

No. 49800-6

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

STATE OF WASHINGTON, Respondent

v.

GARY BOGLE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE JUDGE KALO WILCOX

CORRECTED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. In violation of his Sixth Amendment right, Mr. Bogle received ineffective assistance of counsel.
- B. The State failed to prove the comparability of Mr. Bogle's out of state convictions.
- C. Mr. Bogle's period of incarceration in Washington should be set concurrent with the time served in California.
- D. This Court should not impose appellate costs in the event the State substantially prevails on appeal.

Issues Pertaining to Assignments of Error

- A. Did Mr. Bogle receive ineffective assistance of counsel where counsel did not object to the lack of comparability analysis for out of state convictions?
- B. Out of state convictions may not be included in an offender score where the State fails to prove comparability to a Washington offense. Did the trial court err by including Mr. Bogle's California convictions in the offender score without evidence the convictions were comparable to a corresponding Washington offense?

C. RCW 9.94A.589(3) provides that whenever a person is sentenced for a felony committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court subsequent to the commission of the crime being sentenced *unless* the court pronouncing the sentence expressly orders they be served consecutively. Where the trial court did not expressly order that the Washington sentence to be run consecutive to the California sentence is it concurrent?

D. Under RAP 15.2(f) should this Court deny appellate costs if Mr. Bogle does not substantially prevail on appeal and the State submits a cost bill?

II. STATEMENT OF FACTS

On February 3, 2016, Thurston County prosecutors charged Gary Bogle with 3 counts of identity theft in the second degree¹ for the dates of May 16, October 30 and November 7, 2015. CP 8-9. At the time of charging, Mr. Bogle was in California awaiting sentencing for 10 counts of false impersonation in violation of

¹ RCW 9.35.020(1)(3)

California Penal Code 529². The false impersonation convictions were presumably of Mr. Bogle's brother. CP 51-55. Mr. Bogle was sentenced in California to a 16 month incarceration on March 8, 2016. CP 12.

Six days later and 6 weeks after being charged on the Washington counts, he sent a letter to the Thurston County superior court dated March 14, 2016. Mr. Bogle asked the court to remove the extradition hold and to run any Washington criminal sentence, arising from the February charges, concurrent with the California sentence. CP 11.

Ninety days later, June 7th, Mr. Bogle again wrote to the Thurston County superior court. CP 13. He asked the court to lift the extradition hold (from California to Washington) so he could be released instead of being held after he the conclusion of his California sentence³. CP 13.

He was extradited to Washington and made a first appearance on August 1, 2016. The court appointed an attorney

² The only documentation of the California convictions found in the trial court record appears to be a copy of some papers that Mr. Bogle sent to the superior court in a letter he penned, and filed on June 7, 2016. CP 12-14.

³ The trial record is devoid of official documentation from California indicating whether Mr. Bogle served his entire 16-month sentence, when he was released and whether the crimes were misdemeanors or felonies.

for Mr. Bogle. CP 16;19; (8/1/16 RP 5). A month later, Mr. Bogle filed a *pro se* motion entitled “Motion for Sentencing Points Modification.” CP 22-24. Mr. Bogle wanted the court to be mindful of RCW 9.94A.589 (3)⁴ and to find the same criminal conduct for the California convictions. CP 22. The trial court took no action on the motion and defense counsel did not raise the matter to the court. CP 32.

Mr. Bogle wrote several more letters to the court asking the court to appoint new counsel for him and expressing concern that his attorney was not responsive to his questions about his offender score and “does not know anything about what to do.” CP 26-31.

The prosecution filed an amended information and Mr. Bogle pleaded guilty to 2 charges of first degree identity theft and 3 charges of second degree identity theft. (11/30/16 RP 8-9); CP 35-45. The State recommended 84-months, the high end of the standard range. CP 38. The recommendation was a global resolution of cases pending in King County, Thurston County and Grays Harbor. (12/12/16 RP 6). The court accepted the guilty plea

⁴ In his letter, Mr. Bogle referred to it as RCW 9.94A.5891- however, the context and content of the letter are referring to RCW 9.94A.589(3).

as knowingly, voluntarily, and intelligently given. (11/30/16 RP 9-10).

The only documentation used to determine an offender score was the "Prosecutor's statement of criminal history" which read:

The defendant and defendant's attorney hereby stipulate that the above is a correct statement of the defendant's criminal history relevant to the determination of the defendant's offender score in the above-entitled cause.

CP 46.

The paper listed "Criminal Impersonation 1st degree (x10)" with a sentencing date of June 6, 2016. CP 46. The sentence date for the California convictions differed from the documentation Mr. Bogle had earlier sent to the court. The state did not present a certified judgment and sentence, any official documentation from California, or a stipulation agreement as to the offender score. Defense counsel did not object to the lack of official documentation nor did he question the comparability of the out of state offenses. Counsel did not notify the court that the current offenses Mr. Bogle pleaded guilty to occurred before he was convicted in California. Based on an offender score of 9+, the court imposed an 84-month sentence. CP 59-70.

Mr. Bogle makes this timely appeal. CP 77-78.

III. ARGUMENT

A. Defense Counsel Violated Mr. Bogle's Sixth Amendment Right To Effective Assistance of Counsel.

The Sixth Amendment guarantees a defendant in a criminal case has the right to competent legal counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.799 (1963). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

To establish ineffective assistance of counsel, Mr. Bogle must show that his counsel's performance in failing to object to the lack of documentation, absence of comparability of the California offenses, and failure to raise the issue of same criminal conduct, fell below the objective standard of reasonableness, such that he was deprived of counsel for purposes of the Sixth Amendment. He must further show there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995).

To be included in a Washington state offender score, an out of state conviction for an offense must be classified according to comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3). The burden of proving the existence and comparability of the conviction lies with the prosecution. *State v. Arndt*, 179 Wn.App. 373, 378, 320 P.3d 104(2014).

Bare assertions by the prosecution, whether written or oral, that are unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Here, the "Prosecutor's Statement of Criminal History" document simply listed "Criminal Impersonation, 1st (x10)". There is no California crime of criminal impersonation in the first degree.

Even if the State believed Mr. Bogle admitted such a conviction, a defendant's admission of the fact of the conviction does not relieve the State of its burden to produce reliable evidence for the court to conduct a comparability analysis. *State v. Thiefault*, 160 Wn.2d 409, 424 fn.3, 158 P.3d 580 (2007). Mr. Bogle admitted to the foreign convictions, but he did not stipulate to their

comparability, nor did he stipulate to the underlying facts of the convictions.

In *Thiefault* the Court held that defense counsel was ineffective for failing to object to the superior court's faulty comparability analysis of an out of state conviction. There, in the first trial the court conducted a comparability analysis and found the foreign convictions were legally comparable. *Id.* at 413. On resentencing, new counsel did not challenge the court's previous analysis. *Id.* Thiefault appealed and the Court found not only that the foreign statute was broader than its Washington counterpart, but that counsel was deficient for failing to object to it⁵. *Id.* at 416.

To determine whether a foreign offense is legally comparable, the court compares the elements of the foreign crime with the elements of a Washington offense. Where the elements are the same or substantially similar, the foreign conviction is equivalent and may be included in an offender score. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 254, 111 P.3d 837 (2005). If the foreign crime elements are not identical or are broader than the

⁵ The Court also found the State's motion for leave to file information, the prosecutor's affidavit, and the judgment were insufficient to establish factual comparability. *Id.* at 417.

elements of the Washington offense, they are not legally comparable. *Id.* at 258. The key question is “under what Washington statute could the defendant have been convicted if he had committed the same acts in Washington.” *State v. Weiland*, 66 Wn.App. 29, 33, 831 P.2d 749 (1992).

Assuming the “criminal impersonation 1st” is a reference to California Penal Code § 529 “False Personation of Another”, there is no equivalent crime in Washington⁶. Under California law, false impersonation is a general intent crime. It requires that a defendant intentionally falsely impersonate another, and in such assumed character, perform **any** act that **might** result in liability or benefit to another. The defendant need not have the specific intent to cause the liability or benefit. *People v. Rathert*, 24 Cal.4th 200, 209-210, 6 P.3d 700, 99 Cal.Rptr 779 (2000) (emphasis in the original). Simply possessing or offering another’s birth certificate or driver’s license to substantiate an oral claim of false identity is insufficient to establish felony liability. *People v. Casarez*, 203 Cal. App. 4th 1173, 138 Cal. Rptr 3d 178 (2012).

⁶ PC §529 is referred to as a “wobbler” crime because the court may exercise its discretion to reduce the felony to a misdemeanor and impose punishment accordingly. *People v. Rathert*, 24 Cal. 4th 200, 208, 6 P.3d 700, 99 Cal.Rptr. 2d 779 (2000).

As stated, the trial record here is devoid of reliable evidence of the applicable California statute or whether the convictions were classified as misdemeanors in California. Nevertheless, assuming the State was referencing PC§529, there are two Washington statutes useful in determining comparability.

The Washington identity theft statute, RCW 9.35.020 provides that no person may **knowingly, obtain, possess, use or transfer a means of identification** or financial information of another person, living or dead, **with the intent to commit or to aid or abet any crime**. Unlike the California statute, the Washington statute criminalizes mere possession, and requires a specific intent to commit a crime. RCW 9.35.020.

Similarly, RCW 9A.60.040, criminal impersonation in the first degree, provides that a person is guilty if he assumes a false identity and does an act in his assumed character **with intent to defraud another or for any other unlawful purposes**; or pretends to be a representative of some person or organization as a public servant and does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose.

Unlike the Washington statute, the California crime does not require the specific intent to cause liability to another or benefit to

self. Rather, it requires the individual to intentionally falsely personate another, and do an act that *might* cause liability or benefit. *Rathert*, 24 Cal 4th at 205. Where the foreign jurisdiction's formulation of the crime does not require a specific intent, an element of the Washington offenses, the crimes are not equivalent. *State v. Bunting*, 115 Wn.App. 135, 141, 61 P.3d 375 (2003).

Here, the California crimes are not legally the same as either Washington statute. Where the elements of the crimes are not identical or the foreign statute is broader, the court moves to the second step of the analysis to determine factual comparability. *Thiefault*, 160 Wn.2d 409. The court conducts a limited examination of the undisputed facts of the foreign record that were admitted, stipulated, or proved beyond a reasonable doubt. *State v. Larkins*, 147 Wn.App. 858, 863, 199 P.3d 441 (2008); *State v. Morley* 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998).

This record lacks any certified documentation regarding the underlying facts of the California convictions. Absent reliable and informative documents which could conclusively demonstrate the facts in the California cause, the Court cannot make a factual comparison. The State did not make the required showing for comparability, and the court should not have included the California

convictions in the offender score. *In re Pers. Restraint of Lavery*, 154 Wn.2d at 258.

Failure to object to the inclusion of the offender points without a comparability analysis or reliable documentation was the result of ineffective assistance of counsel. Further, Mr. Bogle was prejudiced by this deficient performance, as he was sentenced to the top of the standard range without the requisite analysis of the previous convictions.

The remedy is for this Court to remand to the superior court to conduct a legal and factual comparability analysis of the California convictions. *Thiefault*, 160 Wn.2d at 417. Only if the convictions are comparable can the out of state convictions be included in the offender score. *Id.* at 415.

B. On Remand, The Superior Court Should Be Instructed To Run The Washington Sentence Concurrent With The California Sentence.

RCW 9.94A.589(3) provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the

current sentence expressly orders that they be served consecutively.

Under the plain language of the statute, a sentencing judge is authorized to impose either a concurrent or consecutive sentence for a crime that the defendant committed before he started to serve a felony sentence for a different crime. *State v. King*, 149 Wn.App. 96, 101, 202 P.3d 351 (2009). Where the court pronouncing the current sentence does **not** order that it be served consecutive it is to be served concurrent to that sentence.

Here, Mr. Bogle was sentenced in Thurston County for felonies he committed before the California sentencing. He was not under any felony sentence at the time of the earlier crimes. The court did not expressly impose a consecutive sentence; thus, his sentence should be served concurrent with any remaining time on the California sentence.

C. This Court Should Not Award Appellate Costs.

Under Rule of Appellate Procedure (RAP) 14.2, a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on appeal, unless the appellate court directs otherwise in its decision terminating review, or the

commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

Where the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, the finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved.

Under RAP 15.2(f), "the appellate court will give a party the benefits of an order of indigency throughout the review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Here, the trial court found Mr. Bogle qualified for an indigent defense at trial and on appeal. CP16;73-76. At sentencing, the court imposed only the mandatory legal financial obligations, as well as restitution in the amount of \$6,951.95. CP 65. Under the rules of appellate procedure, this Court presumes continued indigency. Even if the State were to substantially prevail on appeal, this Court should continue to give Mr. Bogle the benefits of the order of indigency and deny any cost bill submitted by the State.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bogle respectfully asks this Court to remand the matter to the trial court with instructions to determine comparability and conduct a resentencing hearing consistent with RCW 9.94A.525(3).

Respectfully submitted this 3rd day of July 2017.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Gary W. Bogle, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the corrected brief of appellant was sent by first class mail, postage prepaid, on July 3, 2017 to:

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