

FILED
Court of Appeals
Division II
State of Washington
2/13/2019 1:00 PM

NO. 52595-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARYL CLAY REID,

Appellant.

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

The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in including Mr. Reid's Oregon second-degree escape conviction in his offender score calculation when there was no comparability analysis done and Reid did not explicitly agree to its inclusion.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in including Mr. Reid's Oregon second-degree escape conviction in his offender score calculation when there was no comparability analysis done and Reid did not explicitly agree to its inclusion?

C. STATEMENT OF THE CASE

Daryl Clay Reid pleaded guilty to an amended information charging two counts of possession of a controlled substance. RP¹ 4-5; CP 1-2, 3-15. Count 1 charged possession of heroin and Count 2 charged possession of methamphetamine. RP 4-5; CP 1-2. Both possessions occurred on the same day and at the same time, February 8, 2018. CP 1-2; Supplemental Designation of Clerk's Papers, Probable Cause Statement.

¹ The verbatim report of proceedings (VB) is a single, 22 page, volume.

Attorney Kevin Blondin represented Mr. Reid at the plea. RP 25; CP 12. ENo statement of criminal history accompanied the plea form. CP 3-15. The plea form listed Mr. Reid's offender score as 11 on both counts. CP 4.

After the plea and before sentencing, Blondin notified the court Mr. Reid wished to withdraw his guilty plea because of a failure in Blondin's representation. RP 8. The court removed Mr. Blondin. RP 8-9. Attorney Ted DeBray stepped in to represent Mr. Reid and investigate any legal basis to withdraw Reid's guilty plea. RP 9, 11, 16.

DeBray reviewed the record and found nothing to support a motion to withdraw the plea. RP 11-12. Consequently, the court denied Mr. Reid's request to withdraw his guilty plea. RP 12.

At sentencing, the parties discussed a Drug Offender Sentence Alternative (DOSA) Sentence. RP 15-16. Mr. Reid had been evaluated for a DOSA sentence. The evaluation was in the court file. CP 16-24. Rather than being considered for a DOSA sentence, Mr. Reid just asked to be sentenced to the low end of his listed standard range of 12 months plus one day to 24 months. RP 16; CP 4.

The State agreed with the sentencing recommendation. RP 17.

The Prosecutor's Statement of Defendant's Criminal History listed 14 prior convictions for Mr. Reid. CP 28-29. See below pages 4 and 5. The convictions were all from Cowlitz County except Number 4 listed as an escape in the second degree committed in Columbia County, Oregon, on October 17, 1996. CP 28.

Before imposing its sentence, the court did not inquire about the factual or legal comparability of the Oregon escape to a Washington felony offense. RP 16-17. The State never mentioned it. RP 16-17. Mr. Reid never explicitly agreed to the comparability orally or in writing. RP 16-17. The State did not provide the court with a certified copy of the judgment and sentence for the Oregon escape. RP 16-17. Yet, the court included the Oregon conviction in Reid's criminal history. CP 28.

The court imposed the recommended sentence and also ordered Mr. Reid to serve 12 months of community custody. RP 17; CP 30-31.

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME V, SV, SO
1	VUCSA (WASHES)	03-1985	COWLITZ CO., WA	11-1984	A	
2	ELUDE (WASHES)	08-20-87	COWLITZ CO., WA 87-1-00341-5	07-20-87	A	
3	MAL MIS 2 (WASHES)	08-20-87	COWLITZ CO., WA 87-1-00341-5	07-20-87	A	
4	ESCAPE 2 (25 MO PRISON) (PAROLED 06/17/98)	12-11-96	COLUMBIA CO., OR 961169	10-17-96	A	
5	ELUDE	01-07-03	COWLITZ CO., WA 02-1-01573-2	12-04-02	A	
6	VUCSA POSS	10-28-03	COWLITZ CO., WA 03-1-01255-3	09-09-03	A	
7	VUCSA POSS	04-29-04	COWLITZ CO., WA 04-1-00472-9	03-30-04	A	
8	VUCSA POSS METH	01-31-07	COWLITZ CO., WA 06-1-01586-7	12-12-06	A	
9	VUCSA POSS METH *(CLASSIFIED AS SAME CRIMINAL CONDUCT AS VUCSA - POSS CHARGE BELOW)	01-31-07	COWLITZ CO., WA 06-1-01177-2	09-12-06	A	
10	VUCSA POSS *(CLASSIFIED AS SAME CRIMINAL CONDUCT AS VUCSA - POSS CHARGE ABOVE)	01-31-07	COWLITZ CO., WA 06-1-01177-2	09-12-06	A	
11	VUCSA POSS (24 MO PRISON)	01-31-07	COWLITZ CO., WA 06-1-00148-3	09-08-05	A	

1 2	ATTEMPT DRUG CRIMES – POSS METH	03-17-10	COWLITZ CO., WA 09-1-01097-5	10-21-09	A	
1 3	VUCSA – POSS SUBOXONE (12+ 1 MO PRISON) (12 MO COMM CUSTODY)	02-09-12	COWLITZ CO., WA 12-1-00079-1	01-19-12	A	
1 4	VUCSA – POSS WITH CORRECTIONAL FACILITY ENHANCEMENT (24 MO PRISON) (12 MO COMM CUSTODY) (REL PRISON 03/12/15) (LAST REL PRISON 08/30/16 – 09/15/16)	03/15/14	COWLITZ CO., WA 13-1-01494-4	11/09/13	A	

**Prior convictions counted as one offense in determining the offender score. RCW 9.94A.525(5)(a)(i).*

Mr. Reid’s judgment and sentence reflects the two possession offenses were the same criminal conduct.² CP 26.

The judgment and sentence listed an offender score of ten in contrast to the offender score of 11 listed on Mr. Reid’s guilty plea form. CP 4, 10.

Mr. Reid appeals from his sentencing and the entry of his judgment and sentence. CP 38.

² See *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994) (possession of two different controlled substances at the same time sentenced as same criminal conduct.) See also RCW 9.94A.589(1)(a) for definition of same criminal conduct.

D. ARGUMENT

Issue: The trial court erred in including an Oregon escape conviction, an alleged felony, in Mr. Reid's criminal history even though Reid did not agree to it and there was no comparability analysis presented by the State or conducted by the court.

The trial court should not have included Mr. Reid's Oregon conviction in his offender score. The inclusion of the Oregon conviction was improper because there was no comparability analysis of the Oregon escape to a Washington felony offense as required by RCW 9.94A.525(3), and because Mr. Reid never affirmatively acknowledged the comparability of his Oregon conviction during the sentencing hearing.

The State bears the burden of proving the existence of prior convictions used in calculating a defendant's sentencing range. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The State must meet its burden regardless of whether a defendant objects to it during the sentencing process. *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). It is only when a defendant affirmatively acknowledges the facts and information necessary to justify the use of a prior conviction in his offender score that the State is relieved of presenting evidence documenting the existence of prior convictions. *State v. Hunley*, 175

Wn.2d 901, 912, 287 P.3d 584 (2012). The elements of the out-of-state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

A defendant's mere agreement with the State's offender score calculation and admission of the existence of an out-of-state conviction is insufficient to constitute an affirmative acknowledgment that an out-of-state conviction meets the terms of the comparability analysis. *State v. Lucero*, 168 Wn.2d 785, 789, 230 P.3d 165 (2010); *State v. Richmond*, 3 Wn. App. 2d 423, 436, 415 P.3d 1208 (2018), *review denied*, 191 Wn.2d 1009 (2018).

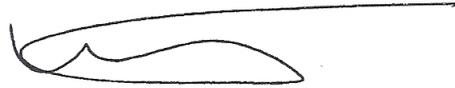
Mr. Reid's record in no way warrants an affirmative acknowledgment of the comparability of the Oregon second-degree escape. Although defense counsel failed to object to the Oregon conviction and, by acquiescing, accepted the State's offender score calculation, neither defense counsel nor Mr. Reid ever affirmatively acknowledged that the Oregon conviction was legally comparable to a Washington offense. RP 15-20. The record also does not support a finding the trial court reviewed a certified copy of the Oregon judgment and sentence for comparability. RP 15-20.

The appellate record lacks sufficient information to resolve whether Mr. Reid's Oregon conviction should have been included in the offender score. Mr. Reid is entitled to remand for resentencing on this issue. *Ford*, 137 Wn.2d at 485-86.

E. CONCLUSION

Mr. Reid's case should be remanded for resentencing and to determine the comparability of the Oregon conviction to a Washington felony offense.

Respectfully submitted February 13, 2019.



LISA E. TABBUT/WSBA 21344
Attorney for Daryl Reid

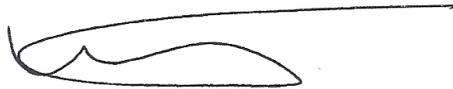
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Daryl Clay Reid, 289 25th Avenue, Longview, WA, 98632.

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

Signed February 13, 2019 in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Daryl Clary Reid, Appellant

LAW OFFICE OF LISA E TABBUT

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Transmittal Information

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