

FILED
Apr 04, 2014
Court of Appeals
Division III
State of Washington

31895-8-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
STATE OF WASHINGTON, RESPONDENT
v.
KORY L. ZIELKE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....2

 A. DEFENDANT NEVER ASKED THE TRIAL COURT
 TO CONDUCT A “SAME CRIMINAL CONDUCT”
 ANALYSIS SO HE CANNOT FAULT THE TRIAL
 COURT NOW2

 B. DEFENDANT AFFIRMATIVELY ACKNOWLEDGED
 THE EXISTENCE OF HIS IDAHO CONVICTION
 WHICH OBVIATES THE NEED TO UNDERTAKE
 A COMPARABILITY ANALYSIS5

CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE SHALE, 160 Wn.2d 489,
158 P.3d 588 (2007)..... 2, 3

STATE V. GRACIANO, 176 Wn.2d 531,
295 P.3d 219 (2013)..... 3

STATE V. NITSCH, 100 Wn. App. 512,
997 P.2d 1000, *review denied*,
141 Wn.2d 1030, 11 P.3d 827 (2000)..... 3

STATE V. ROSS, 152 Wn.2d 220,
95 P.3d 1225 (2004)..... 5

STATUTES

RCW 9.94A.589(1)(a) 4

I.

ASSIGNMENTS OF ERRORS

1. The trial court erred when it failed to determine whether Mr. Zielke's prior convictions sentenced on the same date constituted the same criminal conduct.
2. The trial court erred when it failed to determine whether Mr. Zeilke's self-confessed Idaho prior conviction for forgery was comparable to a Washington felony.

II

ISSUES PRESENTED

- A. Can the defendant assign error to trial court's failure to undertake a "same criminal conduct" analysis when the defendant never asked the court to undertake such an analysis?
- B. If a defendant affirmatively acknowledges an out-of-state conviction and agrees it is part of his criminal history, is there any need for the trial court to do a "comparability" analysis?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's Statement of the Case with the following addition: the three forgery convictions referenced by the defendant were sentenced on the same day but only two out of the three occurred on the same date.

IV.

ARGUMENT

- A. DEFENDANT NEVER ASKED THE TRIAL COURT TO CONDUCT A "SAME CRIMINAL CONDUCT" ANALYSIS SO HE CANNOT FAULT THE TRIAL COURT NOW.

The State maintains that the defendant failed to raise any "same criminal conduct" arguments below, so this issue has been waived.

In a similar case, the Washington State Supreme Court rejected defense arguments that the trial court erroneously failed to treat any of his history as "same criminal conduct." *In re Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007). The court of appeals in that case held that the defendant's "failure to identify a factual dispute for the court's resolution and ... failure to request an exercise of the court's discretion" waived the challenge to his offender score. *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827

(2000). The Court in *Shale* stated: “We again adopt that reasoning and conclude that it controls in this case.” *In re Shale*, 160 Wn.2d at 495. *See also State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013) (burden of proving prior convictions constitute same criminal conduct is on the defendant).

At no point in the record, is there a request or argument regarding counting any of the defendant’s prior history as “same criminal conduct.” This issue is waived.

Even if this issue was not waived, there is the matter of the defendant agreeing to and signing the “Understanding of Defendant’s Criminal History” CP 55-56. On page 2 (CP 56) of the document, it reads in part:

Defendant’s understanding and agreement that his/her criminal conviction history is set forth in this document. Defendant affirmatively agrees that the State has proven, by the preponderance of the evidence, defendant’s prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document - UNDERSTANDING OF DEFENDANT’S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range and that any out-of-state or foreign conviction (s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range.

CP 56.

Moreover, the trial court asked the defendant, “So Mr. Zielke, is that your felony criminal history?” RP 210. The defendant replied, “I think -- yeah, I think so.” RP 210. The defendant volunteered that he had a forgery conviction from

Idaho that was not on the Understanding of Criminal History. RP 215. This conviction was added to the Understanding of Criminal History. RP 215, CP 55.

The prosecutor told the court that the defendant's score was "9" and with the addition of the Idaho forgery, his score would go to "12" and "11" with a range of 43-57 months on the theft conviction and 22-29 months on the attempt to elude. RP 215, 216. Defense counsel agreed with those ranges. RP 216.

The defendant agreed by signing the Understanding of Criminal History and agreed orally on the record. Defense counsel, likewise, signed the Understand of Criminal History and agreed to the ranges orally.

In order for the defendant to see any actual benefit from his arguments, he must argue something more than what has been argued here. The only "cluster" of potential "same criminal conduct" crimes is two forgeries occurring December 9, 2010, and an attempt to elude with possession of stolen motor vehicle occurring on May 17, 2011. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). It is impossible for the defendant to have had the same intent for the attempt to elude and the theft of motor vehicle. It is likewise impossible for the victims to be the same as the victim of the theft was the owner of the car and the victim(s) of the attempt to elude was either the public or the pursuing officer.

The prior forgeries may, or may not be the same criminal conduct. The defendant, in his Statement of the Case, notes that the three prior Spokane forgeries were sentenced on the same date. This is correct but irrelevant. To find two crimes to be same criminal conduct, they must have occurred at the same time. That is not the case here. One forgery occurred on November 13, 2010, and the other two forgeries are listed as occurring on December 9, 2010. Even if two prior forgeries were found to be same criminal conduct, the defendant's score would be reduced by "1". His score would still be "9+" and his range would not change.

The defendant's argument has no merit both because it was waived below and because he agreed to his score.

B. DEFENDANT AFFIRMATIVELY ACKNOWLEDGED THE EXISTENCE OF HIS IDAHO CONVICTION WHICH OBVIATES THE NEED TO UNDERTAKE A COMPARABILITY ANALYSIS.

"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, 95 P.3d 1225 (2004).

It would be hard to postulate a more affirmative acknowledgement than what occurred here. The State did not know about defendant's prior forgery

conviction in Idaho. The *defendant* alerted the court and the State to the fact of the forgery's existence and had a discussion with the court regarding this conviction in Idaho. Under the decision in *Ross*, there can be no issue of out-of-state comparability here as the conviction was voluntarily offered by the defendant himself.

As noted previously, the defendant and his counsel signed an Understanding of Defendant's Criminal History. CP 55-56. The document includes, in part, language on comparability:

Defendant affirmatively agrees that the State has proven, by the preponderance of the evidence, defendant's prior convictions and stipulates, without objection, by his/her signature below, unless a specific objection is otherwise stated in writing within this document - UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range *and that any out-of-state or foreign conviction (s) is the equivalent of a Washington State criminal felony offense and conviction for the purposes of computation of the resultant offender score and sentencing range.*

CP 56 (emphasis added).

As in the previous section, the defendant agreed that his Idaho conviction was comparable to Washington law.

Finally it should be noted that the defendant is "running hard, but making no progress." Even if the Idaho forgery conviction was not counted, nothing would change. The defendant's sentencing range was 43-57 months on the theft

conviction assuming a “9+” score. Removing the Idaho forgery would leave the defendant’s range at 43-57 months.

V.

CONCLUSION

For the reasons stated, the sentencing of the defendant should be affirmed.

Dated this 4th day of April, 2014.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent