

67203-7

67203-7

NO. 67203-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN CALENE, JR.,

Appellant.

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

The Honorable Steven J. Mura, Judge  
The Honorable Ira Uhrig, Judge

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BRIEF OF APPELLANT

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**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> .....	2
C. <u>ARGUMENT</u> .....	4
1. THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED CALENE THE OPPORTUNITY TO BE REPRESENTED BY COUNSEL OF CHOICE .....	4
2. THE SENTENCING COURT ERRED IN COUNTING CALENE’S OUT-OF-STATE PRIORS AS TWO POINTS IN HIS OFFENDER SCORE. ....	9
a. <u>The State bears the burden of proving prior out-of-state convictions count toward the offender score.</u> ....	9
b. <u>For two reasons, the sentencing court erred by adding two points to Calene’s offender score based on his Wyoming convictions.</u> .....	12
D. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Cadwallader</u> 155 Wn.2d 867, 123 P.3d 456 (2005).....	9
 <u>State v. Adame</u> 56 Wn. App. 803, 785 P.2d 1144 <u>review denied</u> , 114 Wn.2d 1030 (1990) .....	11
 <u>State v. Bergstrom</u> 162 Wn.2d 87, 169 P.3d 816 (2007).....	9
 <u>State v. Chase</u> 59 Wn. App. 501, 799 P.2d 272 (1990).....	4
 <u>State v. Early</u> 70 Wn. App. 452, 853 P.2d 964 (1993).....	4
 <u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	9
 <u>State v. Hunley</u> 161 Wn. App. 919, 253 P.3d 448, <u>review granted</u> , 172 Wn.2d 1014 (2011) .....	9
 <u>State v. Lessley</u> 118 Wn.2d 773, 827 P.2d 996 (1992).....	11, 15
 <u>State v. Morley</u> 134 Wn.2d 588, 952 P.2d 167 (1998).....	10
 <u>State v. Price</u> 126 Wn. App. 617, 109 P.3d 27 <u>review denied</u> , 155 Wn.2d 1018 (2005) .....	6, 7, 8
 <u>State v. Roth</u> 75 Wn. App. 808, 881 P.2d 268 (1994) <u>review denied</u> , 126 Wn.2d 1016 (1995) .....	6

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

	Page
<u>State v. Thieffault</u> 160 Wn.2d 409, 158 P.3d 580 (2007) .....	10
<u>State v. Tili</u> 139 Wn.2d 107, 985 P.2d 365 (1999).....	11, 15
<u>State v. Williams</u> 135 Wn.2d 365, 957 P.2d 216 (1998).....	11
<u>State v. Wilson</u> 170 Wn.2d 682, 244 P.3d 950 (2010).....	14, 16
 <u>FEDERAL CASES</u>	
<u>Powell v. Alabama</u> 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).....	4
<u>United States v. Flanagan</u> 679 F.2d 1072 (3d Cir.1982) <u>rev'd on other grounds</u> , 465 U.S. 259 (1984).....	5
<u>United States v. Gonzalez- Lopez</u> 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).....	4, 5, 8
<u>United States v. Gonzalez-Lopez</u> 399 F.3d 924 (8th Cir. 2005).....	4
<u>United States v. Laura</u> 607 F.2d 52 (3rd Cir. 1979) .....	5
<u>United States v. Lewis</u> 759 F.2d 1316 (8th Cir. 1985).....	5
<u>United States v. Mendoza-Salgado</u> 964 F.2d 993 (10th Cir.1992) <u>aff'd</u> , 548 U.S. 140 (2006) .....	5

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

	Page
<u>United States v. Panzardi Alvarez</u> 816 F.2d 813 (1st Cir. 1987) .....	5
<u>United States v. Rankin</u> 779 F.2d 956 (3rd Cir. 1986).....	5, 8
<u>United States v. Sellers</u> 645 F.3d 830 (7 <sup>th</sup> Cir. 2011).....	5
<u>Wheat v. United States</u> 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).....	4

**OTHER JURISDICTIONS**

<u>Eaton v. State</u> 660 P.2d 803 (Wyo., 1983).....	10
---	----

**RULES, STATUTES AND OTHER AUTHORITIES**

Former RCW 9A.56.030 (1975) .....	14
Former RCW 9A.56.040 (1987) .....	13, 14
Former RCW 9A.56.160 (1987) .....	13
Former Wyo. Stat. Ann § 6-3-402(a), (c)(i) (1985).....	12
Former Wyo. Stat. Ann. § 6-3-402(a), (c)(i) .....	12
Former Wyo. Stat. Ann. § 6-3-403(a)(1) (1984) .....	12
RCW 9.94A.030 .....	10
RCW 9.94A.525 .....	10, 14
RCW 9.94A.589 .....	10, 11
RCW 9A.28.040 .....	14

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

	Page
Sentencing Reform Act.....	9
U.S. Const. Amend. VI.....	1, 4, 8
Wyo. Stat. Ann. § 31-11-103(a)(ii), (b).....	12
Wyo. Stat. Ann. § 6-1-201(a) .....	12
Wyo. Stat. Ann. § 6-1-303(a) .....	12

A. ASSIGNMENTS OF ERROR

1. The appellant was denied his Sixth Amendment right to counsel of choice.

2. The trial court erred when it counted appellant's prior out-of-state convictions as two points in his offender score.

Issues Pertaining to Assignments of Error

1. The appellant requested a 60-day continuance so the attorney he wished to hire could prepare for trial. The requested continuance paled by comparison with other pretrial delays, many of which were not requested by the defense. Under these circumstances, did the trial court's denial of the appellant's motion deprive him of his Sixth Amendment right to counsel of choice?

2. Did the court err when, in calculating the appellant's offender score, it (a) counted a non-comparable out-of-State conviction and (b) failed to consider the appellant's prior out-of-state convictions, sentenced on the same day and involving the same course of conduct, to be the same criminal conduct?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged appellant John Calene, Jr. with attempting to elude a pursuing police vehicle, possession of methamphetamine, and witness tampering. CP 62-64, 66-71, 77-82.

Trial on the eluding charge began January 10, 2011. 1RP 3-4. After Calene asserted an alibi defense, the State added the witness tampering and drug possession charges based in part on recordings of calls Calene made from jail. 1RP 44, 46; CP 69-71. At a January 14 arraignment on the additional charges, the court set a trial date of February 22. Supp. CP \_\_ (sub no. 44, Motion Hearing 1/14/11). On February 27, the court continued the case one month for the “defense to locate and interview witnesses.” Supp. CP \_\_ (sub no. 51, Order Setting Trial Date).

The court denied a defense motion for a continuance on March 10. Supp. CP \_\_ (sub no. 59, Motion Hearing 3/10/11). After Calene was released on bail on March 24, however, the parties agreed to a one-month continuance. Supp. CP \_\_ (sub no. 62, Bond Release); Supp. CP \_\_ (sub no. 64, Order Setting Trial Date).

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 1/10 and 4/21/11; 2RP – 4/25/11; 3RP 4/26/11; 4RP – 4/27/11; 5RP – 4/28, 4/29, 5/5, and 5/24/11.

On April 21, 2011, substitute defense counsel<sup>2</sup> asked the court for a continuance because Calene wished to hire private counsel, a Mr. Fryer, who needed 60 days to prepare for trial. Counsel explained Calene had been in custody until a month earlier and was previously unable to hire an attorney due to his financial situation. Since then, Calene had been able to earn money, and his employer agreed to help Calene obtain additional funds to hire the attorney. 1RP 53-54.

The State opposed the motion. The prosecutor, Dona Bracke, commented that Calene's public defender, Ms. Smith, indicated she was prepared for trial. 1RP 56. Bracke acknowledged she agreed to the one-month continuance after Calene bailed out of jail on March 24, but did so on the condition there would be no more continuances. 1RP 54, 56. Bracke also noted that in his recorded telephone conversations, Calene indicated he was satisfied with his public defender but sought to continue the case as long as possible. 1RP 55.

The court summarily denied Calene's motion, stating "I don't think there is a sufficient legal or factual basis to grant the request to continue so that will be respectfully denied." The court ordered the case go to trial the following Tuesday. 1RP 57.

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<sup>2</sup> Substitute counsel appeared for Calene's public defender, who was in trial, at this hearing and a following hearing held on April 25. 1RP 53; 2RP 3.

The following Monday, Calene reiterated his request for a continuance so private counsel could prepare for trial. The court again summarily denied the request. 2RP 7-9. Trial began the following day, and the jury convicted Calene as charged. 3RP 3; CP 29-30.<sup>3</sup>

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED CALENE THE OPPORTUNITY TO BE REPRESENTED BY COUNSEL OF CHOICE.

The Sixth Amendment protection of the right to counsel encompasses the right to be represented by counsel of choice. United States v. Gonzalez- Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); Wheat v. United States, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 1696-97, 100 L. Ed. 2d 140 (1988). “[A] defendant should be afforded a fair opportunity to secure counsel of his own choice.” Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932); accord, State v. Early, 70 Wn. App. 452, 457, 853 P.2d 964 (1993); State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990).

“Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney.” United States v. Gonzalez-Lopez, 399 F.3d 924 (8th Cir. 2005) (quoting

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<sup>3</sup> The facts related to the sentencing issue are set forth in the argument section below.

United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir.1992)), aff'd, 548 U.S. 140 (2006). The right to privately retain one's own counsel derives from the defendant's right to determine his defense. United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979). A violation of this right is a "structural defect" that is not subject to harmless error analysis. Gonzalez-Lopez, 548 U.S. at 148.

As a general rule, courts have little leeway to interfere with a defendant's choice of counsel. United States v. Lewis, 759 F.2d 1316, 1326 (8th Cir. 1985). Although the trial court has some discretion to limit the exercise of this right, it must defer to the defendant's choice and may limit the exercise of this right only if it would unduly hinder the fair and orderly administration of justice. United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987). The trial court may not rigidly insist on expedited trial proceedings in the face of a justifiable request. United States v. Rankin, 779 F.2d 956, 960 (3rd Cir. 1986). Moreover, "[a] defendant's choice of counsel is not to be dealt with lightly or arbitrarily." Id. at 958 (quoting United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir.1982), rev'd on other grounds, 465 U.S. 259 (1984)); see also United States v. Sellers, 645 F.3d 830, 834 (7<sup>th</sup> Cir. 2011) (a trial court cannot arbitrarily or unreasonably deny a defendant the right to retain chosen counsel).

When a continuance is sought to obtain counsel of choice, the trial court must balance the defendant's interest in counsel of choice with the public's interest in the prompt and efficient administration of justice. State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Factors to be considered in determining whether to grant such a continuance include (1) the timeliness of the substitution motion; (2) whether the court has granted prior continuances at defense request; (3) whether the defendant has legitimate cause for dissatisfaction with current counsel, even where it falls short of incompetent representation, and whether the defendant will be prejudiced by denial of the motion; (4) whether the defendant has retained preferred counsel and how soon he or she could be prepared to go to trial; and (5) whether the court's insistence on a particular trial date is justified under the circumstances. Id. at 632-33.

Here, the trial court made no clear findings on these or any other factors. 5RP 412. While the court was not required to balance the factors on the record,<sup>4</sup> its perfunctory ruling suggests it failed to consider the factors. And while Calene's request was made only a few days before trial, the other factors suggest the court should have granted the motion.

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<sup>4</sup> State v. Roth, 75 Wn. App. 808, 827 n.12, 881 P.2d 268, 279 (1994), review denied, 126 Wn.2d 1016 (1995).

First, Calene's motion came only three months after the State added new charges. And after the continuance prompted by those charges, Calene obtained only one continuance over the State's objection. Supp. CP \_\_ (sub no. 51, supra); Supp. CP \_\_ (sub no. 64, supra) (agreed continuance). As the prosecutor candidly admitted, she would not have objected to a continuance to obtain new counsel had Calene immediately so moved upon his release from jail. 1RP 56. But, as Calene explained, he was unable to immediately obtain counsel for financial reasons. Under these circumstances, Calene timely moved for the continuance as soon as he was financially able to obtain counsel.

Next, Calene acknowledges he did not tell the court he was dissatisfied with his assigned counsel. It is unnecessary, however, for an appellant to establish that counsel is ineffective when seeking a continuance to obtain counsel of choice. Price, 126 Wn. App. at 632.

Next, Calene indicated he had selected a new and affordable attorney whom he would retain provided an appropriate continuance was granted. Cf. Price, 126 Wn. App. at 633 (affirming denial of continuance to obtain new counsel where Price made no showing he could afford to hire an attorney).

Finally, the trial court's rigid insistence on maintaining the trial date was, under the circumstances, unwarranted. The court made no finding as to why the trial, which did not involve complex issues or multiple defendants,

could not be briefly delayed. . The projected 60-day delay was insignificant compared to other delays that were not attributable to Calene. For example, the State waited to file the first charging document until a year after the date of the crimes charged in counts 1 and 2, and then added the new charges six months after that. CP 69-71, 81-82. Yet Calene's request for a continuance came only three months after the additional charges and only one month after Calene bailed out of jail and began earning money. Cf. Price, 126 Wn. App. at 633 (Price made request to hire a new attorney on the second day of trial almost 10 months after arraignment). Moreover, despite the prosecutor's claim that Calene had ulterior motives in seeking the continuance, Calene satisfactorily explained he only then sought the continuance because he could not previously afford private counsel. 1RP 53-54.

On balance, Calene's right to counsel of choice outweighed the public interest in expediting the trial. Rankin, 779 F.2d at 960. The trial court thus unreasonably denied Calene the opportunity to secure counsel of choice. This violated Calene's Sixth Amendment right and constituted structural error. Gonzalez-Lopez, 548 U.S. at 148. Reversal is, therefore, required.

2. THE SENTENCING COURT ERRED IN COUNTING CALENE'S OUT-OF-STATE PRIORS AS TWO POINTS IN HIS OFFENDER SCORE.

The court erred when it counted a non-comparable Wyoming conviction as a point in Calene's offender score. The court also erred when it failed to consider whether each of Calene's Wyoming convictions were the "same criminal conduct" under the test set forth in the Sentencing Reform Act (SRA).

a. The State bears the burden of proving prior out-of-state convictions count toward the offender score.

This Court reviews a sentencing court's offender score calculation de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). The State does not meet its burden through bare assertions. State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999); see also State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448 (2008 amendments to RCW 9.94A.500 and .530 unconstitutionally shift to defendant burden of proof relating to defendant's prior history), review granted, 172 Wn.2d 1014 (2011).

Under the SRA, a foreign conviction is included in a defendant's offender score if it is "comparable" to a Washington felony. RCW

9.94A.030(11); RCW 9.94A.525(3). To determine whether there is comparability, a court must first consider whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the conduct underlying the foreign offense would have violated the Washington statute. State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Thieffault, 160 Wn.2d at 415.

Under certain circumstances, a sentencing court must also consider whether prior convictions constitute the same criminal conduct and should therefore be counted as if they were one prior conviction. RCW 9.94A.525(5)(a)(1).<sup>5</sup> This Court reviews the trial court's determination of

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<sup>5</sup> RCW 9.94A.525(5)(a)(1) states that in considering prior offenses, the court is required to engage in the same criminal conduct analysis under RCW 9.94A.589(1)(a) for “adult sentences served concurrently.” Some of the Wyoming offenses were sentenced consecutively. But unlike Washington, which presumes crimes sentenced at the same time shall be sentenced concurrently, id.; RCW 9.94A.525(1), Wyoming sentencing courts have discretion to run sentences on separate counts consecutively. Eaton v. State, 660 P.2d 803, 806 (Wyo., 1983). Because Calene's sentences were imposed on the same date under the same case number, they would have presumptively run concurrently in Washington. The

what constitutes the same criminal conduct for abuse of discretion or misapplication of the law. State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). Prior offenses involve the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a); State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998).

"Intent" as used under this statute "is not the particular mens rea element of the crime but rather the offender's objective criminal purpose in committing the crime." State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). If one crime furthered another and the time and place of the crimes remained the same, the defendant's criminal intent did not change and the court should find the offenses were the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992).

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sentencing court was thus required to analyze whether the charges were the same criminal conduct.

- b. For two reasons, the sentencing court erred by adding two points to Calene's offender score based on his Wyoming convictions.

The Wyoming judgment and sentence indicates that on October 4, 1990, Calene was sentenced under the same case number for the following four crimes:<sup>6</sup>

Count I: felony receiving property obtained in violation of law (former Wyo. Stat. Ann. § 6-3-403(a)(1) (1984)), committed August 7-18, 1989.

Count II: knowingly possessing an automobile with an altered vehicle identification number (Wyo. Stat. Ann. § 31-11-103(a)(ii), (b)), committed August 7-18, 1989.

Count III: accessory before the fact to felony larceny (Wyo. Stat. Ann. § 6-1-201(a) and former Wyo. Stat. Ann § 6-3-402(a), (c)(i) (1985)), committed August 18, 1989.

Count IV: conspiracy to commit felony larceny (Wyo. Stat. Ann. § 6-1-303(a) and former Wyo. Stat. Ann. § 6-3-402(a), (c)(i)), committed August 18, 1989.

Sentencing Ex. 1 (attached as Appendix B). The Wyoming court imposed concurrent sentences on Counts I and II and ran them consecutive to the concurrent sentences on Counts III and IV. Sent. Ex. 1.

At sentencing in the present case, the prosecutor argued the “receiving property” (Count I) and “conspiracy” (Count IV) convictions should each count as a point in Calene’s offender score. 5RP 410-11. The

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<sup>6</sup> Current versions of each Wyoming statute cited in this brief are attached, in ascending numerical order, as Appendix A.

prosecutor correctly noted that the Wyoming felony larceny and receiving statutes required a dollar amount of \$500 or more. That was consistent with Washington felony theft and possession of stolen property statutes at the time, which provided for a cutoff of \$250: 5RP 410-11; former RCW 9A.56.040 (1987) (second degree theft); former RCW 9A.56.160 (1987) (second degree possession of stolen property).

In contrast, Calene argued that each of the counts were appropriately considered the same criminal conduct. Counsel argued:

It's my understanding that each of the crimes for which he was convicted in the state of Wyoming deal with the same course of conduct[,] essentially possession of a vehicle known to be stolen. So . . . while [Calene] was convicted of four separate crimes involving that same course of conduct, . . . under our . . . offender score statute [the crimes] would be counted [as] one [point]."

5RP 412.<sup>7</sup>

The court stated: "Is not conspiracy complete upon the agreement and the substantial step and then the actual possession is an – I don't understand how it would be considered to be the same criminal conduct."

5RP 412. The court rejected Calene's argument and counted the Wyoming convictions as two points. As a result, the court found Calene's score to be 11 on the first two counts and 10 on the third. 5RP 413.

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<sup>7</sup> Thus, counsel argued, Calene's score was 10 on counts 1 and 2 and nine on count 3. 5RP 413.

The trial court erred. As a preliminary matter, the court erred when it counted count IV, conspiracy, as a point. Under Washington law, criminal conspiracy is a class C felony when the object of the conspiratorial agreement is a class B felony, but a gross misdemeanor when the object is a class C felony. RCW 9A.28.040(3)(c), (d); RCW 9.94A.525.

As discussed above, a conviction under the Wyoming statutes establishes only that the value of property exceeded \$500. In Washington, however, conspiracy to commit theft must involve an amount greater than \$1500 (first degree theft) to be considered a class C felony; conspiracy to commit second degree theft is a gross misdemeanor. Former RCW 9A.56.030 (1975) (former first degree theft statute); former RCW 9A.56.040 (1987) (former second degree theft statute); RCW 9A.28.040(3)(c), (d).

The Wyoming crime of conspiracy to commit felony larceny is thus legally broader than its closest Washington counterpart. The State was therefore required to prove the underlying conduct would have nonetheless been considered a felony in Washington. RCW 9.94A.525(3); Thiefault, 160 Wn.2d at 415; see also State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010) (anticipatory offenses must be felonies themselves, not merely associated with other crimes that are felonies, to

count in an offender's score). It did not. The sentencing court therefore erred to the extent it found the conspiracy charge comparable to a Washington felony based on the record before it.

In any event, the court erred when it ruled “felony receiving property” (comparable to possession of stolen property) and conspiracy to commit larceny -- of the same property – could not constitute the same criminal conduct. The trial court appeared to apply a double jeopardy analysis, ruling that any conspiracy would be complete before the property in question was obtained. 5RP 412. This is not the test for same criminal conduct. Instead, the test is whether one crime furthered another and the time and place of the crimes remained the same. Lessley, 118 Wn.2d at 777. If so, the criminal intent did not change and the offenses encompass the same criminal conduct. Id.

Calene’s Wyoming charges constituted same criminal conduct. The date ranges for all the charged counts, while not identical, overlap. And conspiracy to commit theft of certain property furthered the eventual receipt of that same property. The same reasoning applies to the other listed convictions, should the trial court find, on remand, that another count is comparable to a Washington felony.

The court therefore erred in counting the convictions separately. Tili, 139 Wn.2d at 124 (sentencing court abuses its discretion in counting

crimes separately where there is no basis to find the defendant's conduct in committing the offenses was separate or distinct). This Court should remand for resentencing based on a properly calculated offender score. Wilson, 170 Wn.2d at 688-89 (remedy for a miscalculated offender score is resentencing using the correct offender score).

D. CONCLUSION

A new trial is required because the trial court abused its discretion in denying Calene's request for a continuance so his chosen counsel could prepare for trial. Improper denial of counsel of choice is structural error. Alternatively, this Court should remand for resentencing based on proper comparability and same criminal conduct analysis.

DATED this 16<sup>TH</sup> day of November, 2011.

Respectfully submitted,

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# **APPENDIX A**

Westlaw

WY ST § 6-1-201  
W.S.1977 § **6-1-201**

Page 1

**C**West's **Wyoming** Statutes Annotated Currentness  
Title 6. Crimes and Offenses  
    § Chapter 1. General Provisions  
        § Article 2. Liability**→ § 6-1-201. Accessory before the fact**

(a) A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact.

(b) An accessory before the fact:

(i) May be indicted, informed against, tried and convicted as if he were a principal;

(ii) May be indicted, informed against, tried and convicted either before or after and whether or not the principal offender is indicted, informed against, tried or convicted; and

(iii) Upon conviction, is subject to the same punishment and penalties as are prescribed by law for the punishment of the principal.

CREDIT(S)

Laws 1982, ch. 75, § 3; Laws 1983, ch. 171, § 1.

W. S. 1977 § **6-1-201**, WY ST § **6-1-201**

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Westlaw

WY ST § 6-1-303  
W.S.1977 § 6-1-303

Page 1

**C**

West's **Wyoming** Statutes Annotated Currentness

Title 6. Crimes and Offenses

↳ Chapter 1. General Provisions

↳ Article 3. Inchoate Offenses

**→ § 6-1-303. Conspiracy; renunciation of criminal intention; venue**

(a) A person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons that they or one (1) or more of them will commit a crime and one (1) or more of them does an overt act to effect the objective of the agreement.

(b) A person is not liable under this section if after conspiring he withdraws from the conspiracy and thwarts its success under circumstances manifesting voluntary and complete renunciation of his criminal intention.

(c) A conspiracy may be prosecuted in the county where the agreement was entered into, or in any county where any act evidencing the conspiracy or furthering the purpose took place.

CREDIT(S)

Laws 1982, ch. 75, § 3; Laws 1983, ch. 171, § 1.

W. S. 1977 § 6-1-303, WY ST § 6-1-303

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W.S.1977 § 6-3-402

West's **Wyoming** Statutes Annotated Currentness

Title 6. Crimes and Offenses

Chapter 3. Offenses Against Property

Article 4. Larceny and Related Offenses (Refs &amp; Annos)

→ **§ 6-3-402. Larceny; livestock rustling; theft of fuel; penalties**

(a) A person who steals, takes and carries, leads or drives away property of another with intent to deprive the owner or lawful possessor is guilty of larceny.

(b) A bailee, a public servant as defined by W.S. 6-5-101(a)(vi) or any person entrusted with the control, care or custody of any money or other property who, with intent to steal or to deprive the owner of the property, converts the property to his own or another's use is guilty of larceny.

(c) Except as provided by subsections (e) and (f) of this section, larceny is:

(i) A felony punishable by imprisonment for not more than ten (10) years, a fine of not more than ten thousand dollars (\$10,000.00), or both, if the value of the property is one thousand dollars (\$1,000.00) or more; or

(ii) Repealed by Laws 1984, ch. 44, § 3.

(iii) A misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both, if the value of the property is less than one thousand dollars (\$1,000.00).

(d) Conduct denoted larceny in this section constitutes a single offense embracing the separate crimes formerly known as larceny, larceny by bailee or embezzlement.

(e) A person who steals any horse, mule, sheep, cattle, buffalo or swine is guilty of livestock rustling which is a felony punishable by imprisonment for not more than ten (10) years, a fine of not more than ten thousand dollars (\$10,000.00), or both.

(f) A person who causes a motor vehicle to leave the premises of an establishment at which motor vehicle fuel is offered for retail sale without the person making full payment for motor fuel that was dispensed into the fuel tank of a motor vehicle or into another container is guilty of larceny. Any person convicted of a second or subsequent offense under this subsection shall have his driver's license suspended pursuant to W.S. 31-7-128. The court shall forward to the department of transportation a copy of the record pertaining to disposition of the arrest or citation. In addition:

(i) A first conviction under this subsection is punishable by a fine of not more than seven hundred fifty dollars (\$750.00), imprisonment for not more than six (6) months, or both:

(ii) A second or subsequent conviction under this subsection is punishable by a fine of not more than one thousand dollars (\$1,000.00), imprisonment for not more than six (6) months, or both.

W.S.1977 § **6-3-402**

CREDIT(S)

Laws 1982, ch. 75, § 3; Laws 1983, ch. 171, § 1; Laws 1984, ch. 44, § 2; Laws 1985, ch. 2, § 1; Laws 2004, ch. 126, § 1, eff. July 1, 2004; Laws 2007, ch. 68, § 1, eff. July 1, 2007.

HISTORICAL AND STATUTORY NOTES

Laws 2007, ch. 68, § 1, in subsec. (c), in the introductory paragraph, changed "subsection" to "subsections" and inserted "and (f)"; and added subsec. (f).

W. S. 1977 § **6-3-402**, WY ST § **6-3-402**

Current through the 2011 General Session

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Westlaw

Page 1

W.S.1977 § 6-3-403

West's **Wyoming** Statutes Annotated Currentness

Title 6. Crimes and Offenses

↳ Chapter 3. Offenses Against Property

↳ Article 4. Larceny and Related Offenses (Refs &amp; Annos)

**→ § 6-3-403. Wrongful taking or disposing of property; venue of indictment**

(a) A person who buys, receives, conceals or disposes of property which he knows, believes or has reasonable cause to believe was obtained in violation of law is guilty of:

(i) A felony punishable by imprisonment for not more than ten (10) years, a fine of not more than ten thousand dollars (\$10,000.00), or both, if the value of the property is one thousand dollars (\$1,000.00) or more; or

(ii) Repealed by Laws 1984, ch. 44, § 3.

(iii) A misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both, if the value of the property is less than one thousand dollars (\$1,000.00).

(b) A person may be indicted under this section in the county where he received or possessed the property, notwithstanding the wrongful taking occurred in another county.

CREDIT(S)

Laws 1982, ch. 75, § 3; Laws 1983, ch. 171, § 1; Laws 1984, ch. 44, §§ 2, 3; Laws 2004, ch. 126, § 1, eff. July 1, 2004.

W. S. 1977 § **6-3-403**, WY ST § **6-3-403**

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Westlaw

W.S.1977 § 31-11-103

Page 1

**C**

West's Wyoming Statutes Annotated Currentness

Title 31. Motor Vehicles (Refs &amp; Annos)

Chapter 11. Identification of Vehicles and Prevention of Theft (Refs &amp; Annos)

→ → **§ 31-11-103. Alteration of vehicle identification numbers; penalty**

(a) No person shall:

(i) Remove, change, alter or obliterate the vehicle identification number of a vehicle with intent to defraud by altering or disguising the identity of a vehicle; or

(ii) Possess a vehicle or vehicle component with knowledge that it has a vehicle identification number which has been removed, changed, altered or obliterated in violation of paragraph (i) of this subsection.

(b) A person who violates this section is guilty of a felony punishable by imprisonment for not more than ten (10) years.

CREDIT(S)

Laws 1923, ch. 88, § 3; Laws 1979, ch. 152, § 2; Laws 1983, ch. 171, § 3; Laws 1984, ch. 48, § 1; Laws 1985, ch. 183, § 1.

**Codifications:** R.S. 1931, § 72-403; C.S. 1945, § 60-1403; W.S. 1957, § 31-318.

W. S. 1977 § 31-11-103, WY ST § 31-11-103

Current through the 2011 General Session

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# **APPENDIX B**

PLAINTIFF'S EXHIBIT  
One 210  
10-1-00906-2  
PENGAD 800-631-6889

DAVID MCGONIGAN  
Prosecuting Attorney

MAY 12 2011

STATE OF WYOMING

IN THE DISTRICT COURT

Whitlock County  
Bellingham, WA

COUNTY OF CAMPBELL

SIXTH JUDICIAL DISTRICT

STATE OF WYOMING,

*Plaintiff,*

vs.

JOHN CALENE,

*Defendant.*

FILED NO. 2516  
CIVIL  PROBATE  CRIMINAL   
M.C.  ADOP.  EPL   
OCT 28 1990  
*James M. Peck*  
CLERK OF DISTRICT COURT

RECEIVED

OCT 28 2011

Criminal Case No. 2516  
Men. & Koch, P.L.L.C.

**JUDGMENT AND SENTENCE**

This matter came before the Court on the 13th day of September, 1990, for allocation and sentencing of the defendant, John Calene, for the offenses of Count I: felony receiving property obtained in violation of law, in violation of Wyoming Statute §6-3-403(a)(i); Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute §31-11-103(a)(ii)(b); Count III, accessory before the fact to the crime of felony larceny, in violation of Wyoming Statute §6-1-201(a) and 6-3-402(a)(c)(i); Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute §6-1-303(a) and 6-3-402(a)(c)(i); for which the defendant was found guilty as charged after a trial to a jury to twelve. The defendant was present and represented by his attorney, James M. Peck, and the State of Wyoming was represented by M. Greg Carlson, Deputy Campbell County Attorney.

IT IS THEREFORE ADJUDGED AND DECREED by the Court that the defendant, John Calene, is guilty of Count I, felony receiving property obtained in

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violation of law, in violation of Wyoming Statute §6-3-403(a)(i), which offense occurred on or about the 7th through the 18th day of August, 1989; Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute §31-11-103(a)(ii)(b), which offense occurred on or about the 7th through the 18th day of August, 1989; Count III, accessory before the fact to the crime of felony larceny, in violation of Wyoming Statute §6-1-201(a) and 6-3-402(a)(c)(i), which offense occurred on or about the 18th day of August, 1989; and Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute §6-1-303(a) and 6-3-402(a)(c)(i); which offense occurred on the 18th day of August, 1989; all offenses occurring in the County of Campbell and the State of Wyoming.

The defendant offered no reason why sentence ought not be imposed. The Court then considered the evidence produced, the statements of the defendant and the remarks of counsel.

**IT IS THE SENTENCE OF THE COURT** on Counts I and II that the defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed in Count I. The terms of incarceration imposed on Count I and II shall run concurrently with each other. In addition, a one hundred dollar (\$100.00) surcharge for victim's of crime is assessed pursuant to Wyoming Statute §1-40-119 on each of the two (2) counts, for a total of two hundred dollars (\$200.00).

**IT IS THE SENTENCE OF THE COURT** on Counts III and IV that the defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years. The terms of incarceration imposed on Count III and IV shall run concurrently with each other. In addition, a one hundred dollar (\$100.00) surcharge for victim's of crime is assessed pursuant to Wyoming Statute §1-40-119 on each of the two (2) counts, for a total of two hundred dollars (\$200.00).

**IT IS FURTHER ORDERED** that the concurrent sentences imposed on

1/8/96

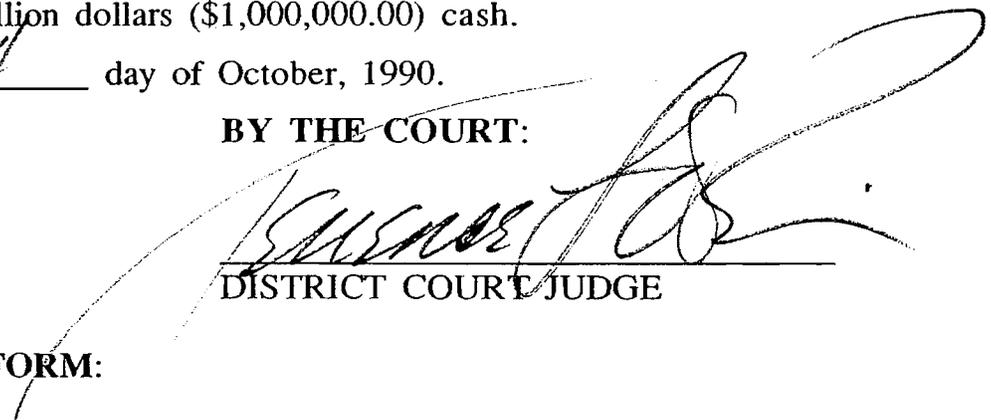
Counts I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV.

**IT IS FURTHER ORDERED** that the defendant shall make restitution to the victim of this crime pursuant to Wyoming Statute §7-9-102 to -103. The Court specially finds the amount of pecuniary damages to each victim of the defendant's criminal activities as follows: one thousand four hundred dollars (\$1,400.00) in damages to Anthony DeAngelis.

**IT IS FURTHER ORDERED** pursuant to the defendant's motion to admit the defendant to bond pending an appeal from the above captioned matter that bond is hereby set at one million dollars (\$1,000,000.00) cash.

DATED this 4 day of October, 1990.

**BY THE COURT:**

  
DISTRICT COURT JUDGE

**APPROVED AS TO FORM:**

\_\_\_\_\_  
JAMES M. PECK  
Attorney for the Defendant

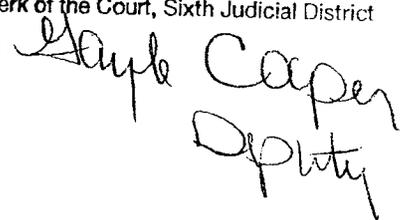
STATE OF WYOMING }  
Campbell County } s.s.

NANCY RATCLIFF, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Gillette, Wyoming, this date.

NANCY RATCLIFF

\_\_\_\_\_  
Clerk of the Court, Sixth Judicial District

5-9-11   
Gayle Cooper  
Deputy

## MITTIMUS

The People of the State of Wyoming:

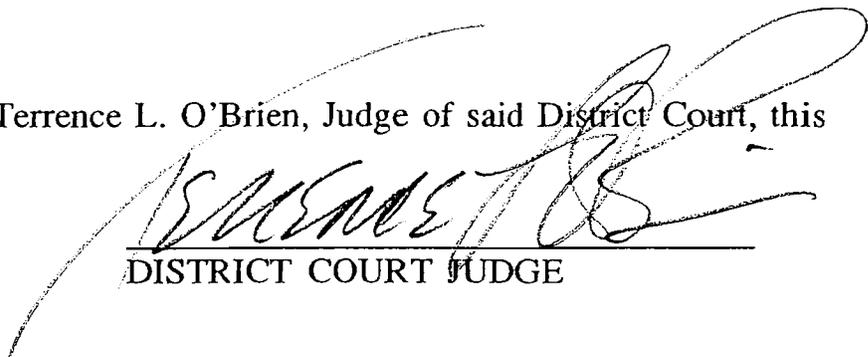
To the Sheriff of Campbell County, and the Warden and Officer in charge of the Wyoming State Penitentiary at or near Rawlins, Carbon County, Wyoming,  
GREETINGS:

**WHEREAS**, John Calene has been duly convicted in the District Court of said County and State, of the crime of Count I: felony receiving property obtained in violation of law, in violation of Wyoming Statute §6-3-403(a)(i); Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute §31-11-103(a)(ii)(b); Count III, accessory before the fact to the crime of felony larceny, in violation of Wyoming Statute §6-1-201(a) and 6-3-401(a)(c)(i); Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute §6-1-303(a) and 6-3-402(a)(c)(i), and judgment has been pronounced against him that on Counts I and II he be punished by imprisonment in the Wyoming State Penitentiary, at or near Rawlins, Wyoming for the term of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed in Count I. The terms of incarceration imposed on Count I and II shall run concurrently with each other. On Counts III and IV he shall be punished by imprisonment in the Wyoming State Penitentiary, at or near Rawlins, Wyoming for the term of a period of not less than two (2) years nor more than four (4) years. The terms of incarceration imposed on Count III and IV shall run concurrently with each other. The concurrent sentences imposed in Count I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV, all of which appears of record as is shown by the certified transcript of judgment endorsed hereon, and made a part hereof.

**NOW THIS IS TO COMMAND YOU**, the said Warden and other Officers in charge of said prison, to receive of and from said Campbell County Jail, convey, at the expense of the State of Wyoming, to said penitentiary and keep and imprison him in the said prison on Counts I and II for the term of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed in Count I. The terms of incarceration imposed on Count I and II shall run concurrently with each other. On Counts III and IV he be punished by imprisonment in the Wyoming State Penitentiary, at or near Rawlins, Wyoming for the term of a period of not less than two (2) years nor more than four (4) years. The terms of incarceration imposed on Count III and IV shall run concurrently with each other. The concurrent sentences imposed in Count I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV.

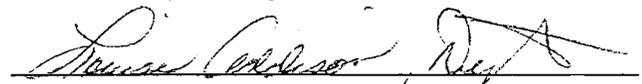
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4 WITNESS, Honorable Terrence L. O'Brien, Judge of said District Court, this day of October, 1990.



DISTRICT COURT JUDGE

Attest my hand and Seal of Court, the day and year last above written.

  
Clerk of the District Court

Filed \_\_\_\_\_, 1990.

C84,117-121

\_\_\_\_\_  
Clerk of District Court

By \_\_\_\_\_  
Deputy

121  
.aa

DAVID McLEACHMAN  
Prosecuting Attorney

MAY 12 2011

Whatcom County  
Bellingham, WA

STATE OF WYOMING )  
 ) ss.  
COUNTY OF CAMPBELL )

IN THE DISTRICT COURT  
SIXTH JUDICIAL DISTRICT  
Criminal Action No. 2516

STATE OF WYOMING, )  
 )  
Plaintiff, )  
 )  
vs. )  
JOHN CALENE, )  
 )  
Defendant. )

FILED NO. \_\_\_\_\_  
CIVIL  PROBATE  CRIMINAL   
W.C.  ADOPT  DEL.

SEP 26 1991  
*Sandy [Signature]*  
CLERK OF DISTRICT COURT

AMENDED JUDGMENT AND SENTENCE

This matter previously came before the Court on the 13th day of September, 1990, for allocution and sentencing of the defendant, John Calene, for the offenses of Count I: felony receiving property obtained in violation of law, in violation of Wyoming Statute § 6-3-403(a)(i); Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute § 31-11-103(a)(ii)(b); Count III, accessory before the fact to the crime of felony larceny, in violation of Wyoming Statute § 6-1-201(a) and 6-3-402(a)(c)(i); Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute § 6-1-303(a) and 6-3-402(a)(c)(i); for which the defendant was found guilty as charged after a trial to a jury to twelve. The defendant was present and represented by M. Greg Carlson, Deputy Campbell County Attorney.

At that time the defendant was sentenced as follows:

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12.

On Counts I and II defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed in Count I. The terms of incarceration imposed on Count I and II shall run concurrently with each other.

On Counts III and IV that the defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years. The terms of incarceration imposed on Count III and IV shall run concurrently with each other.

It was further ordered that the concurrent sentences imposed on Counts I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV.

The matter is presently before the court on defendant's motion to correct an illegal sentence pursuant to Rule 36(a), W.R.Cr.P. Whereby defendant seeks credit for time served of ninety-six (96) days against all the sentences previously imposed.

IT IS THEREFORE ADJUDGED AND DECREED by the Court that the defendant, John Calene, is guilty of Count I, felony receiving property obtained in violation of law, in violation of Wyoming Statute § 6-3-403(a)(i), which offense occurred on or about the 7th through the 18th day of August, 1989; Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute § 31-11-103(a)(ii)(b), which offense occurred on or about the 7th through the 18th day of August, 1989; Count III, accessory before the fact to the crime of felony larceny, in violation of

Wyoming Statute § 6-1-201(a) and 6-3-402(a)(c)(i), which offense occurred on or about the 18th day of August, 1989; and Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute § 6-1-303(a) and 6-3-402(a)(c)(i); which offense occurred on the 18th day of August, 1989; all offenses occurring in the County of Campbell and the State of Wyoming.

IT IS THE SENTENCE OF THE COURT on Counts I and II that the defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed in Count I and II. The terms of incarceration imposed on Count I and II shall run concurrently with each other. In addition, a one hundred dollar (\$100.00) surcharge for victim's of crime is assessed pursuant to Wyoming Statute § 1-40-119 on each of the two (2) counts, for a total of two hundred dollars (\$200.00).

IT IS THE SENTENCE OF THE COURT on Counts III and IV that the defendant, John Calene, be incarcerated in the Wyoming State Penitentiary, Rawlins, Wyoming, for a period of not less than two (2) years nor more than four (4) years, with credit of ninety-six (96) days for the time he has previously been incarcerated to be applied against the sentence imposed on Counts III and IV. The terms of incarceration imposed on Counts III and IV shall run concurrently with each other. In addition, a one hundred dollar (\$100.00) surcharge for victim's of crime is assessed pursuant to Wyoming Statute § 1-40-119 on each of the two (2) counts, for a total of two hundred dollars (\$200.00).

IT IS FURTHER ORDERED that the concurrent sentences imposed on Counts I and II shall run consecutive with the concurrent sentences imposed on Counts III and IV.

IT IS FURTHER ORDERED that the defendant shall make restitution to the victim of this crime pursuant to Wyoming Statute § 7-9-102 to -103. The Court specially finds the amount of pecuniary damages to each victim of the defendant's criminal activities as follows: one thousand four hundred dollars (\$1,400.00) in damages to Anthony DeAngelis.

IT IS FURTHER ORDERED pursuant to the defendant's motion to admit the defendant to bond pending an appeal from the above captioned matter that bond is hereby set at one million dollars (\$1,000,000.00) cash.

DATED this 25 day of September, 1991.

BY THE COURT:

*David L. Paul II*  
DISTRICT COURT JUDGE

*090, 311-314*

*copy to: Sharp  
Gallivan*

APPROVED AS TO FORM:

*Terry Tharp*  
TERRY THARP  
Deputy County Attorney

STATE OF WYOMING } s.s.  
Campbell County }

NANCY RATCLIFF, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Gillette, Wyoming, this date.

NANCY RATCLIFF

Clerk of the Court, Sixth Judicial District

*5-9-11 Gayle Cooper  
Deputy 14*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67203-7-I
	)	
JOHN CALENE,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X]    DAVID McEACHRAN  
          WHATCOM COUNTY PROSECUTOR'S OFFICE  
          SUITE 201  
          311 GRAND AVENUE  
          BELLINGHAM, WA 98227
  
- [X]    JOHN CALENE  
          DOC NO. 789598  
          COYOTE RIDGE CORRECTIONS CENTER  
          P.O. BOX 769  
          CONNELL, WA 99326

COURT OF APPEALS OF THE STATE OF WASHINGTON  
NOV 16 2011 1:39 PM

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2011.

x Patrick Mayovsky