

FILED  
Court of Appeals  
Division II  
State of Washington  
6/11/2019 1:24 PM

NO. 52904-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

ILLYA WATKINS,

Appellant.

---

---

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

The Honorable Chris Lanese, Judge

---

---

BRIEF OF APPELLANT

---

---

DANA M. NELSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	5
1. THE COURT ERRED IN INCLUDING OUT-OF-STATE CONVICTIONS IN WATKINS' OFFENDER SCORE THAT ARE NOT COMPARABLE TO WASHINGTON FELONIES. ....	5
(i) <u>The 1986 California Burglary is Not Comparable             to a Washington Offense.</u> ....	9
(ii) <u>The 1993 Ohio Aggravated Robbery is               Not Comparable to a Washington Offense.</u> ....	12
(iii) <u>The 1993 Ohio Receiving Stolen Property is                Not Comparable to a Washington Offense.</u> ....	17
2. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.....	19
D. <u>CONCLUSION</u> .....	<b>Error! Bookmark not defined.</b>

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Adolph</u> 170 Wash.2d 556, 243 P.3d 540 (2010) .....	6
<u>In re Pers. Restraint of Lavery</u> 154 Wash.2d 249, 111 P.3d 837 (2005) .....	7
<u>State v. Arndt, Jr.</u> 179 Wn. App. 373, 320 P.3d 104 (2014).....	5
<u>State v. Bergstrom</u> 162 Wash.2d 87, 169 P.3d 816 (2007). ....	6
<u>State v. Ford</u> 137 Wash.2d 472, 973 P.2d 452 (1999) .....	5, 6
<u>State v. Johnson</u> 155 Wash. 2d 609, 121 P.3d 91 (2005) .....	16
<u>State v. Lucero</u> 168 Wn.2d 785, 230 P.3d 165 (2010). ....	12
<u>State v. Morley</u> 134 Wash.2d 588, 952 P.2d 167 (1998) .....	6, 8
<u>State v. Richmond</u> 3 Wn. App.2d 423, 415 P.3d 1208 (2018).....	11, 12
<u>State v. Sabala</u> 44 Wash. App. 444, 723 P.2d 5 (1986).....	15

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Thiefaul</u>	
160 Wash.2d 409, 158 P.3d 580 (2007). . . . .	7, 8, 19, 20, 21
<u>State v. Thomas</u>	
135 Wn. App. 474, 144 P.3d 1178 (2006) . . . . .	9, 10
<u>State v. Wiley</u>	
124 Wash.2d 679, 880 P.2d 983 (1994)) . . . . .	5

**FEDERAL CASES**

<u>Strickland v. Washington</u>	
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . . . . .	19, 20

**RULES, STATUTES AND OTHER AUTHORITIES**

1987 Cal. Legis. Serv. 344, sec. 1 . . . . .	9
1995 Ohio Laws File 49 (H.B. 4) . . . . .	17
Cal. Penal Code § 459 (West) . . . . .	9
Laws of 1975, 1 <sup>st</sup> ex. S. c. 260. . . . .	15
Laws of 1987 c 140 sec. 3. . . . .	18
OH ST 2913.51 (1986) . . . . .	17
OH ST 2923.11 (1990); 1990 Ohio Laws File 149 . . . . .	14
OH ST sec. 2911.01 . . . . .	13
OH ST sec. 2911.02; 1995 Ohio Laws File 50 (S.B. 2) . . . . .	13
OH ST section 2911.02 (1982); 1982 H 269, sec. 4 . . . . .	12
RCW 9.94A . . . . .	5

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.94A.500 .....	6
RCW 9.94A.525 .....	6
RCW 9A.52.030 .....	10
RCW 9A.56.140 (1987) .....	18
RCW 9A.56.190 .....	16
RCW 9A.56.200 .....	15
Sentencing Reform Act of 1981 (SRA).....	5
U.S. Const. Amend. VI .....	19

A. ASSIGNMENTS OF ERROR

1. The court erred in including out-of-state convictions in appellant's offender score that are not comparable to Washington offenses.

2. To the extent defense counsel contributed to the error, appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. The state included a California burglary and Ohio convictions for aggravated robbery and receiving stolen property in appellant's offender score. None of these offenses are legally comparable to Washington felonies. Where the state presented no documentation, such as a charging document, to establish a factual comparability, did the court err in including these offenses in appellant's offender score?

2. To the extent counsel contributed to the err by failing to object or by tacitly acknowledging comparability, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

By an amended information, the Thurston county prosecutor charged appellant Illya Watkins with two offenses allegedly committed against his girlfriend Marie Sinfield on September 27,

2018, including: first degree burglary (a strike offense) *or in the alternative* residential burglary; and felony violation of a no contact order (based on prior misdemeanor violations). CP 4-5. The prosecutor also charged Watkins with one count involving Sinfield's daughter Nicole Sinfield, arising out of the same incident: second degree assault (allegedly because Watkins squirted Nicole<sup>1</sup> with bleach during a verbal argument while Watkins was cleaning the kitchen), *or in the alternative*, fourth degree assault. CP 4-5.

As alluded to above, the totality of the charges stemmed from an incident allegedly involving a spray bottle. CP 1-2. Allegedly, Watkins squirted Nicole with bleach because she wanted to make something to eat and he was cleaning the kitchen. Nicole called the police and reported the incident and also reported that there was a no contact order prohibiting Watkins from being within 500 feet of Marie's residence, where they all lived. CP 1. But Marie was not even at home at the time. RP 15.<sup>2</sup>

The prosecutor and Watkins ultimately reached a settlement. Watkins entered an Alford plea to FVNCO in exchange for a joint recommendation for a prison based DOSA and the state agreed to

---

<sup>1</sup> Because Nicole and Marie Sinfield share the same last name, first names will be used to avoid confusion. No disrespect is intended.

drop counts (1) and (3). CP 27-32. Watkins' motivation was to avoid any possibility of striking out on the alleged burglary or second degree assault charge, although there were many defenses he could have asserted had he gone to trial. RP 19.

The state's motivation was to take into account Watkins' substance abuse issues, as well as Marie's wishes. RP 10-11.

Marie spoke eloquently on Watkins' behalf at his sentencing:

When the original case happened, I tried to – I filed a non – an affidavit of non-prosecution, and I tried to have the no contact order modified three times. Each time it was denied, and in the last instance the judge told me that he could not modify the order because I was not a party to the action and my rights were not at issue. But this order has really had a huge, significant impact on my life, and the fact that they say that my rights are not at issue when this whole thing is supposed to be about me is very disturbing. It has caused me a great deal of stress and anxiety to understand how this could have happened. (Inaudible) when I called 911, I had no idea that there was any kind of mandate for arrest. I had no idea that the State could impose a no-contact order on us. I'd never been involved in the criminal system at all, so when I was told that, I said I don't need that. I'm not afraid of him. He was shredding up work papers. That's what he was doing. And they said it didn't matter because it was between the State and him. It did matter to me. It was – it did impact me. It impacted me a lot. (Inaudible) the Constitution is not an instrument for the government to restrain the people. It's an instrument for the people to restrain the government (inaudible) to dominate our lives and

---

<sup>2</sup> "RP" refers to the plea and sentencing hearing on October 17, 2018.

interests. This no-contact order clearly dominated my life.

When I met Mr. Watkins, I (inaudible) cancer. I was finishing chemo. I was bald. I was in a black hole. I was about to lose my job that I had for nine years, and he saved me. He saved me. And no one asked me about that.

RP 13-14.

Based on Marie's wishes, the court did not impose a new no contact order as a condition of sentence. RP 25.

The state calculated Watkins' standard range as 51-60 months, based on offender score of 7. CP 28. This calculation included 3 points for the following out-of-state convictions:

<u>Crime</u>	<u>Sentencing Court</u>	<u>Crime Date</u>
Burglary 1 <sup>st</sup>	Long Beach, CA	3/12/1986
Receiving Stolen Property	Richland Co, OH	7/19/1993
Aggravated Robbery	Richland Co, OH	7/19/1993

CP \_\_ (sub. no. 79, Prosecutor's Statement of Criminal History, 10/17/18).

The court imposed a prison based DOSA based on half the mid-point of the standard range (as calculated) – 55.5 months – divided into 27.75 months of incarceration and 27.75 months of community custody. CP 36.

C. ARGUMENT

1. THE COURT ERRED IN INCLUDING OUT-OF-STATE CONVICTIONS IN WATKINS' OFFENDER SCORE THAT ARE NOT COMPARABLE TO WASHINGTON FELONIES.

The 1986 California burglary conviction is not comparable to a Washington felony. Neither is the 1993 Ohio conviction for receiving stolen property or aggravated robbery. The court erred in including these in Watkins' offender score. Watkins maintains defense counsel did not acknowledge comparability. But to the extent counsel did, Watkins received ineffective assistance of counsel. Resentencing is required. State v. Arndt, Jr., 179 Wn. App. 373, 320 P.3d 104 (2014).

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the sentencing court uses the defendant's prior convictions to determine an offender score, which along with the "seriousness level" of the current offense establishes his or her presumptive standard sentencing range. State v. Ford, 137 Wash.2d 472, 479, 973 P.2d 452 (1999) (quoting State v. Wiley, 124 Wash.2d 679, 682, 880 P.2d 983 (1994)). This Court reviews a sentencing court's calculation of an offender score de

novo. State v. Bergstrom, 162 Wash.2d 87, 92, 169 P.3d 816 (2007).

The State must prove the existence of prior felony convictions used to calculate an offender score by a preponderance of the evidence. Ford, 137 Wash.2d at 479–80, 973 P.2d 452; see also RCW 9.94A.500(1). If the convictions are from another jurisdiction, the State also must prove that the conviction would be a felony under Washington law. Ford, 137 Wash.2d at 480, 973 P.2d 452. “The existence of a prior conviction is a question of fact.” In re Pers. Restraint of Adolph, 170 Wash.2d 556, 566, 243 P.3d 540 (2010).

Where the defendant's offenses resulted in out-of-state convictions, RCW 9.94A.525(3) provides that such offenses “shall be classified according to the comparable offense definitions and sentences provided by Washington law.” This statute requires the sentencing court to make a factual determination of whether the out-of-state conviction is comparable to a Washington conviction. State v. Morley, 134 Wash.2d 588, 601, 952 P.2d 167 (1998) (citing former 9.94A.360 (1996), recodified as RCW 9.94A.525 by laws of 2001, ch. 10, § 6). Only if the convictions are comparable can the

out-of-state conviction be included in the offender score. State v. Thiefault, 160 Wash.2d 409, 415, 158 P.3d 580 (2007).

Our Supreme Court has adopted a two-part analysis for determining whether an out-of-state conviction is comparable to a Washington conviction. Thiefault, 160 Wash.2d at 414–15, 158 P.3d 580. First, the sentencing court determines whether the offenses are *legally* comparable – i.e. whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. Thiefault, 160 Wash.2d at 415, 158 P.3d 580. If the elements of the out-of-state offense are broader than the elements of the Washington offense, they are not legally comparable. In re Pers. Restraint of Lavery, 154 Wash.2d 249, 258, 111 P.3d 837 (2005).

Second, even if the offenses are not legally comparable, the sentencing court can still include the out-of-state conviction in the offender score if the offense is *factually* comparable. Thiefault, 160 Wash.2d at 415, 158 P.3d 580; Lavery, 154 Wash.2d at 255, 111 P.3d 837. Determining factual comparability involves analyzing whether the defendant's conduct underlying the out-of-state conviction would have violated the comparable Washington statute. Thiefault, 160 Wash.2d at 415, 158 P.3d 580. The

sentencing court may “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.” Lavery, 154 Wash.2d at 255, 111 P.3d 837. In making this factual comparison, the sentencing court may rely on facts in the out-of-state record only if they are admitted, stipulated to, or proved beyond a reasonable doubt. Thiefault, 160 Wash.2d at 415, 158 P.3d 580. But the elements of the charged crime must remain the cornerstone of this inquiry because “[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.” Lavery, 154 Wash.2d at 255, 111 P.3d 837 (quoting Morley, 134 Wash.2d at 606, 952 P.2d 167).

If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the sentencing court may not include the conviction in the defendant's offender score. Thiefault, 160 Wash.2d at 415, 158 P.3d 580.

(i) The 1986 California Burglary is Not Comparable to a Washington Offense.

Division One of this Court has already held that California burglary is not legally comparable to Washington burglary. State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006). Under Cal. Penal Code sec. 459:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Cal. Penal Code § 459 (West). The law was essentially the same in 1986 but did not list as many specific properties. See 1987 Cal. Legis. Serv. 344, sec. 1.

The California burglary statute is much broader than Washington's, which requires proof of an unlawful entry. Compare:

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030. California burglary also encompasses a much broader range of property. Thomas, at 478.

Because the California burglary is not legally comparable to a Washington felony, the court could not include it in Watkins' offender score unless the state proved factual comparability. See Thomas, at 483-84. The state failed to do so, as it presented no documentation regarding the underlying facts of the crime. Thomas, at 487 ("the trial court's decision to include the 1980 and 1982 California burglary conviction in Thomas's offender score was error.").

In response, the state may try to argue Watkins waived the error because he affirmatively acknowledged the California burglary was properly included in his offender score. Any such argument should be rejected.

Watkins' Statement of Defendant on Plea of Guilty, contains the following boilerplate language:

The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete.

CP 28. However, this is merely an agreement that the convictions exist, not that they are comparable. Moreover, the section wherein the prosecutor indicated her recommendation would be for a prison based DOSA of 27.75 months of incarceration and 27.75 months of community custody, defense counsel did not join. CP 30. The recommendation was purely the state's. CP 30. And at sentencing, defense counsel said nothing about the offender score or criminal history. RP 18-21. Thus, there was no "affirmative acknowledgment" the burglary was comparable.

Division Three of this Court has recently held the same under similar conditions. State v. Richmond, 3 Wn. App.2d 423, 415 P.3d 1208 (2018). There, the defense agreed with the state's offender score calculation. But the court held such did not amount to an affirmative acknowledgment of comparability:

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.

Richmond, 3 Wn. App.2d 423 (2018) (citing State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010)).

The circumstances here are no different – there was mere agreement to the existence of the out-of-state conviction. This Court should find the sentencing error is preserved. But in the event it does not, Watkins received ineffective assistance of counsel. See infra.

(ii) The 1993 Ohio Aggravated Robbery is Not Comparable to a Washington Offense.

In 1993, Ohio provided one could commit robbery in one of two ways:

Sec. 2911.01 (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such the attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control

(2) Inflict, or attempt to inflict serious physical harm on another

(B) Whoever violates this section is guilty of aggravated robbery, an aggravated felony of the first degree.

OH ST section 2911.02 (1982); 1982 H 269, sec. 4.

The statute was amended as follows in 1995:

Sec. 2911.01 (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after <<-such->> <<+the+>> attempt or offense, shall do <<- either->> <<+any+>> of the following:

(1) <<-Have a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;->>

<<-(2) Inflict, or attempt to inflict serious physical harm on another->> <<+Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;+>>

<<+(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;+>>

<<+(3) Inflict, or attempt to inflict, serious physical harm on another.+>>

(B) Whoever violates this section is guilty of aggravated robbery, <<-an aggravated->> <<+a+>> felony of the first degree.

<<+(C) As used in this section, "deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.+>>

OH ST sec. 2911.02; 1995 Ohio Laws File 50 (S.B. 2). Thus, prior to 1995, an Ohio citizen could be convicted of aggravated robbery for attempting to commit a theft offense with a concealed "ordnance" or weapon on his person or in his control. It was not

necessary that he or she either display the weapon, brandish it, indicate that the offender possesses it, or use it.” Moreover, the statute included – not just deadly weapons – but “dangerous ordnances:”

(K) “Dangerous ordnance” means any of the following, except as provided in division (L) of this section:

(1) Any automatic or sawed-off firearm, zip-gun, or ballistic knife;

(2) Any explosive device or incendiary device;

(3) Nitroglycerin, nitrocellulose, nitrostarch, PETN, cyclonite, TNT, picric acid, and other high explosives; amatol, tritonal, tetrytol, pentolite, pecretol, cyclotol, and other high explosive compositions; plastic explosives; dynamite, blasting gelatin, gelatin dynamite, sensitized ammonium nitrate, liquid-oxygen blasting explosives, blasting powder, and other blasting agents; and any other explosive substance having sufficient brisance or power to be particularly suitable for use as a military explosive, or for use in mining, quarrying, excavating, or demolitions;

(4) Any firearm, rocket launcher, mortar, artillery piece, grenade, mine, bomb, torpedo, or similar weapon, designed and manufactured for military purposes, and the ammunition therefor;

(5) Any firearm muffler or silencer;

(6) Any combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.

OH ST 2923.11 (1990); 1990 Ohio Laws File 149.

The offense most similar in Washington is first degree robbery. Prior to 2002, it provided:

(1) A person is guilty of robbery in the first degree if

In the commission of a robbery or of immediate flight therefrom, he

(a) Is armed with a deadly weapon; or

(b) Displays what appears to be a firearm or other deadly weapon; or

(c) Inflicts bodily injury

(2) Robbery in the first degree is a class A felony.

RCW 9A.56.200; Laws of 1975, 1<sup>st</sup> ex. S. c. 260.

To be “armed” meant having a weapon which is readily available and accessible to his or her use for either offensive or defensive purposes. State v. Sabala, 44 Wash. App. 444, 448, 723 P.2d 5, 7 (1986). Being “armed” – having a weapon immediately accessible for offensive or defensive purposes – requires more than merely having a weapon or “dangerous ordnance” on or about an offender’s person.

And in Washington, to be guilty of first degree robbery, the accused must commit robbery, not just attempt a theft offense. A person commits robbery by unlawfully taking personal property from another against his will by the use or threatened use of force to take or retain the property. “Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. RCW 9A.56.190; State v. Johnson, 155 Wash. 2d 609, 610–11, 121 P.3d 91, 92 (2005). In contrast, it would be possible to commit aggravated robbery in Ohio without even committing robbery.

The elements of the Ohio and Washington statutes are not legally comparable. The onus therefore was on the state to prove factual comparability. It did not. As with the California burglary conviction, the state provided no documentation establishing the facts underlying the conviction. As with the California burglary, defense counsel did not affirmatively acknowledge its comparability. The court therefore erred in including it in Watkins’ offender score. Resentencing is required.

(iii) The 1993 Ohio Receiving Stolen Property is Not Comparable to a Washington Offense.

Until its amendment in 1995, the Ohio receiving stolen property statute provided:

Sec. 2913.51. (A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property. If the value of the property involved is less than three hundred dollars, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is three hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, or if the offender previously has been convicted of a theft offense, receiving stolen property is a felony of the fourth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the value of the property involved is five thousand dollars or more and is less than one hundred thousand dollars. or if the offender previously has been convicted of two or more theft offenses, receiving stolen property is a felony of the third degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the second degree.

OH ST 2913.51 (1986); see 1995 Ohio Laws File 49 (H.B. 4)

(emphasis added).

The most similar crime in Washington is possession of stolen property. But in Washington, the person had to actually know the property was stolen:

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person not an issuer or agent thereof has in his possession or under his control stolen access devices issued in the names of two or more persons, he shall be presumed to know that they are stolen.

This presumption may be rebutted by evidence raising a reasonable inference that the possession of such stolen access devices was without knowledge that they were stolen.

RCW 9A.56.140 (1987); Laws of 1987 c 140 sec. 3.

As a result, the offenses are not legally comparable. The state presented no evidence to show factual comparability. Defense counsel did not affirmatively acknowledge comparability. The court therefore erred in including this Ohio receiving offense in Watkins' offender score.

2. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

To the extent defense counsel contributed to the inclusion of the out-of-state priors in Watkins' offender score, Watkins received ineffective assistance of counsel. See e.g. State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007) (counsel ineffective for failing to object to court's faulty comparability analysis).

To prevail on a claim of ineffective assistance of counsel, Watkins must demonstrate (1) that his lawyer's performance in not objecting to the comparability of his offenses was so deficient that he was deprived of counsel for Sixth Amendment purposes and (2) there is a reasonable probability the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Thiefault is directly on point. Thiefault's attorney failed to object to the comparability of Thiefault's attempted robbery conviction from Montana. Thiefault, 160 Wn.2d at 414. The Court of Appeals agreed that Thiefault's attorney provided deficient performance by failing to object, because the Montana offense was broader than its Washington counterpart; the Montana statute required a lesser mens rea. The Court further concluded it could

not determine whether the offenses were factually comparable because the record provided by the state – including a motion for leave to file information, an affidavit from a prosecutor, and a judgment – did not include facts Thieffault admitted. Thieffault, at 415-16.

Nevertheless, the appellate court held Thieffault could not satisfy Strickland's second prong and establish with reasonable probability that his counsel's failure to object to the comparability analysis prejudiced his case. The court reasoned that the superior court would likely have given the state the opportunity to obtain information properly establishing the facts underlying Thieffault's Montana conviction had his attorney objected. The court further reasoned that Thieffault did not demonstrate a reasonable probability that the facts underlying the Montana conviction would not have satisfied the Washington crime. The court therefore concluded Thieffault's counsel was not ineffective. Thieffault, at 416.

The Supreme Court agreed counsel provided deficient performance by failing to object to the comparability of the Montana conviction, but disagreed that Thieffault had not established prejudice. Thieffault, at 417.

The Court of Appeals improperly found that such deficient representation did not prejudice Thiefault. Although the state may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable; in which case, the superior court could not have deemed the Montana conviction a “strike” for purposes of the POAA.

Thiefault, at 417. The court vacated Thiefault’s sentence and remanded the case to superior court to conduct a factual comparability analysis of the Montana conviction. Id.

Just as Thiefault’s attorney provided deficient representation by failing to object to the comparability of the Montana conviction, Watkins’ attorney provided deficient representation by failing to object to the comparability of the California burglary and the Ohio robbery and receiving convictions. Just as the Montana attempted robbery offense was broader than its Washington counterpart, the out-of-state convictions at issue here are broader than their Washington counterparts, as discussed above.

Like Thiefault, Watkins was prejudiced by his attorney’s failure to object. These out-of-state convictions were old. It is unlikely any documentation for them still exists. Computers were not a mainstay in 1986 and fairly novel in 1993. It is likely that the

court files for these offenses have long been destroyed. As a result, it is highly unlikely that the state would ever be able to prove the specifics of the convictions. Like the court in Thiefault, this Court should accordingly vacate Watkins' sentence and remand for a factual comparability analysis of the California and Ohio convictions.

D. CONCLUSION

Several out-of-state convictions included in Watkins' offender score calculation are not legally comparable to Washington offenses. Because the state failed to present any evidence to prove factual comparability, this Court should vacate Watkins' sentence and remand for resentencing.

Dated this 11<sup>th</sup> day of June, 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH



---

DANA M. NELSON, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**June 11, 2019 - 1:24 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52904-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Illya Napoleon Watkins, Appellant  
**Superior Court Case Number:** 17-1-01733-1

**The following documents have been uploaded:**

- 529041\_Briefs\_20190611132358D2799649\_6380.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BOA 52904-1-II.pdf*

**A copy of the uploaded files will be sent to:**

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

**Comments:**

Copy mailed to: Illya Watkins 791683 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20190611132358D2799649**