

No. 49656-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS READE

Appellant.

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

Cause No. 05-1-01468-1; 04-1-02172-7; 06-1-00343-1;
08-1-01465-1

SUPPLEMENTAL BRIEF OF RESPONDENT ADDRESSING
STATEMENT OF ADDITIONAL GROUNDS

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

 1. The parties and trial court did not err in calculating Reade’s offender score, and he waived his right to challenge his offender score on appeal 3

 2. Reade’s plea of guilty was made knowingly, intelligently and voluntarily 16

 3. Reade had effective assistance of counsel 17

D. CONCLUSION..... 22

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Ford</u> , 137 Wash. 2d 472, 483 n. 5, 973 P.2d 452 (1999)	6, 12, 13
<u>State v. Garrett</u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1995)	18
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 78, 917 P.2d 563 (1996)	18
<u>State v. Jordan</u> , 180 Wash.2d 456, 461, 325 P.3d 181 (2015)	5
<u>In re Personal Restraint of Lavery</u> , 154 Wash.2d 249, 255, 111 P.3d 837 (2005)	5, 6
<u>State v. McCorkle</u> , 137 Wash.2d 490, 495, 973 P.2d 461 (1999)	5
<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	17, 21
<u>State v. Morley</u> , 134 Wash.2d 588, 952 P.2d 167 (1998)	5
<u>State v. Reichenbach</u> , 153 Wash.2d 126, 130, 101 P.3d 80 (2004)	18
<u>State v. Ross</u> , 152 Wash.2d 220, 230, 95 P.3d 1225 (2004)	6, 12, 13, 14
<u>State v. Smith</u> , 134 Wn.2d 849, 852, 953 P.2d 810 (1988)	17
<u>State v. Thiefault</u> , 160 Wash.2d 409, 415, 158 P.3d 580 (2007)	5

Decisions Of The Court Of Appeals

<u>State v. Collins,</u> 144 Wash. App. 547, 555, 182 P.3d 1016 (2008)	14, 15
<u>State v. Farnsworth,</u> 133 Wash. App. 1, 22, 130 P.3d 389 (2006)	6
<u>State v. Horton,</u> 116 Wn. App. 909, 912, 68 P.3d 1145 (2003)	18
<u>State v. Russell,</u> 104 Wash. App. 422, 441, 16 P.3d 664 (2001)	6
<u>State v. White,</u> 80 Wn. App. 406, 410, 907 P.2d 310 (1995)	18

U.S. Supreme Court Decisions

<u>Boykin v. Alabama,</u> 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....	16, 17
<u>Brookhart v. Janis,</u> 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).....	19
<u>Carey v. Musladin,</u> 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).....	18
<u>Strickland v. Washington,</u> 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	17, 18, 19

Statutes and Rules

California Penal Code § 261.5	8, 9, 10, 19
Cal. Penal Code § 261.5(a) (effective 1999)	9
California Penal Code 261.5(c)	19
RCW 9A.44.079	9, 10

RCW 9A.44.079(1).....	9
RCW 9A.44.096	8
RCW 9A.44.130	8, 20
RCW 9A.44.130(9)(a)	7, 8
RCW 9A.44.130(10).....	7
RCW 9.68A.090	8
RCW 9.94A.030	8
RCW 9.94A.130	7
RCW 9.94A.525	4, 5
RCW 9.94A.525(3).....	4
RCW 10.01.200.....	7
RCW 43.43.540	7
RCW 70.48.470.....	7
RCW 72.09.330.....	7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Reade's California conviction was comparable to the equivalent Washington offense for purpose of determining his offender score.
2. Whether Reade waived the right to appeal the determination of his offender score by pleading guilty.
3. Whether the defendant's guilty plea was knowingly, intelligently, and voluntarily made.
4. Whether the defendant had effective assistance of counsel.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the case, as stated in his opening brief. For purposes of responding to Reade's Statement of Additional Grounds, the State adds the following facts: In cause number 04-1-02172-7, Reade pled guilty to one count of felony violation of sex offender registration. CP 41-48. In support of his plea, Reade made the following statement:

"I have previously been convicted of a sex offense. As a result of that conviction I am required to register as a sex-offender. I was, at the time of this offense, aware of my registration requirements. In Thurston County, during the period of September 7, 2004, through November 11, 2004, I knowingly provided the sheriff's office with an address where I was not then residing."

CP 47. The crime was unranked and Reade was sentenced to 30 days with credit for time served. CP 49-58.

In cause number 05-1-01468-1, Reade again pled guilty to one count of felony violation of sex offender registration. CP 14-20. The prosecutor's statement on criminal history listed a 2002 conviction for Sexual Intercourse with a Minor (15 y/o victim). CP 21. In support of his plea, Reade stated, "during the period June 13 to July 25, 2005, in Thurston County, I knowingly failed to register with the sheriff's office after having been convicted of a crime that requires sex offender registration." CP 19. The trial court found that the offense was unranked and sentenced Reade to 60 days. CP 27-35.

In cause number 06-1-00343-1, Reade pled guilty to felony violation of sex offender registration. CP 80-87. In support of his plea, Reade stated:

"I have previously been convicted of a sex-offense, and I am required by law to register my address or location with the sheriff's office. I was aware of this requirement and had been registering as a transient. During the period from around January 17 to January 23, 2006, in Thurston County, I missed two consecutive weeks of transient reporting, which was a violation of registration requirements."

CP 86. The Judgment and Sentence noted that Reade had a prior conviction for Sexual Intercourse with a Minor (15 y/o victim). CP

89. The trial court found that the offense was unranked and sentenced Reade to 90 days. CP 88-97.

In cause number 08-1-01465-1, Reade pled guilty to felony violation of sex offender registration, and two counts of attempted indecent exposure. CP 122-128. The prosecutor's statement of criminal history again listed a 2002 conviction for Sexual Intercourse with a Minor (15 y/o victim). CP 120. By the time of the conviction, felony violation of sex offender registration had become a ranked offense if it was a second or subsequent conviction and the trial court sentence Reade to serve 43 Months. CP 131-141.

This appeal followed Reade's convictions. On July 21, 2017, Reade filed a Statement of Additional Grounds for Review, in which he added a claim of ineffective assistance of counsel in 04-1-02172-7, claims that his plea in 04-1-02172-7 was involuntary, claims that he did not stipulate to comparability of his California conviction in 04-1-02172-7, therefore his offender score was miscalculated, and claims that he is actually innocent in 05-1-01468-1, 06-1-00343-1 and 08-1-01495-1 because he was not required to register as a sex offender.

C. ARGUMENT.

1. The parties and trial court did not err in calculating Reade's offender score, and he waived his right to challenge his offender score on appeal.

a. Standard of review.

RCW 9.94A.525 guides a trial court's determination of a defendant's offender score at sentencing. In considering out-of-state convictions, it states:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal 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).

Washington courts employ a two-part test to determine the comparability of a foreign offense.

A court must first query whether the foreign offense is *legally* comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is *factually* comparable—that is, whether the conduct underlying

the foreign offense would have violated the comparable Washington statute.

State v. Thiefaul, 160 Wash.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wash.2d 588, 952 P.2d 167 (1998)).

The Washington State Supreme Court has interpreted RCW 9.94A.525 to require “substantial similarity” between the elements of the foreign offense and the Washington offense in order to find them legally comparable. State v. Jordan, 180 Wash.2d 456, 461, 325 P.3d 181 (2015). If the elements of the foreign offense are found comparable to those of a Washington offense, and thus they are legally comparable, then “the inquiry ends” and the foreign crime counts toward the offender score as if it were the comparable Washington crime. Id.

Where the elements of the Washington crime and the foreign crime are not substantially similar, the Washington State Supreme Court has held that the sentencing court may then look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute. In re Personal Restraint of Lavery, 154 Wash.2d 249, 255, 111 P.3d 837 (2005) (citing Morley, 134 Wash.2d at 606). When making that factual comparison, the

sentencing court may rely on facts in the foreign record that are “*admitted*, stipulated to, or proved beyond a reasonable doubt.” Lavery, 154 Wash.2d at 258; State v. Farnsworth, 133 Wash. App. 1, 22, 130 P.3d 389 (2006). If in convicting the defendant, the foreign court “necessarily found facts that would support each element of the comparable Washington crime, then the foreign conviction counts toward the defendant’s offender score.” Farnsworth, 133 Wash. App. at 18 (citing State v. Russell, 104 Wash. App. 422, 441, 16 P.3d 664 (2001)).

Under the SRA, the State bears the burden to prove by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state conviction. State v. Ross, 152 Wash.2d 220, 230, 95 P.3d 1225 (2004) (citing State v. McCorkle, 137 Wash.2d 490, 495, 973 P.2d 461 (1999)). However, the Washington State Supreme Court has stated a defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements. Ross, 152 Wash.2d at 230 (citing State v. Ford, 137 Wash. 2d 472, 483 n. 5, 973 P.2d 452 (1999)). Although the State had sufficient evidence to show the comparability of the out-of-state conviction here, Reade gave such affirmative

acknowledgements that it was properly included in his offender score, relieving the State of this burden.

b. The parties and trial court had sufficient information on Reade's California convictions to make a determination of the offender score.

Reade contends that he was not obligated to register as a sex offender, because his California offense is not comparable to an offense that under Washington law would be a felony sex offense. Statement of Additional Grounds for Review. Reade mistakenly cites "RCW 9.94A.130," and presumably meant to reference the version of RCW 9A.44.130 which was in effect at the time of his 2004 failure to register offense, which states in part:

(10) A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (9)(a) of this section or a federal *or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (9)(a) of this section.*

RCW 9A.44.130(10) (Effective July 27, 2003).

RCW 9A.44.130(9)(a) lists qualifying offenses for registration purposes.

(9) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

(a) "Sex offense" means:

(i) *Any offense defined as a sex offense by RCW 9.94A.030;*

(ii) *Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);*

(iii) *Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);*

(iv) *Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection;*

RCW 9A.44.130(9)(a) (Effective July 27, 2003).

According to RCW 9.94A.030, Rape of a Child Third Degree is included in the list of sex offenses, as referenced in RCW 9A.44.130. Thus, any out-of-state conviction which would be comparable to that offense would create a registration requirement. According to the Judgement and Sentence for Reade's 2004 offense, his California offense was "Sexual Intercourse with Minor (15 y/o victim)", committed in San Mateo, CA in 2001, and sentenced in April 2002. CP 6. The California statute for that offense was California Penal Code § 261.5, Unlawful sexual intercourse with person under 18. The statute in effect at the time of Reade's 2001 California offense reads in part:

261.5. (a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person

under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a *minor who is more than three years younger than the perpetrator* is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

Cal. Penal Code § 261.5(a) (effective 1999).

Reade claims that he is not required to register in Washington because California does not require registration after conviction under Penal Code § 261.5. However, this offense is equivalent to Rape of a Child Third Degree, RCW 9A.44.079, under Washington law.

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator *and the perpetrator is at least forty-eight months older than the victim.*

RCW 9A.44.079(1).

As discussed, this is an offense which creates a registration requirement. The effective date of RCW 9A.44.079 was 1988, so it

was the current version of the statute throughout Reade's failure to register guilty pleas. Where a defendant has been convicted under California Penal Code § 261.5, and the defendant was also at least forty-eight months older than the victim, the defendant would have been convicted under RCW 9A.44.079 if the offense has been committed in Washington. As such, in situations with those facts, the two offenses are factually comparable.

Reade was born on March 26, 1981. CP 4. As such, he was at least nineteen years old for his 2001 offense, and twenty years old if it was committed after his birthday on March 26, 2001. The victim for that offense was fifteen years old. CP 6. Thus, he met the thirty-six month requirement for the California statute, and based on his stipulations in multiple plea hearings, he met the forty-eight month requirement for the comparable Washington offense. This made the two statutes factually comparable for offender score calculation purposes and for determining the requirement that Reade register as a sex offender in the State of Washington. While, the exact age difference for the California offense does not appear in the record because Reade never contested his duty to register or offender score at the trial court, it is reasonable to infer that the parties concluded that Reade was at least 48 months older

than the victim of his California crime. Reade has not shown otherwise, and so this court should not disturb Reade's convictions based on that point without a showing that he was less than forty-eight months older than his victim.

c. Reade affirmatively acknowledged that his California conviction was properly included in the offender score.

Reade claims that he never gave affirmative acknowledgement of his offender score calculation at the time of plea or sentencing; however, he did exactly that each time he plead guilty. In his guilty plea for his 2005 offense, as with his other guilty pleas, Reade affirmed that his offender score, which included his California conviction, was properly calculated. CP 15, 20. Attached to the plea form was the Prosecutor's statement of Criminal History, CP 21, which specifically listed his California offense. In his 2004 offense, Reade affirmatively acknowledged that he had a prior sex offense that required registration. CP 47. In the 2006 offense, Reade again acknowledged that he had previously been convicted of a sex offense, and was required to register. CP 86. Finally, in the 2008 offense, Reade acknowledged his offender score based on his criminal history which included his out of state offense. CP 123. By affirming his conviction was

properly included, Reade gave affirmative acknowledgement that his California offense was comparable to a Washington offense for the purpose of offender score calculation. It should be noted that in the 2004, 2005 and 2006 cases, calculation of Reade's offense score was un-necessary as each of those offenses were unranked.

The Washington State Supreme Court has reaffirmed the holding from Ford in that "a defendant's *affirmative acknowledgment* that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements." Ross, 152 Wash. 2d at 230 (citing Ford, 137 Wash. 2d at 483 n. 5). In Ross, one defendant plead guilty to second degree attempted robbery, and one defendant was found guilty by a jury trial of possession with intent to deliver cocaine. Ross, 152 Wash. 2d at 226-27. Both had out-of-state convictions, which were included in their offender score at sentencing. Id. "Both defendants affirmatively acknowledged at sentencing that their prior out-of-state and/or federal convictions were comparable to Washington State crimes and thus, were properly included in their offender score." Id. at 230. On appeal, they argued that the trial court improperly included their prior out-of-state and/or federal convictions in their offender scores, because the State had not

proven the comparability of those convictions to Washington offenses. Id. The court rejected this argument, and held that the trial court had complied with the SRA in relying on the defendant's affirmative acknowledgements that their offender scores properly included prior out-of-state convictions. Id. at 241.

Reade signed his plea forms in affirmation, which included affirmative acknowledgement that his offender score had been properly calculated with his California offense included. At sentencing, the trial court judge ensured Reade had read the plea form in its entirety, that he understood it, and that he understood by pleading guilty, he was waiving the right to appeal any findings of guilt. RP November 17, 2006 at 3-4; RP April 26, 2005 at 3-. Reade answered each question in the affirmative. Id. He also verbally affirmed that he knowingly failed to register after having been convicted of a crime that required sex offense registration, here being his California offense. Id. at 4. As such, the SRA requirements regarding offender score determination were satisfied in this case.

d. Reade waived his right to challenge the calculation of his offender score on appeal.

The right of a defendant to argue that his offender score has been miscalculated can be waived, particularly in cases where a defendant enters a plea of guilty. State v. Collins, 144 Wash. App. 547, 555, 182 P.3d 1016 (2008); State v. Ross, 152 Wash.2d 220, 95 P.3d 1225 (2004). In Collins, the defendant signed a plea agreement which recommended a specific sentence for second degree assault and unlawful imprisonment with sexual motivation, based on a specific offender score which included out-of-state convictions. State v. Collins, 144 Wash. App. 547, 549, 183 P.3d 1016 (2008). Attached to the plea agreement was a Prosecutor's Understanding of Criminal History which listed defendant's convictions from California, which was signed in affirmation by the defendant, along with scoring forms showing the defendant's calculated offender score, including the out-of-state convictions. Id. at 550-51. At sentencing, after the court had accepted the plea agreement, the defendant then attempted to argue that the trial court could not include the out-of-state convictions in his offender score unless the State proved them to be factually comparable to a Washington offense. Id. at 549. The trial court concluded that the defendant had breached the plea agreement, rescinded it, and reinstated the original charge. Id. The defendant then sought

discretionary review to reinstate the plea agreement, with remand for a revised sentencing hearing during which the trial court would determine the comparability of his California offenses. Id. at 553.

On discretionary review, the defendant argued that it was the responsibility of the court to calculate the offender score correctly, notwithstanding his plea agreement, and further that the State could not prove the California convictions were truly comparable. Id. at 553-54. The court of appeals rejected this argument, finding that the defendant affirmatively acknowledged that his foreign convictions had been properly included in the offender score, and so the trial court did not need further proof of classification before imposing a sentence based on that score. Id. at 555. “When [the defendant] signed the plea agreement and agreed that his criminal history and the scoring forms were “accurate and complete,” he relieved the State of its burden to present certified records proving that his conduct during the commission of the California offenses made those offenses factually comparable to the more narrowly defined Washington offense.” Id. at 557.

Similarly, here Reade signed the plea agreement for each offense and agreed that his criminal history and scoring forms were accurate and complete. In doing so, he relieved the State of its

burden to show that his conduct during his California offenses made those offenses factually comparable to the Washington offenses. Additionally, he waived his right to appeal the sentences which were imposed pursuant to his guilty pleas.

2. Reade's plea of guilty was made knowingly, intelligently and voluntarily.

Reade claims that each of his guilty pleas were involuntary, because he was given incorrect advice about his offender score. However, as discussed, he was given correct advice by his attorney and the court engaged in a colloquy in each of his cases. Reade cites Boykin, where the United States Supreme Court determined a defendant's guilty plea to "commonlaw robbery" offenses, which were death-penalty eligible, was involuntary made. Boykin v. Alabama, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The determinative fact in Boykin was a lack of confirmation by the trial court judge that the defendant was truly pleading guilty. "So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." Id. at 240.

By contrast, here at sentencing for his first offense in 2004, the trial court judge verbally confirmed with the defendant that he

was making a fully informed guilty plea of his own free will, and that he understood the details of his plea. VRP April 26, 2005 at 3-4. Reade verbally affirmed to the court that he understood, and had no questions. Id. “When the defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary.” State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1988). As such, each of Reade’s guilty pleas were voluntarily made.

3. Reade had effective assistance of counsel.

a. Standard of review.

Reade claims that his trial counsel’s failure to object to the trial court’s calculation of his offender score was so deficient and unreasonable that he was deprived of his constitutional right to effective assistance of counsel. Both the Washington and federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Prejudice occurs when trial counsel’s performance is so inadequate that there is a reasonable probability that the result would have differed, undermining confidence in the outcome. Strickland, 466 U.S. at 694. There is a

strong presumption that defense counsel's conduct is not deficient. State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail in an ineffective assistance of counsel claim, a defendant must show that 1) his trial counsel's performance was deficient and 2) this deficiency prejudiced him. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). Prejudice occurs when trial counsel's performance is so inadequate that there is a reasonable probability that the trial result would have differed, undermining confidence in the outcome. Strickland, 466 U.S. at 694. If a defendant fails to establish either prong, the claim automatically fails without consideration of the remaining prong. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (*overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)).

A reviewing court will not find ineffective assistance of counsel if the action complained of goes to trial tactics or the defense theory of the case. State v. Garrett, 124 Wn.2d 504, 520,

881 P.2d 185 (1995). It is also well established that “[a] lawyer may properly make the tactical determination of how to run a trial even in the face of his client’s incomprehension or even explicit disapproval.” Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

b. Defense counsel acted reasonably in not contesting the trial court’s offender score determination.

As discussed, the parties and trial court made a proper determination of the defendant’s offender score. Reade claims that “it would have taken my attorney less than five minutes to google California Penal Code 261.5(c) and determine that it was not legally comparable to a Washington sex-offense.” Statement of Additional Grounds for Review. However, the California and Washington offenses were factually comparable; Reade’s attorney did not need

to google the California Penal code to come to that conclusion. Moreover, Reade himself did not contest the inclusion of his California offense in his offender score at any point, and each time he plead guilty to failing to register, he admitted his understanding that he was required to register. His defense counsel acted as a reasonable attorney in not objecting to the offender score determination, because at each time it was clear that it had been properly calculated.

c. Reade did not suffer prejudice from his counsel's performance.

Reade claims that had he not plead guilty to the first 2004 offense, he would not be registering as a sex offender today under RCW 9.44A.130 because California does not require registration for Unlawful Intercourse with a Minor. Statement of Additional Grounds for Review. Presumably this is in reference to his belief that he would not have plead guilty but for his attorney's performance, and further that he allegedly would have been found innocent of failing to register. However, he misstates the law on this point; under RCW 9.44A.130, defendants convicted in Washington of rape of a child third degree are required to register, and this is the factually comparable offense to his California

conviction. In order to show that the offenses are not factually comparable, as discussed, Reade would need to show that he was not at least forty-eight months older than the victim of the 2001 California offense as required by the Washington statute. As he has not done so, there is no showing that the outcome of his failure to register proceedings would have been different.

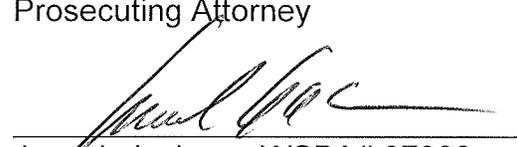
To demonstrate that a defendant was actually prejudiced by failure of counsel, a defendant must show that the trial court would have granted the action had an objection been made. State v. McFarland, 127 Wn.2d at 333-334. “It is not enough that the Defendant allege prejudice--actual prejudice must appear in the record.” Id. at 334. Because this is a direct appeal and not a personal restraint petition, the issues must be decided on the trial records identified on appeal. Id. at 335. On the record available, Reade has shown neither defective performance nor prejudice. Even if his attorney had objected to the comparability of his California offense with the Washington equivalent, the outcome would have been the same, and so he has not suffered prejudice.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Reade's convictions.

Respectfully submitted this 10 day of August, 2017.

JON TUNHEIM
Prosecuting Attorney



Joseph Jackson, WSBA# 37306
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent Addressing Statement of Additional Grounds on the date below as follows:

ELECTRONICALLY FILED AT DIVISION II

TO: DEREK M. BYRNE, CLERK
COURT OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA WA 98402-6045

VIA E-MAIL

TO: CATHERINE E. GLINSKI
GLINSKI LAW FIRM
P O BOX 761
MANCHESTER WA 98353-0761

GLINSKILAW@WAVECABLE.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of August, 2017, at Olympia,
Washington.


CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

August 11, 2017 - 8:17 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49656-9
Appellate Court Case Title: State of Washington, Respondent v. Thomas Carl Reade, Appellant
Superior Court Case Number: 05-1-01468-1

The following documents have been uploaded:

- 7-496569_Briefs_20170811081621D2875454_1664.pdf
This File Contains:
Briefs - Respondents - Modifier: Supplemental
The Original File Name was READE SUPP BRIEF.pdf

A copy of the uploaded files will be sent to:

- glinskilaw@wavecable.com

Comments:

Sender Name: Cynthia Wright - Email: wrightc@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20170811081621D2875454