these two crimes shows that both Judge McCarthy and the current trial court were correct.<sup>3</sup>

In 1972, Robbery was defined in RCW 9.75.010 as follows: "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery."

The 1972 Information charging Floyd with robbery alleges the following:

[That Floyd] unlawfully and feloniously, ~~while armed with a pistol,~~ [did] take personal property from the person or in the presence of John Edward Noland, the owner thereof, against his will or by means of force or violence or fear of immediate injury to his person.

(Exh. P3) The information misstates the elements of robbery, and this misstatement is repeated in the jury instructions. (Exh. P3) By including an "or" between the phrases "against his will" and "by

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<sup>3</sup> The court documents relating to Floyd's criminal record, as well as trial and appellate briefing relating to Judge McCarthy's ruling, are contained in the appellate record for that case (Appeal Number 42396-1-II), which has been consolidated with this current case on appeal.

means of force,” the information and instructions abandon the required element that the taking is done by “force or violence or fear of injury.” As charged and instructed, Floyd’s conviction only required proof that Floyd took the personal property against Noland’s will.

The defects in the information and jury instructions rendered the conviction constitutionally invalid. See State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000) (both State and Federal Constitutions are violated when the Information does not contain all the elements of the offense). If a conviction is unconstitutional on its face, as the Court correctly found to be the case with Floyd’s 1972 robbery conviction, then it cannot be used for any sentencing purpose. See State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986); State v. Morley, 134 Wn.2d 588, 614, 952 P.2d 167 (1998). Accordingly, the 1972 robbery conviction was properly excluded from Floyd’s offender score calculation in this case.

Next, the State also incorrectly asserts that Floyd’s 1972 second degree assault conviction is a class B felony, which does not wash from Floyd’s criminal history. (Appellant’s Brief at 6). The Second Amended Information filed against Floyd in 1972 alleged that he “did willfully inflict grievous bodily harm upon the person of

Richard Dean Strain.” (Exh. P3) The current version of the second degree assault statute states that a “person is guilty of assault in the second degree if he or she . . . Intentionally assaults another and thereby recklessly inflicts substantial bodily harm[.]” RCW 9A.36.021(2)(a).

The elements diverge in two distinct ways. First, Floyd was charged with committing a willful assault, whereby the current statute requires an intentional assault. Next, Floyd was only required to have inflicted grievous bodily harm, whereas the current second degree assault statute requires the infliction of substantial bodily harm.

In City of Spokane v. White, the court specifically held that willful is the same mental state as knowingly, and that “knowingly is a less serious form or mental culpability than intent.” 102 Wn. App. 955, 961, 10 P.3d 1095 (2000). With this lower mental state, the 1972 second degree assault conviction cannot be compared to a current second degree assault.

In addition, grievous bodily harm and substantial bodily harm are not the same. Grievous bodily harm was defined as:

- (1) “a hurt or injury calculated to interfere with the health or comfort of the person injured”; and
- (2) “atrocious, aggravating, harmful, painful, hard to bear,

and serious in nature.”

State v. Hovig, 149 Wn. App. 1, 11, 202 P.3d 318 (2009) (quoting State v. Salinas, 87 Wn. 2d 112, 121, 549 P.2d 712 (1976); citing Former RCW 9.11.020). The definition of substantial bodily harm, as contained in the pattern jury instructions, is:

Bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

WPIC 2.03.01.

In comparing the prior definition of grievous bodily harm to the definition of substantial bodily harm, the Hovig court pointed out that pain was not longer an element of the offense. 149 Wn. App. at 11. And in State v. Brown, the court noted that grievous bodily harm and substantial bodily harm are not interchangeable definitions. 17 Wn. App. 587, 564 P.2d 342 (1977).

Rather, the grievous bodily harm definition is more comparable to assault in the third degree, which is established when, “with criminal negligence,” a person “causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]” RCW 9A.36.031(1)(f).

Accordingly, Floyd’s 1972 assault conviction is more

comparable to a current third degree assault, which is a class C felony. RCW 9A.36.031. Under RCW 9.94A.525(2)(c), class C felonies “shall not be included in the offender score if, since the last date of release from confinement . . . the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.” According to the criminal history presented by the State, Floyd had no criminal convictions between 1972 and 1980. (CP 34-35; Exh. P1-P3) It appears, according to the documentation presented to the court, that Floyd was crime-free for at least five years after his 1972 assault conviction, so this crime does wash out and was properly excluded from his offender score.

Finally, the State asserts that Floyd’s 1981 conviction for taking a motor vehicle without permission was also improperly excluded from Floyd’s offender score. (Appellant’s Brief at 6) Out-of-state convictions are included in a Washington defendant’s offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). But an out-of-state conviction may not be used to increase a 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).

The State bears the burden of establishing the comparability of offenses, typically by proving that the out-of-state conviction exists and by providing the foreign statute to the court. State v. Ford, 137 Wn.2d 472, 479-482, 973 P.2d 452 (1999). If the State provides sufficient evidence, the sentencing court must conduct the comparison on the record. State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state conviction should be included in the offender score. Ford, 137 Wn.2d at 480-81.

In this case, the State presented no argument or authorities either at the sentencing hearing or on appeal to establish that the California conviction is comparable to a Washington felony offense. The trial court therefore properly excluded this offense from Floyd's offender score as well.

## **V. CONCLUSION**

The trial court only employed the doctrine of collateral estoppel to the issue of whether Floyd's 1972 robbery conviction was unconstitutional on its face, and whether Floyd's 1972 assault conviction was a class B or class C felony. These are legal determinations that are subject to the collateral estoppel doctrine.

The trial court did not err in applying the doctrine and adopting Judge McCarthy's rulings in this case.

But the trial court did not apply the doctrine to the calculation of Floyd's offender score, and instead followed the dictates of the SRA and conducted an independent determination of Floyd's offender score. Finally, the State has not shown that the trial court's offender score calculation was incorrect. Accordingly, Floyd's sentence should be affirmed.

DATED: August 13, 2012



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**CERTIFICATE OF MAILING**

I certify that on 08/13/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Thomas L. Floyd, DOC# 234038, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**August 13, 2012 - 2:59 PM**

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