

No. 45730-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Terry Jacob,

Appellant.

Mason County Superior Court Cause No. 11-1-00354-0

The Honorable Judge Amber Finlay

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Jacob his Sixth and Fourteenth Amendment right to counsel.
2. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Jacob and his court-appointed attorney.

ISSUE 1: An accused person who is indigent has a constitutional right to have counsel appointed. When alerted to Mr. Jacob's dissatisfaction with his court-appointed attorney, the trial court failed to make any inquiry into the breakdown of the attorney-client relationship. Did the court's failure to inquire into the attorney-client relationship violate Mr. Jacob's Sixth and Fourteenth Amendment right to counsel?

3. The sentencing court failed to properly determine Mr. Jacob's offender score.
4. The trial court erred by sentencing Mr. Jacob with an offender score of seven.
5. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence).
6. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

ISSUE 2: Under the SRA, only certain prior convictions may be included in the offender score. Here, the sentencing court included a 1997 DUI in Mr. Jacob's offender score even though the state failed to prove that it should be included. Did the trial court err by sentencing Mr. Jacob with an offender score of seven?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Terry Jacob with felony driving under the influence in October of 2011. After a trial, he was convicted. The court sentenced him with nine offender points to 60 months incarceration. Mr. Jacob appealed, and his conviction was affirmed but his sentence vacated. The Court of Appeals held that a 1989 prior DUI was not properly included in his offender score. CP 22-37.

The court held a resentencing hearing on November 18, 2013. At that hearing, Mr. Jacob told the court that his attorney had not come to see him and they had not discussed the matter. RP 1. The court responded that since it is a resentencing hearing and the appointed attorney indicated he had exchanged correspondence with Mr. Jacob, the hearing would proceed. RP 1-2.

The state proposed a Judgment and Sentence that included the following as Mr. Jacob's priors:

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult. Juv.	Type of Crime
1	FELONY DUI	01/03/09	05/11/09	Mason County, WA Superior Court	A	FC
	DWLS/R 1	04/18/05	02/04/09	Mason County, WA District Court		
2	DUI	03/06/03	07/03/03	Mason County, WA District Court	A	GM

3	DUI	01/31/01	06/05/01	Mason County, WA District Court	A	GM
4	DUI	05/17/00	06/05/01	Mason County, WA District Court	A	GM
5	DUI	11/29/99	06/05/01	Mason County, WA District Court	A	GM
6	DUI	01/26/97	08/21/97	Mason County, WA District Court	A	GM
	VUCSA	06/10/91	01/22/93	King County, WA Superior Court	A	FC
	DUI	08/29/88	06/05/89	Mason County, WA District Court	A	GM

CP 9.

Mr. Jacob spoke up further, and urged the court to remove three additional offenses from his offender score. The state agreed with two of these. RP 2-4. Mr. Jacob argued that his conviction from 1997 should not count since it is more than 15 years old. RP 3. The state disagreed and urged the court to sentence Mr. Jacob with 7 points to 51 months, since the range was 51 to 60 months. RP 4-7.

The court asked Mr. Jacob's attorney if he agreed with the state's calculation (or his own client's). RP 7. The attorney responded that he cannot disagree with "what's in black and white," and urged the court to issue a sentence of 51 months. RP 7-8.

The court found that the 1997 conviction counted as a point, and issued a sentence of 51 months. CP 5-19. Mr. Jacob timely appealed. CP 4.

ARGUMENT

I. THE SENTENCING JUDGE VIOLATED MR. JACOB'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). 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. *Id.*

B. The trial judge infringed Mr. Jacob'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 proceed "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 sentencing court learned that Mr. Jacob did not want to proceed with his court-appointed lawyer. RP 1. Despite this, the trial made no inquiry into the conflict. RP 1-9.

The sentencing court should have asked specific and targeted questions, encouraging Mr. Jacob to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The trial court's failure to conduct a meaningful inquiry into Mr. Jacob's concerns denied Mr. Jacob's Sixth Amendment right to counsel. *Cross*, 156 Wn.2d at 607. His sentence must be vacated and the case remanded for a new sentencing hearing.¹ *Id.*

¹ In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict and for a new sentencing hearing if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott*, 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

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

A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 806 n.1, 312 P.3d 784 (2013).

B. The state failed to prove that Mr. Jacob's 1997 DUI conviction qualified for inclusion in his offender score.

The state bears the burden of proving that a prior conviction adds a point to the accused's offender score. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Under former RCW 9.94A.525(2)(e) (2011),

If the present conviction is felony driving while under the influence of intoxicating liquor or any drug... prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

RCW 9.94A.525.

Mr. Jacob's 1997 DUI conviction does not qualify for inclusion under this statute. It is not a prior offense within ten years of the current

offense, and thus does not qualify for inclusion under former RCW 9.94A.525(2)(e)(ii).

Nor does it qualify for inclusion under RCW 9.94A.525(2)(e)(i).

This is so for two reasons. First, that provision only applies to “prior *convictions*” (plural):

[P]rior *convictions* of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, *and* serious traffic offenses shall be included in the offender score if: (i) The prior *convictions were* committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence...

RCW 9.94A.525(2)(e). The repeated use of the plural (“convictions”), the use of the conjunctive (“and”), and the plural verb form (“were”) establish the legislature’s intent to include the listed offenses only when they occur in combination. Mr. Jacob’s 1997 DUI was not accompanied by any other listed offense. CP 6. Accordingly, the state did not prove that it qualified for inclusion.

Second, the prosecution failed to establish that the 1997 DUI was “committed within five years since the last date of release from confinement... or entry of judgment and sentence.” RCW 9.94A.525(2)(e)(i). The Court of Appeals decided that the 1991/1993 drug charge could be the reference conviction for subsequent offenses under RCW 9.94A.525(2)(e)(i); it did not hold that the state had proved

Mr. Jacob's release date or the date the judgment and sentence was entered, with respect to that charge. CP 20-37.

Under the existing record, it is possible that Mr. Jacob was released from custody in 1991 (when the offense was committed), and that he was not required to serve additional time when sentence was pronounced in 1993. If that is the case, the 1997 conviction was not committed within five years of his release date: the offense date for the 1997 DUI was (according to the court's findings) January 26, 1997. CP 6.

Similarly, under the existing record, it is possible that the court pronounced sentence for the earlier drug charge on January 22, 1993, but that Mr. Jacob failed to appear, thus delaying "entry of judgment and sentence" until some time *after* January 26, 1997.

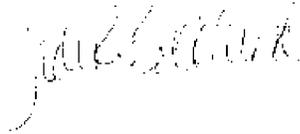
Absent proof of Mr. Jacob's release date or the date of entry of the judgment and sentence, the state failed in its burden to prove that the 1997 DUI conviction should be included in the offender score. The sentence must be vacated and the case remanded for a new sentencing hearing. Because Mr. Jacob objected to the inclusion of his 1997 DUI in his offender score, the state must be held to the existing record on remand. *In re Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

CONCLUSION

For the foregoing reasons, Mr. Jacob's sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on May 20, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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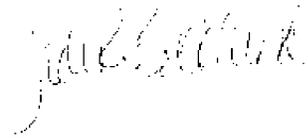
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 20, 2014.



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