

31641-6-III  
COURT OF APPEALS  
DIVISION III

FILED  
JAN 14, 2014  
Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS R. LEVITON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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## I.

### APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erroneously calculated defendant's offender score by including out-of-state convictions that are not comparable to Washington felonies.
2. Defendant received ineffective assistance when counsel did not determine the comparability of defendant's out-of-state convictions before stipulating as part of his guilty plea.
3. Defendant's stipulation to the comparability and inclusion of out-of-state convictions in his offender score was not knowing and voluntary due to ineffective assistance of counsel.
4. The court erroneously calculated defendant's offender score.
5. The trial counsel rendered ineffective assistance.

## II.

### ISSUES PRESENTED

1. Did counsel render ineffective assistance by not validating defendant's criminal history prior to his guilty plea?
2. Did the State prove the comparability of defendant's out-of-state convictions for purposes of calculating his offender score?

3. Was defendant's stipulation to the comparability and inclusion of his out-of-state convictions in his offender score knowing, intelligent, and voluntary?
4. Was defendant prejudiced by counsel's ineffective assistance?
5. Is remand for resentencing the proper remedy?

### III.

#### STATEMENT OF THE CASE

The respondent accepts the appellant's statement with the following additional information. The appellant's statement of the case cites to the pertinent court dates without noting the reasons for the appearance of three separate counsel and the passing of eleven months between the entry of defendant's guilty plea and sentencing. All three of defendant's counsel addressed the issue of the comparability of defendant's out-of-state convictions.

Defendant's first counsel successfully gained the concessions from the State that some of defendant's out-of-state convictions constituted the same course of criminal conduct and others "washed out" under the sentencing statutes. May 30, 2012 RP 4-9; CP 40-49. Defendant's second counsel moved the trial court to permit defendant to withdraw his guilty plea because he claimed that the offender score improperly included out-of-state convictions that were not comparable to Washington felonies. October 16, 2012 RP 4-20; CP 40-49.

However, the trial court held that defendant had not satisfied his burden of proof in support of the motion. October 16, 2012 RP 7-20; CP 53. Defendant's third counsel reiterated the issue of the comparability of the out-of-state convictions at the time of sentencing. November 20, 2012 RP 21-44. Finally, defendant's fourth counsel again raised the issue of the comparability of defendant's out-of-state convictions after defendant failed to comply with the residential-DOSA sentence he received for a second time. April 12, 2013 RP 2-22; and April 18, 2013 RP 53-70.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT PROPERLY INCLUDED DEFENDANT'S OUT-OF-STATE CONVICTIONS IN CALCULATING HIS OFFENDER SCORE.

Defendant claims that the trial court erroneously included his out-of-state felony convictions in his offender score despite his stipulation to the factual and legal comparability of those convictions. Defendant stipulated to the factual and legal comparability of his prior out-of-state convictions when he pled in the Drug Court to obtain the benefit of an alternative sentence. Defendant negotiated a resolution of his several cases to thereby qualify to be sentenced to a Drug Offender Sentencing Alternative ("DOSA"). The trial court did impose a residential-DOSA pursuant to the plea agreement. Nevertheless, defendant faced

revocation of that sentence when he failed to comply with the conditions of that sentence several times.

Facing revocation, defendant then moved to withdraw his guilty plea claiming an improperly calculated offender score. Defendant contended that his convictions from Montana were neither legally nor factually comparable to felonies in Washington State. The trial court considered the arguments of the parties and denied the motion. October 16, 2012 RP 4-20; November 20, 2012 RP 21-44; CP 53.

It is well established that:

There is a strong public interest in enforcing the terms of voluntarily and intelligently made plea agreements... Between the parties, [plea agreement] are regarded and interpreted as contracts and both parties are bound by the terms of a valid plea agreement. There is no miscarriage of justice when the sentence imposed is the precise sentence requested by the defendant.

*State v. Chambers*, 176 Wn.2d 573, 586-587, 293 P.3d 1185 (2013) (*citing In re Breedlove*, 138 Wn.2d 298, 309-311, 979 P.2d 417 (1999)). Defendant entered into an indivisible agreement that the State detrimentally relied upon in dismissing one case and reducing the charged crime in another case all to facilitate the imposition of the residential-DOSA sentence. Whether a contract is divisible is dependent upon the intent of the parties as objectively manifested. *State v. Chambers*, 176 Wn.2d at 580-581. Here, Mr. Leviton received precisely the sentence he bargained for as he requested on November 20, 2012 RP 37.

Now, on appeal, defendant contends that he received ineffective assistance of counsel during the plea negotiation process because counsel did not independently investigate the legal and factual comparability of his Montana convictions.

The analysis of whether defendant received ineffective assistance of counsel in the calculation of his offender score must start with examination of the court's acceptance of his guilty plea. The Supreme Court has described the standard of review regarding a motion to withdraw a guilty plea as "demanding" due to the extensive safeguards provided to defendants by CrR 4.2(f). *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). More recently, the Supreme Court ruled that CrR 4.2(f) requires that the defendant demonstrate a manifest injustice partially due to these safeguards.

We adopted the uniform standard because an examination of other rules connected to CrR 4.2(f) "prevents a court from accepting a plea of guilty until it has ascertained that it was 'made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" "Thus, we felt, there were sufficient safeguards present before a plea was accepted to protect the defendant against involuntary pleas.

*State v. Robinson*, 172 Wn.2d 783, 791-792, 263 P.3d 1233 (2011) (citations omitted) (internal quotation marks omitted).

In *State v. Osborne*, 102 Wn.2d 87, 684 P.2d 683 (1984), the Supreme Court rejected the defendant's challenge to the denial of his motion to withdraw his guilty plea because the defendant had "specifically stated, several times during

the plea proceedings, that his guilty plea was voluntary and free of coercion.” *Id.*, at 97. The Supreme Court characterized such statements on the record as “highly persuasive evidence of voluntariness” that can only be overcome by evidence rather than a “mere allegation of the defendant.” *Id.*

The court did not err in denying defendant’s motion to withdraw his guilty plea because he proffered insufficient support of his motion. Defendant effectively limited counsel’s ability to render effective assistance by his unwavering insistence on obtaining a residential-DOSA sentence. May 30, 2012 RP 2-14; November 20, 2012 RP 21-44. Defendant bargained for and received a residential-DOSA sentence; however, his own failure to comply with the conditions necessitated the court’s eventual revocation of that sentence months later. RP January 4, 2013 RP 46-50; April 12, 2013 2-22; April 18, 2013 RP 53-70; CP 86-87; CP 88-89; 74-77; CP 91-94. Defendant forced the issue at the revocation hearing by objecting to continuing the hearing until the court could secure a bed date in the treatment program. April 18, 2013 RP 53-70. Defendant forced the court to revoke the residential-DOSA sentence by his repeated failure to comply with the conditions thereof. CP 91-94.

To establish ineffective assistance resulting in a guilty plea, the defendant must show (1) counsel’s performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). To provide

constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001). Nevertheless, to prevail on an ineffective assistance claim, defendant must overcome a “strong presumption that counsel’s performance was reasonable...When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *State v. Kylo*, 166 Wn.2d 856, 862-863, 215 P.3d 177 (2009). “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.” *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Finally, “[i]n a plea bargaining context, effective assistance of counsel merely requires that counsel ‘actually and substantially [assist] his client in deciding whether to plead guilty.’” *State v. Osborne*, 102 Wn.2d at 99 (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)).

Here, the record subsequent to his guilty plea clearly establishes that defendant was convicted of the crimes in Montana. Defendant’s stipulation to his criminal history and offender score was justified. There was no ineffective assistance of counsel rendered with respect to his guilty plea negotiations, the

stipulation of his history and offender score, or his entry of his guilty plea. Defendant received the benefit of his bargain.

The next issue is whether defendant was prejudiced by his stipulation to his offender score and the outcome of the guilty plea process. In the context of a plea, the prejudice prong requires that defendant show that he would not have pleaded guilty and would have insisted on going to trial but for counsel's errors. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-781, 863 P.2d 554 (1993). Clearly, defendant entered his guilty plea with the stipulation to his criminal history and the calculated offender score knowingly, voluntarily, and intelligently. May 30, 2012 RP 2-14; CP 5-13. Defendant negotiated for and received the benefit of his plea bargain but for his own failure to comply with the conditions of the bargained-for-sentence. Such a circumstance cannot be attributed to counsel's failure to render effective assistance. Defendant's bargain included the reduction of a felony drug crime to a misdemeanor in another case (Spokane County Superior Court No. 11-1-01023-7) and the amendment of charges herein to render him eligible for a residential-DOSA sentence. May 30, 2012 RP 2-14. Defendant can only offer the bare allegation that he would not have pled guilty at this point to thereby qualify for relief under the case law, yet such a course could have resulted in a much worse sentence with the prospect of adding another one or two points to his offender score. Clearly, it was, and remains, to defendant's benefit

to maintain his guilty plea and sentence to avoid the prospects of a harsher sentence.

B. THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT'S OUT-OF-STATE CONVICTIONS WERE COMPARABLE TO WASHINGTON STATE CRIMES FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE PER STIPULATION.

Defendant contends that the court should not have included his Montana convictions in his offender score. RCW 9.94A.525 – Offender Score provides, in pertinent part:

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

RCW 9.94A.525

The State has the burden to show, by a preponderance of the evidence, that the record supports the existence and classification of the out-of-state convictions. *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999). Nevertheless, an affirmative acknowledgement by defense counsel that a prior out-of-state conviction is properly included in the offender score satisfies the requirements of the Sentencing Reform Act (“SRA”) and requires no further proof. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). Here, both defense counsel and defendant affirmatively acknowledged that Mr. Leviton’s Montana convictions were properly included in the offender score. May 30, 2012 RP 2-14; CP 40-49

(Exhibit B). The trial court was entitled to rely upon the concession. Accordingly, the court properly found that defendant's out-of-state convictions were counted in the calculation of his offender score.

Assuming, *arguendo*, that the trial court should have conducted a more detailed comparability analysis. The results may not have been as defendant contends in this appeal. Defendant argues that the Montana Forgery statute includes a reference to counterfeiting not included in the RCW equivalent. Nevertheless, RCW 9.94A.525(3) provides that out-of-state convictions will be classified according to Washington law. Counterfeiting is a separately defined felony in Washington pursuant to RCW 9.16.035. Defendant argues that the Montana Burglary statute includes a reference to the entering of an occupied structure, including a vehicle while the RCW Burglary definition does not include the entry of vehicles. First Degree Vehicle Prowling is a separately defined class C felony under RCW 9A.52.095. The reasonable inference from examination of the elements of the respective Montana and Washington statutes reveals that defendant's acts which resulted in his convictions in Montana would also have qualified as felony convictions in Washington. Again, the court properly included defendant's Montana convictions in his offender score as comparable to felony convictions under Washington law.

C. THE DEFENDANT'S STIPULATION TO THE COMPARABILITY AND INCLUSION OF HIS OUT-OF-STATE CONVICTIONS WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

Defendant contends that the court improperly accepted his stipulation to the comparability and inclusion of his Montana convictions in determining his offender score vis-à-vis his guilty plea. A valid guilty plea requires that the defendant intelligently and voluntarily enter the plea with knowledge that certain constitutional rights are being waived. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). “Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances.” *Id.*

The defendant necessarily waives important constitutional rights when entering a guilty plea, including the right to a trial by jury, to confront one's accusers, and the privilege against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). “[T]here is no constitutional requirement that there be express articulation and waiver of the three rights referred to in *Boykin* by the defendant at the time of acceptance of his guilty plea if it appears from the record ... that the accused's plea was intelligently and voluntarily made, with knowledge of its consequences.” *Wood v. Morris*, 87 Wn.2d 501, 508, 554 P.2d 1032 (1976).

In *Branch*, the Supreme Court held, under the totality of the circumstances, that the defendant's guilty plea and waiver of rights was

intelligently and voluntarily made, with full knowledge of its consequences, when Mr. Branch stated that he knew he was giving up the specific rights listed on the plea statement, and the trial judge generally asked if he had any questions regarding these rights. *Branch*, 129 Wn.2d at 643-644.

Here, as in *Branch*, Mr. Leviton had full understanding of the specific constitutional rights being forfeited by his guilty plea because those were listed in the Statement of Defendant on Plea of Guilty signed by defendant. CP 5-13. At the plea hearing, the court specifically asked whether defendant understood that he was waiving these constitutional rights listed in the plea statement. Defendant confirmed his understanding. May 30, 2012 RP 2-14; CP 5-13. Though not required, the trial court pointedly went through the defendant's entire plea statement to confirm that he knew and understood what he was doing entering his guilty plea. RP 2-14; CP 5-13. Necessarily included in the pleadings as well as the oral colloquy between the court and defendant was the discussion regarding his criminal history. May 30, 2012 RP 2-14; CP 5-13; CP 40-49 (Exhibit B). The process utilized by the court to establish the existence and extent of Mr. Leviton's criminal history included both a written and oral confirmation. May 30, 2012 RP 2-14; CP 5-13; CP 40-49 (Exhibit B). The court did not accept Mr. Leviton's guilty plea until it was satisfied that he had knowingly, intelligently, and voluntarily acknowledged his criminal history and agreed with the offender score calculation. May 30, 2012 RP 2-14; CP 5-13; CP 40-49 (Exhibit B). The court

properly found that Mr. Leviton's guilty plea was knowing, intelligent, voluntary, and with the full knowledge of the constitutional rights being waived. Accordingly, it is reasonable to infer that the court was justified in finding that Mr. Leviton's acknowledgement and confirmation of the comparability and inclusion of his Montana convictions in his offender score was also knowing, intelligent, and voluntary under the totality of the circumstances.

D. DEFENDANT HAS NOT PROVEN THAT HE WAS PREJUDICED BY HIS COUNSEL'S ALLEGED INEFFECTIVE ASSISTANCE.

Defendant contends that his counsel's failure to adequately investigate the comparability and inclusion of his Montana convictions in his offender score calculation resulted in a higher sentence. The pleadings and report of proceedings clearly establish that such was not the circumstance. Rather, the trial court imposed exactly the sentence that Mr. Leviton bargained for as memorialized by the pleadings and oral colloquy conducted prior to the court's acceptance of the guilty plea. May 30, 2012 RP 2-14; CP 5-13; CP 40-49 (Exhibit B).

The Statement of Defendant on Plea of Guilty, section 6(a), provides that defendant's offender score for count I is "5" which corresponds to a standard range of actual confinement of 17-22 months. CP 5-13. Section 6 of Defendant's Guilty Plea Statement further provides, in pertinent part:

(b) The standard sentence range is based on the range on the crime charged and *my* criminal history. Criminal history includes

prior convictions...whether in this state, in federal court, *or elsewhere.*

(c) 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...*If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the judge about those convictions.

(d) If...any additional criminal history is discovered, both the standard range sentence and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me, I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

...

(g) The prosecuting attorney will make the following recommendation to the judge: Residential-DOSA  
Standard costs and fines.

CP 5-13.

Defendant's guilty plea Statement further notified defendant in section 6(t) about the different types of DOSA sentences that the trial court could impose. Especially significant is the notice that if defendant fails to comply with the residential-DOSA program, then the court is empowered to revoke the alternative sentence and impose a term of total confinement within the standard range.

CP 5-13.

Section 7 of the defendant's guilty plea Statement affirmed his intention to plead guilty to Second Degree Trafficking in Stolen Property. Section 8 of the

Statement affirmed that defendant made his guilty plea freely and voluntarily. In sections 9 and 10, defendant affirmed to the court that he had neither been threatened nor coerced by promises to enter his guilty plea. Section 12 of his Statement affirms that defendant's lawyer had explained to him, and they had fully discussed, all of the paragraphs of the Statement. Defendant affirmed that he understood all aspects of the guilty plea Statement, had received a copy of the Statement, and that he had no further questions for the judge. CP 5-13. Defendant then signed his guilty plea Statement. Thereafter, the Statement included the signature of defendant's counsel that she had read & discussed the statement with Mr. Leviton. Counsel affirmed that she believed Mr. Leviton was competent and fully understood the statement. CP 5-13. Defendant's guilty plea statement includes the trial court's acknowledgement that the defendant signed the statement in open court in the presence of his counsel and the undersigned judge. The court noted defendant's assertion that he had previously read the entire statement and understood it in full. CP 5-13. Finally, defendant's guilty plea statement includes the judge's affirmation that:

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

CP 5-13. Clearly, defendant was fully on notice of his rights and duties in entering a guilty plea as well as the consequences thereof. Defendant was

suffering from no delusion regarding what he was doing and seeking to obtain by entering his guilty plea. Regardless, of his motivations, defendant bargained for a reduction of his pending felony charges to thereby qualify for a residential-DOSA sentence. A residential-DOSA sentence is precisely what defendant received. It is defendant's own choices which led the court to find that he had failed to comply with the residential-DOSA sentence and that it should be revoked in favor of a standard range sentence. Only at the point that Mr. Leviton's choices resulted in his DOSA sentence being revoked did he decide that he had suffered ineffective assistance of counsel despite the clear record to the contrary.

Defendant seeks to split the issue of assistance of counsel into even smaller pieces by attacking component parts of the guilty plea and sentencing process exhibited herein. Defendant contends that he received ineffective assistance because his counsel did not investigate the very criminal history to which defendant stipulated to thereby gain the benefit of his bargain, reduction of his felony charges and a residential-DOSA sentence. In addition to the extensive examination and notice of rights and consequences of his guilty plea reflected in his guilty plea statement, defendant executed the Understanding of Defendant's Criminal History that was part of his guilty plea. The Understanding of Defendant's Criminal History reflects defendant's Montana convictions in section 1.4, then in section 1.4(a) provides that:

This statement of prosecutor's Understanding of Defendant's Criminal History is based upon present information known to the Prosecutor and does not limit the use of additional criminal history if later ascertained.

Section 1.5 of the Understanding provides that:

Defendant's understanding of defendant's criminal history is as set out above. Defendant agrees that, unless otherwise noted in writing here, each of the listed convictions counts in the computation of the offender score and that any out-of-state or foreign conviction is the equivalent of the Washington felony offense.

The Understanding includes the defendant's dated signature of May 30, 2012. CP 40-49 (Exhibit B). Review of the pleading clearly demonstrates that the defense counsel, defendant, and deputy prosecutor discussed defendant's Montana convictions and determined which convictions would combine to count as only one point in defendant's offender score. The parties also noted which of defendant's Montana convictions would "wash out" from the calculation of his offender score. CP 40-49 (Exhibit B). Clearly, defense counsel was effective in obtaining concessions from the State that certain prior convictions of defendant would either merge or wash out of his offender score.

As noted, a defendant must establish that the attorney's performance was deficient and that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show

deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the defendant alleges that he received ineffective assistance of counsel with regard to the establishment of his offender score, yet the record simply does not support such a claim. During the sentencing hearing, it was noted that the defendant's criminal history failed to include defendant's felony Bail Jumping conviction when the issue of criminal history was raised again. November 20, 2012 - RP 21-44.

Here, the trial court did not engage in the legal analysis required to conclude that prior convictions either merged or constituted same criminal conduct for purpose of calculating an offender score due to the stipulation. Obtaining the State's stipulation that certain of defendant's prior convictions either merged or washed out worked to reduce defendant's offender score without

the need for litigation that may not have ended in defendant's favor. Such legal representation should not be characterized as "ineffective assistance of counsel" since defendant derived significant benefits therefrom.

As noted, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d at 226. The record supports finding that defendant has failed to satisfy either prong of the *Strickland* test, so the claim of ineffective assistance of counsel should fail.

E. REMAND FOR RESENTENCING IS NOT REQUIRED.

Defendant contends that his stipulation to his criminal history and resulting offender score should simply be disregarded because it was not knowingly, intelligently, and voluntarily entered. Defendant further argues that he is entitled to be resentenced because he had established that the trial court erroneously calculated his offender score.

The State disagrees that the defendant has justified a holding that he is entitled to be resentenced. Assuming, *arguendo*, that defendant is entitled to be resentenced, the parameters of such must be established.

Defendant cites to the Supreme Court's decision in *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009), as controlling authority justifying resentencing herein without any augmentation of the record with regard to

defendant's prior convictions. The holding and analysis in *Mendoza* does not support defendant's claim herein. The *Mendoza* Court dealt with the determination of an offender score after a jury trial and the adequacy of proof of defendant's criminal history under the former version of the SRA. The State produced evidence of defendant's criminal history to which defendant neither stipulated nor objected. Under those circumstances, the Supreme Court ruled that Mr. Mendoza's mere acquiescence was insufficient to constitute a waiver and that resentencing was appropriate. Nevertheless, the Supreme Court began its analysis of the remedy by noting its holding in *State v. Ford*, 137 Wn.2d at 483-485, "absent an affirmative agreement, the defendant's failure to object to the State's assertion of out-of-state criminal history did not waive the issue on appeal." (Emphasis added) Conspicuously present in the record of defendant's case is his stipulation to the comparability and inclusion of his prior convictions in the calculation of his offender score. The circumstances of defendant's case trigger the holding of *Ford* rather than *Mendoza*, thus making resentencing inappropriate.

If this Court grants defendant a resentencing, then RCW 9.94A.530(2) now provides that in all cases remanded for resentencing, the parties shall have the opportunity to present all relevant evidence regarding criminal history, including criminal history not previously presented. Thus the Legislature codified what is permitted at a resentencing in line with the Supreme Court's holding in *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007).

Here, a resentencing would permit the State to present evidence of the defendant's Montana convictions, including the Bail Jumping conviction. The State would be able to contest whether any of defendant's prior convictions qualified for consideration as same criminal conduct and whether any of his convictions wash out. The State would not be bound by the very stipulation that defendant seeks to vacate. The vacation of the stipulation could result in the addition to defendant's offender score of at least 2 points to a "7" (*i.e.* 1 point for the Bail Jumping and 1 point for a finding that the January 2005 Drug Possession convictions are not same criminal conduct). The resulting SRA standard range would then increase to 33-43 months. Additionally, if the trial court finds that the 1995 Forgery and 1998 Drug Possession convictions do not wash out, then defendant's offender score could increase to an "8" or "9" with corresponding standard range sentences of 43-57 and 51-60 months.

In the final analysis, defendant's circumstance is closer to that resolved in *State v. Collins*, 144 Wn. App. 547, 182 P.3d 1016 (2008). In *Collins*, the court addressed the circumstance where a plea deal included an agreement to the comparability of the offender's out-of-state criminal history. Noting that "comparability is both a legal and a factual question" the *Collins* court reasoned that when a defendant affirmatively acknowledges the comparability of foreign convictions in his criminal history, the trial court needs no further proof.

*Collins*, 144 Wn. App. at 553 (citing *State v. Morley*, 134 Wn.2d 588, 605-606, 952 P.2d 167 (1998)).

This perspective was reiterated by the Supreme Court in its analysis and holding in *State v. Wilson*, 170 Wn.2d 682, 244 P.3d 950 (2010). In *Wilson*, the Court cited back to its ruling in *Ross*, which resolved a challenge to out-of-state convictions being used in the offender score despite the defendant having affirmatively acknowledged the existence and comparability of those convictions. Here, defendant proffered the trial court a stipulation to both the existence and comparability of his convictions out of Montana. The circumstances of defendant's case firmly fit within the reasoning and holdings set out in the Supreme Court's holdings cited. Defendant cannot be permitted to invoke "buyer's remorse" when consequences that he fully acknowledged come to fruition by virtue of his choices. Defendant challenges his offender score by this appeal through a claim of ineffective assistance of counsel despite a record that firmly establishes the extent to which defendant received effective assistance of counsel. Defendant has not met his burden of proof to qualify for either a finding of ineffective assistance of counsel or for resentencing.

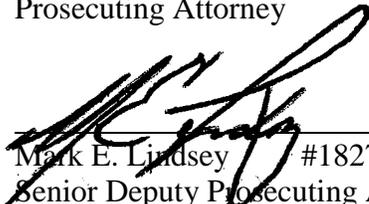
V.

CONCLUSION

For the reasons stated above the defendant's conviction and sentence should be affirmed.

Dated this 14<sup>th</sup> day of January, 2014.

STEVEN J. TUCKER  
Prosecuting Attorney



\_\_\_\_\_  
Mark E. Lindsey #18272  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     NO.   31641-6-III  
                                  v.                )  
  )  
THOMAS R. LEVITON,            )  
  )  
                                  Appellant,    )

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I certify under penalty of perjury under the laws of the State of Washington, that on January 14, 2014, I mailed a copy of the Respondent's Brief in this matter, addressed to:

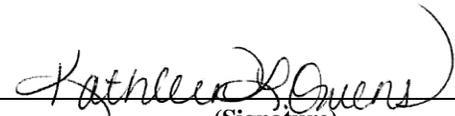
Elizabeth Halls  
Attorney at Law  
6 ½ North 2<sup>nd</sup> Ave, Ste 200  
Walla Walla WA 99362

and to:

Thomas R. Leviton  
c/o Spokane County Jail  
1100 West Mallon  
Spokane WA 99260

1/14/2014  
(Date)

Spokane, WA  
(Place)

  
(Signature)