

No. 44857-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timothy Restorff,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00043-9

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court infringed Mr. Restorff's Sixth and Fourteenth Amendment right to counsel.
2. The trial judge erred by denying Mr. Restorff's requests for appointment of new counsel.
3. The trial judge erred by failing to conduct a meaningful inquiry into the conflict between Mr. Restorff and his court-appointed attorney.

ISSUE 1: A trial court must conduct meaningful inquiry into an accused person's request for the appointment of new counsel. Here, the trial court did not inquire into Mr. Restorff's concerns when he twice informed the judge that he did not feel his attorney was acting in his best interests. Did the court violate Mr. Restorff's Sixth and Fourteenth Amendment right to counsel?
4. The sentencing judge erred by sentencing Mr. Restorff with an offender score of six.
5. The prosecution failed to prove the comparability of Mr. Restorff's Oregon conviction for sexual abuse.
6. The sentencing judge erred by including Mr. Restorff's Oregon conviction for sexual abuse in the offender score.
7. The sentencing judge erred by concluding that Mr. Restorff's Oregon conviction for sexual abuse was comparable to a violent offense.

ISSUE 2: A court may not increase punishment beyond the standard range based on "facts" that have not been proven to a jury beyond a reasonable doubt. Here, the court determined that Mr. Restorff's Oregon conviction was comparable to a Washington offense even though the Washington statute includes two elements that were not proven as part of his out-of-state case. Did the court violate Mr. Restorff's Sixth and Fourteenth Amendment right to a jury trial and to proof beyond a reasonable doubt?

ISSUE 3: When determining comparability of an out-of-state conviction, the court is limited to facts that were admitted,

stipulated to, or proved beyond a reasonable doubt. Here, the court found Mr. Restorff's Oregon conviction comparable to a Washington offense based on "facts" that were not admitted, stipulated to, or proved as part of his guilty plea. Did the court err by finding Mr. Restorff's Oregon conviction comparable?

8. The sentencing judge erred by including washed-out offenses in Mr. Restorff's offender score.
9. The state failed to prove that Mr. Restorff's prior convictions for class B felonies qualified for inclusion in the offender score.

ISSUE 4: Prior class B felony convictions do not contribute to an offender score if the defendant subsequently spent ten years in the community without reoffending. Here, the court included Mr. Restorff's 1980-1986 convictions in his offender score even though his last prior conviction was more than ten years old. Did the court err by including these convictions in Mr. Restorff's offender score?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Timothy Restorff was waiting to fill his truck with gas when David Robinson, who was parked in front of him, told him to “back the ‘F’ up.” RP 128. Robinson claimed that he could not get his car out. RP 128. Mr. Restorff backed up. RP 128. Nonetheless, Robinson rushed at Mr. Restorff with one hand inside of his coat. RP 130.

Mr. Restorff got out of his truck and stood still, holding a knife in one hand. RP 131-32. What happened next is in dispute. Mr. Restorff testified that he warned Robinson not to come any closer. RP 131. Robinson continued toward Mr. Restorff and grabbed his arm. RP 132. In the process, Robinson’s hand was cut. RP 132-33.

Robinson testified that Mr. Restorff attacked him and stabbed his hand four times. RP 51-52. The state’s photographic exhibits only showed one cut. RP 54-55; Ex 1, 2.

Someone at the gas station called the police. RP 97. The state charged Mr. Restorff with second-degree assault and a deadly weapon sentencing enhancement. CP 1-2.

A month before trial began, Mr. Restorff told the court that he did not think that his appointed counsel was acting in his best interest. RP 2. He pointed out that his attorney had been unable to tell him whether he

was facing a third strike. RP 2. Referring to his attorney, Mr. Restorff said that he was “not going to talk to this man” and “[had] nothing further to say to him.” RP 3-4. The court did not ask Mr. Restorff any questions about his concerns. RP 1-4.

The next week, Mr. Restorff again informed the court that he was having a conflict with defense counsel. RP 8-9. He noted that his attorney was still unable to tell him whether this could be his third strike. RP 6-7. He also pointed out that his attorney had said he would get the surveillance video but had not done so. RP 6. Mr. Restorff began to explain his concerns:

You know, [counsel’s] story changes every time I see him. All right. I don’t want to even talk to this man anymore. There’s two cameras out there that show that I was attacked and he has yet to... go an obtain the evidence... He doesn’t make me feel confident by any standing.
RP 8-9.

The court did not ask for any details. RP 5-10. Defense counsel offered an explanation and the court told Mr. Restorff that he had “better be making up [his] mind to talk to [his attorney].” RP 10.

The jury found Mr. Restorff guilty. RP 243.

At sentencing, the state sought to add two points to Mr. Restorff’s offender score based on a 1991 Oregon conviction for sexual abuse. RP 266. The prosecutor noted that the analogous Washington statute

contained two elements that were not required under the Oregon statute: that the accused must be at least 36 months older than and not married to the alleged victim. RP 266.

The state relied on the indictment from the Oregon case to attempt to prove the age different. RP 267-68. Specifically, the state pointed to Mr. Restorff's birthdate as listed on the indictment heading. RP 267-68. Regarding the marriage issue, the state presented an unpublished Washington case saying that a person younger than fourteen cannot be married in Oregon. RP 269-70. The court found the Oregon conviction comparable to first-degree child molestation. The court scored the Oregon offense as a violent offense that added two points to Mr. Restorff's offender score. RP 272-73; CP 5.

The state also sought to increase Mr. Restorff's offender score based four second-degree burglary convictions entered between 1980 and 1986. CP 5; RP 275. The state claimed that Mr. Restorff's 2002 assault conviction prevented the burglary convictions from washing out. RP 275. The state did not introduce any evidence showing that Mr. Restorff had been held in custody following the 2002 conviction. Sentencing Ex. 1, 2; RP 265-82. The court used the 1980-1986 convictions to increase Mr. Restorff's offender score.

This timely appeal follows. CP 17.

ARGUMENT

I. THE COURT VIOLATED MR. RESTORFF'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

A. Standard of Review.

Constitutional errors are reviewed *de novo*. *State v. Lynch*, --- Wn.2d ---, 309 P.3d 482, 484 (Sept. 19, 2013). A manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court "necessarily abuses its discretion" by violating an accused person's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court, likewise, abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Cross*, 156 Wn.2d at 607.

B. The trial judge infringed Mr. Restorff's right to counsel by failing to inquire into the breakdown of the attorney-client relationship.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *Cross*, 156 Wn.2d at 607. To compel an accused to ““undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.”” *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court “must conduct ‘such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’”

United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001).

Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted

questions.” *Adelzo-Gonzalez*, 268 F.3d at 776-777. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez*, 268 F.3d at 776-777.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict between Mr. Restorff and his attorney and by refusing to appoint new counsel. Mr. Restorff informed the court a month before trial that he did not believe that his court-appointed attorney was acting in his best interest. RP 2. During that hearing, the court did not ask Mr. Restorff any questions about his concerns regarding his attorney. RP 1-4. When Mr. Restorff told the judge that he was “not going to talk to” his attorney, the court simply responded: “I understand that.” RP 3.

A week later, Mr. Restorff again told the judge that his attorney “doesn’t make [him] feel confident at all by any standing.” RP 9. Again, the court did not ask Mr. Restorff for any details about his apprehensions. RP 5-10. Rather, the judge took defense counsel’s explanation at face value and told Mr. Restorff that he had “better be making up [his] mind to talk to [his attorney].” RP 10.

The court did not conduct sufficient inquiry to ease Mr. Restorff’s apprehensions or to collect information sufficient to make a decision.

Adelzo-Gonzalez, 268 F.3d 772. The court failed to undertake a meaningful evaluation of the conflict. *Cross*, 156 Wn.2d at 610.

The court violated Mr. Restorff's right to counsel by failing to inquire into the breakdown of the attorney-client relationship. *Adelzo-Gonzalez*, 268 F.3d at 777-78. Mr. Restorff's conviction must be reversed. *Id.* at 781.

II. THE COURT MISCALCULATED MR. RESTORFF'S OFFENDER SCORE.

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, --- Wn. App. ---, 309 P.3d 791, 793 (Sept. 24, 2013). Comparability of out-of-state convictions for sentencing purposes is also reviewed *de novo*. *Id.* Constitutional errors are, likewise, reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744-745, 193 P.3d 678 (2008); *State v. Hayes*, 43207-2-II, 2013 WL 6008686 (Wash. Ct. App. Nov. 13, 2013).

B. The state failed to prove comparability for Mr. Restorff's out-of-state conviction.

Out-of-state convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law... If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges out-of-state convictions, the prosecution bears the burden of proving comparability. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves comparability. *Id.*

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Thieffault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

1. The court violated Mr. Restorff's Sixth and Fourteenth Amendment rights by increasing his sentence based on "facts" that had not been proven to a jury beyond a reasonable doubt.

The right to a jury trial prohibits a sentence beyond the statutory maximum based on "facts" that have not been proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 499, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. Amend VI, XIV. The fact of a prior conviction, however, need not be proven to a jury in order to increase the

sentence for a subsequent offense. *Almendarez-Torres v. United States*, 523 U.S. 224, 226, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). This is because the fact of a prior conviction is already established through procedural safeguards, including the rights to notice and to a jury trial. *Apprendi*, 530 U.S. at 488-90.

The *Almendarez-Torrez* exception – permitting a judge to find the fact of a prior conviction – “is not a panacea allowing recidivism-related judicial factfinding.” *Garrus v. Sec’y of Pennsylvania Dep’t of Corr.*, 694 F.3d 394, 406 (3d Cir. 2012). The *Apprendi* court distinguished between “accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilty beyond a reasonable doubt” and “allowing the judge to find the required fact under a lesser standard of proof.” *Apprendi*, 530 U.S. at 496. The latter violates the Sixth Amendment. *Id.*¹

Mr. Restorff was convicted in 1991 under the Oregon statute for first degree sexual abuse. The statute criminalized sexual contact with a person under twelve years old. Former ORS 163.425 (1987).

¹ More recently, the U.S. Supreme Court has noted that it would “(at least) raise serious Sixth Amendment concerns” for a sentencing court find facts underlying a prior conviction that were not necessarily proven beyond a reasonable doubt. *Descamps v. United States*, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013) *reh’g denied*, 11-9540, 2013 WL 4606326 (2013).

The analogous Washington statute criminalizes child molestation in the first degree. Former RCW 9A.44.083 (1990). It prohibits sexual contact “with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” Former RCW 9A.44.083 (1990).

At sentencing, the state agreed that the Washington statute includes two elements not covered by the broader Oregon statute. The prosecutor noted that a person accused of the offense in Washington must be at least 36 months older than the alleged victim and not married to the alleged victim. RP 267. Nonetheless, the court determined that Mr. Restorff’s out-of-state conviction was comparable. RP 272-73. The judge stated that Mr. Restorff’s 1991 Oregon indictment proved an age difference greater than 36 months. RP 273.

The court also found that Mr. Restorff and the 1991 victim were not married. This finding was based on the age (as reflected in the indictment) and an unpublished Washington case noting that a child under fourteen cannot be married in Oregon. RP 273.

These “facts” underlying the prior conviction were neither admitted by Mr. Restorff nor proven beyond a reasonable doubt. The court’s factfinding on these issues infringed Mr. Restorff’s constitutional rights. *Descamps*, 133 S.Ct. 2276. The court’s inclusion of the 1991

Oregon conviction in his offender score violated his Sixth and Fourteenth Amendment right to a jury trial and proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 499; *Garrus*, 694 F.3d at 406.

The court violated Mr. Restorff's right to a jury trial by increasing his sentence based on "facts" that had not been proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 499; *Garrus*, 694 F.3d at 406.

Mr. Restorff's case must be remanded for resentencing. *Id.*

2. Even if a sentencing court may consider facts not proven to a jury beyond a reasonable doubt, the state failed to prove comparability.

As outlined above, the court violated Mr. Restorff's Sixth and Fourteenth Amendment rights by finding facts other than the bare fact of a prior conviction to establish the standard range. However, even if the court were allowed to rely on judicial factfinding, the state failed to prove that Mr. Restorff's Oregon conviction is factually comparable to the Washington statute.

If an out-of-state conviction is for violation of a statute broader than the analogous Washington statute, the court may conduct a limited factual comparison. *Tewee*, 309 P.3d at 793. The court may rely only on facts that were admitted, stipulated to, or proved beyond a reasonable doubt. *Id.*

Here, the evidence was insufficient to prove factual comparability. The document charging Mr. Restorff parroted the language of the Oregon statute. CP 73. The factual basis for Mr. Restorff's no contest plea stated only that he "recognize[d] a probable conviction if tried." Sentencing Ex. 2, p. 2.

To establish that Mr. Restorff was 36 months older than the alleged victim, the state pointed to his birth date as listed on the heading of the indictment. Sentencing Ex. 1; RP 267. Mr. Restorff, however, did not admit to the accuracy of the listed birth date as part of his plea. Sentencing Ex. 2. The 36-month age difference required by the Washington statute was not admitted, stipulated to, or proved as part of Mr. Restorff's Oregon conviction. RCW 9A.44.083 (1990); *Tewee*, 309 P.3d at 793.

To establish that Mr. Restorff was not married to the alleged victim of the 1991 offense, the state relied on the indictment and an unpublished Washington case mentioning that a person younger than fourteen cannot be married in Oregon. RP 270. Even if this were proper, it is insufficient. Mr. Restorff and the alleged victim could have been married in a different state. Because marriage was not at issue in the Oregon case, Mr. Restorff had no reason to admit or deny that they were unmarried. The element of the Washington statute requiring the accused to be unmarried to the

alleged victim was not admitted, stipulated to, or proved pursuant to Mr. Restorff's Oregon conviction. RCW 9A.44.083 (1990); *Tewee*, 309 P.3d at 793.

The state failed to prove that Mr. Restorff's conviction under the broad Oregon statute was factually comparable to the more narrow Washington statute. *Tewee*, 309 P.3d at 793. The court erred by increasing Mr. Restorff's offender score based on that out-of-state conviction. *Id.* The case must be remanded for resentencing. *Id.*

C. All of Mr. Restorff's prior convictions "washed out" under RCW 9.94A.525(2)(b).

The state bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused's offender score. *Ford*, 137 Wn.2d at 480. Prior convictions for class B felonies are not included in an offender score if the accused has spent ten consecutive years in the community without conviction following his/her most recent conviction or release from confinement. RCW 9.94A.525(2)(b).

Mr. Restorff agreed that he committed the offenses listed on the state's criminal history sheet. RP 256. The sheet shows four second-degree burglary convictions between 1980 and 1986 as well as the 1991 sex abuse offense. CP 5. The sheet also lists a third-degree assault conviction with an offense date of 3/23/02 and a sentencing date of

7/10/02. CP 5. Mr. Restorff's current offense is alleged to have occurred on 1/7/13. RP 40.

Burglary 2 is a class B felony.² RCW 9A.52.030 (1975).

The prosecutor argued that the 2002 assault conviction prevented Mr. Restorff's prior class B felonies from washing out. RP 275; RCW 9.94A.525(2)(c). But more than ten years had passed between Mr. Restorff's sentencing date on the 2002 conviction and the date of the 2013 offense. The prior offenses should have washed out. RCW 9.94A.525(2)(b).

The state appears to have relied on its belief that Mr. Restorff was not released from confinement until August 2003.³ However, the state did not present any evidence establishing when Mr. Restorff was released. RP 265-82; Ex 1-2. Although Mr. Restorff agreed that he had been convicted of the offenses listed, he did not stipulate that he was held in custody beyond his sentencing date. RP 256.

The state did not prove facts necessary to include the class B felonies in the offender score. It failed to meet its burden of establishing

² Assault 3 is a class C felony. RCW 9A.36.031 (1999). Because class C felonies only require five offense-free years to wash out, the state agreed that Mr. Restorff's 2002 assault conviction did not add a point to his offender score. RP 275.

³ The state's criminal history sheet lists "REL PRISON 08/06/03" under the 2002 conviction. CP 5.

that Mr. Restorff's 1980-1986 convictions increased his offender score. *Ford*, 137 Wn.2d at 480.

The court erred by using convictions for class B felonies that were twenty-seven to thirty-three years old to increase Mr. Restorff's offender score. RCW 9.94A.525(2)(b). The case must be remanded for resentencing. *Id.*

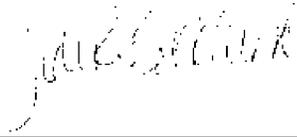
CONCLUSION

The court violated Mr. Restorff's right to counsel by failing to inquire into the breakdown of his relationship with his attorney. Mr. Restorff's conviction must be reversed.

In the alternative, the court violated Mr. Restorff's right to a jury trial by increasing his sentence based on "facts" that had not been proven to a jury beyond a reasonable doubt. Even if the court did not violate Mr. Restorff's right to a jury trial, the state failed to prove that his 1991 Oregon conviction was factually comparable to a Washington statute. Finally, the court erred by using Mr. Restorff's 1980-1986 convictions to increase his offender score because the offenses washed out. Mr. Restorff's sentence must be vacated and his case remanded for resentencing.

Respectfully submitted on December 5, 2013,

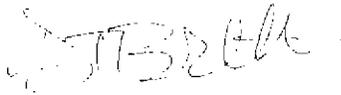
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CERTIFICATE OF SERVICE

I certify that on today's date:

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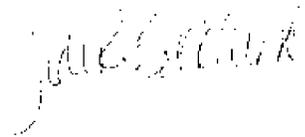
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 5, 2013.



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