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Court of Appeals
Division II
State of Washington
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No. 52904-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

Illya N. Watkins

Appellant.

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

The Honorable Chris Lanese, Judge
Cause No. 17-1-01733-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial Court erred in including out-of-state convictions in appellant's offender score when the appellant stipulated to the inclusion of his out-of-state convictions in his offender score.

2. Whether appellant's claims of ineffective assistance of counsel during his plea overcome the strong presumption of efficient counsel when the record does not demonstrate deficient performance or prejudice to the appellant.

B. STATEMENT OF THE CASE.

The appellant Illya N. Watkins was charged with residential burglary domestic/domestic violence and felony violation of a no contact order/domestic violence, in Thurston County cause number 17-1-01733-34. CP 3. The charges were later amended to burglary in the first degree/domestic violence or, in the alternative, residential burglary/domestic violence, felony violation of a no contact order/domestic violence, and assault in the second degree/domestic violence or, in the alternative, assault in the fourth degree/domestic violence. CP 4-5. Based on his prior criminal history, the State notified Watkins of its intent to seek sentencing as a persistent offender. Supp CP __.

Watkins eventually accepted a plea agreement, in which the State agreed to recommend a drug offender sentencing alternative on a plea to a single count of felony violation of a no contact order. CP 27-32. The State also agreed to dismiss counts 1 and 3, and dismiss other charges in Thurston County cause number 18-1-01225-34. RP 3, CP 30.

In his statement of defendant on plea of guilty, Watkins acknowledged, “[e]ach crime with which I am charged carries a maximum sentence, a fine, and a Standard Sentencing Range as follows” and listed below for count 2 was an indication that his offender score was seven, and his standard range was 51-60 months. CP 28. The statement further indicated “[t]he 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 complete and accurate.” CP 28. A prosecutor’s statement of criminal history was filed along with the statement of defendant on plea of guilty, which included Watkins’ and his counsel’s signatures. Supp Cp. ___.

Above Watkins’ signature on the statement of criminal history, was the acknowledgement,

The defendant and the 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.

Supp CP. _____. During his plea hearing, the trial court inquired of Watkins, "Do you understand what an offender score is" to which Watkins responded, "yes." RP 6. The Court continued,

Based on your offender score, the standard range for the crime you're intending to plead guilty to is as follows . . . so as to Count 2, the count you're intending to plead guilty to, actual confinement of 51 to 60 months, community custody of 12 months, and a maximum term and fine of five years and \$10,000. Do you understand that?

RP 6-7. Watkins responded, "yes." RP 7.

During the State's sentencing recommendation, the prosecutor stated,

[a]s the Court can tell from the defendant's criminal history, had he been convicted in the 1733 case, he was facing a third strike that carried with it the possibility – or that carried with it the possibility, if convicted, of life imprisonment. This recommendation for a prison-based DOSA is a joint recommendation by the parties.

RP 10. Watkins counsel did not disagree, stating, "we appreciate the State's willingness to make this recommendation." RP 19. The trial court adopted the "jointly recommended sentence." RP 24. This appeal follows.

C. ARGUMENT.

1. Watkins stipulated to the inclusion of his out of state convictions in his offender score.

Before he made his plea, the parties presented the court with a stipulation, signed by the prosecutor, the defense attorney, and the defendant, setting forth Watkins' criminal history and his offender score. Attached to the stipulation was a score sheet from the Sentencing Guidelines Manual expressly detailing the prior and other current convictions that were counted in the offender score. Supp CP ___. According to that score sheet, the score of seven was reached by adding seven prior felony convictions. Supp CP ___.

RCW 9.94A.525 sets forth the process for calculating an offender score. Generally speaking, each prior felony conviction that has not washed out counts as one point. RCW 9.94A.525(1) and (2). Out-of-state convictions are to be classified according to the comparable Washington offense. RCW 9.94A.525(3). If a defendant affirmatively acknowledges his criminal history, the State is not required to produce the evidence to support it. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Emphasis added.

Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have 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.

State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004), citing to State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452. Mere failure to object to the State's summary of criminal history does not constitute an acknowledgment, even if the defendant agrees with the State's standard range calculation. Mendoza, 165 Wn.2d. at 928.

Watkins' stipulation is unquestionably an "affirmative acknowledgment" and not merely a failure to object. "[S]ince [the defendant] affirmatively acknowledged at sentencing that his prior out-of-state convictions were properly included in his offender score, we hold the sentencing court did not violate the SRA nor deny him due process." Ross, 152 Wn.2d at 233. Watkins has waived a challenge to the comparability of his foreign convictions.

A defendant cannot, however, waive a challenge to a miscalculated offender score. State v. Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). He can waive factual errors, or errors involving the trial court's discretion, but he cannot waive a legal

error. Id. It is apparent, however, that Watkins' offender score was correctly calculated — seven prior felonies. No comparability analysis was required regarding the California and Ohio felony convictions because he stipulated to their comparability and has, thus, waived any challenge on that basis. There was no error and this matter should not be remanded for resentencing. See, State v. Collins, 144 Wn. App. 547, 555, 182 P.3d 1016 (2008), *review denied*, 165 Wn.2d 1032, 203 P.3d 381 (2009) (the right to argue that an offender score was miscalculated can be waived).

Watkins argues that his case is very similar to State v. Richmond, 3 Wn. App.2d 423, 436-437, 415 P.3d 1208 (2018), where Division III of this Court held that the defendant had not affirmatively acknowledged that his Idaho conviction was comparable to Washington law at sentencing following trial. That case is easily distinguishable from Watkins' case because there was no agreed upon jointly recommended sentence and Richmond's counsel specifically argued that the Idaho offense wasn't even a crime in Washington before agreeing to its inclusion in the offender score. Id. at 430.

Watkins affirmatively acknowledged that his California and Ohio convictions were properly included in his offender score by

executing his statement of defendant on plea of guilty, acknowledging the correct standard range was based on an offender score of seven, signing the acknowledgment on the prosecutor's statement on criminal history, which had a score sheet attached identifying the offender score as seven, and affirmatively acknowledging to the trial court that he understood his offender score and acknowledging that his standard range was 51-60 months. As in State v. Collins, Watkins affirmatively acknowledged the inclusion of his prior convictions by entering a plea agreement to a negotiated resolution. 144 Wn. App. at 556. His sentence was correct.

2. Watkins has not demonstrated that his trial counsel rendered ineffective assistance of counsel during his plea.

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 on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132

Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

To determine the comparability of a foreign offense, Washington courts first determine whether the foreign offense is legally comparable—meaning, whether the elements of the foreign offense are substantially similar to the Washington offense. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the crime are not identical or the foreign statute is broader, the court then determines factual comparability. Offenses

are factually comparable when the conduct for which the defendant was convicted would have violated a Washington statute. State v. Olsen, 180 Wn.2d 468, 473, 325 P.3d 187 (2014). To determine factual comparability, the court may rely on facts that were admitted, stipulated, or proved to the fact finder beyond a reasonable doubt. Olsen, 180 Wn.2d at 473-74.

Here, as argued above, Watkins stipulated to the inclusion of his out of state convictions in his offender score and, therefore, the State was not required to provide further evidence based on his affirmative acknowledgement. Ross, 152 Wn.2d at 233. To demonstrate prejudice in his claim of ineffective assistance of counsel, Watkins must show a reasonable probability that the outcome of the proceedings would have been different absent the deficient performance of his counsel. State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Thus, he needs to demonstrate that his California and Ohio convictions were neither legally nor factually comparable to a Washington offense.

He cannot carry his burden of demonstrating a lack of factual comparability on this record. Matters outside the record at trial are not considered in a direct appeal. State v. McFarland, 127 Wn.2d at 335. Watkins cannot demonstrate that his counsel's performance

was deficient or that it prejudiced him. The clear implication from the record is that Watkins' counsel negotiated an agreed resolution that avoided the possibility of sentencing as a persistent offender. Watkins cannot meet his heavy burden of demonstrating ineffective assistance of counsel.

D. CONCLUSION.

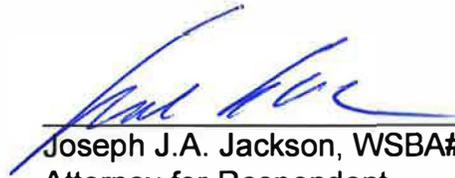
It is clear that Watkins affirmatively acknowledged the inclusion of his California and Ohio convictions in his offender score by accepting a plea agreement to a jointly recommended sentence that was based on an offender score that included them. Nothing in this record demonstrates that Watkins' counsel provided ineffective assistance in the plea process. To the contrary, the record demonstrates that his counsel very effectively negotiated a resolution for Watkins that avoided potentially more serious consequences. There is no error in this record.

If this Court, for any reason, decides that a resentencing hearing is necessary, the State should be given the opportunity to provide evidence of factual comparability and provide argument, if the State so chooses, that Watkins has breached his plea agreement. See, State v. Jones, 182 Wn.2d 1, 10-11, 338 P.3d

278 (2014); RCW 9.94A.530(2); State v. Collins, 144 Wn. App. at 558.

The State respectfully request that this Court affirm Watkins' conviction and sentence.

Respectfully submitted this 16th day of July, 2019.


Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: July 16, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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