

67873-6

67873-6

No. 67873-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GARY SAWYER,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Mr. Sawyer committed the crime of bail jumping.

2. Mr. Sawyer's Illinois theft conviction is not comparable to a Washington felony and was improperly included in his criminal history.

3. Mr. Sawyer's constitutional right to effective assistance of counsel at sentencing was violated when his attorney failed to request a sentence below the standard range based upon the bail jumping statute's affirmative defense and the exceptional sentence statute.

4. Mr. Sawyer's constitutional right to effective assistance of counsel at trial was violated when defense counsel violated his duty of loyalty to Mr. Sawyer and argued a theory in conflict with Mr. Sawyer's testimony in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt, including the identity of the defendant. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. In order to convict a defendant of bail jumping, the State must prove beyond a reasonable doubt that the defendant (1)

was charged with a particular crime, (2) was released by court order or admitted to bail with the requirement of subsequent personal appearance, and (3) knowingly failed to appear as required. RCW 9A.76.170(1). Where the evidence showed that Gary Sawyer was present in court when his trial began, but did not return after a morning recess, must Mr. Sawyer's bail jumping conviction be dismissed in the absence of proof of that he failed to appear as court ordered?

2. An out-of-state conviction may be included in a defendant's offender score only if the elements of the crime are comparable to those of a Washington felony statute in effect at the time of the commission of the out-of-state crime. Mr. Sawyer was convicted in Illinois of theft from a person, which can be committed by taking property from a person or in the person's presence. The Illinois theft statute is therefore broader than Washington's first degree theft, and the information provided by the State did not prove the crime fell within Washington's first or second degree theft statutes. Must Mr. Sawyer's sentence be vacated and remanded for sentencing within the correct standard sentence range because the Illinois conviction is not comparable to a Washington felony and thus should not have been included in the offender score calculation?

3. A criminal defendant has the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. In his trial for bail jumping, Mr. Sawyer testified that he left the courtroom during a recess in his trial because of a family emergency, which established one but not all of the requirements of the statutory affirmative defense of uncontrollable circumstances.

a. At sentencing, defense counsel argued for an exceptional sentence below the standard range based upon a theory that conflicted with Mr. Sawyer's testimony rather than arguing for one based upon the failed statutory defense to bail jumping. Did defense counsel's deficient performance prejudice Mr. Sawyer's right to a fair sentencing hearing?

b. In closing argument, defense counsel told the jury he did not care if they believed Mr. Sawyer's testimony and posited a different reason for Mr. Sawyer's decision to leave the courtroom during his trial. Did defense counsel's violation of his duty of loyalty to Mr. Sawyer and undermining of his client's testimony prejudice Mr. Sawyer's right to a fair trial?

C. STATEMENT OF THE CASE

Gary Sawyer's wife was suffering from ovarian cancer at the time when he faced trial for possession of cocaine with the intent to deliver. CP 1; 8/10/11RP 135-36. Mr. Sawyer appeared for his trial on February 7, 2011, but learned during a morning recess that his wife was hemorrhaging and had been taken to Harborview Hospital. 8/10/11RP 120-21, 136; Exs. 7, 11. He therefore left court and went to the hospital, where his wife was very ill. 8/10/11RP 136-37. When Mr. Sawyer did not return or notify the court what had happened, he was charged by amended information with two additional crimes: delivery of cocaine and bail jumping. CP 11-12; 8/10/11RP 121-22, 136-37; Ex. 11.

After a trial before the Honorable Richard D. Eadie, a jury convicted Mr. Sawyer of two counts of possession of cocaine and bail jumping. CP 78-80. The court included an Illinois theft conviction in calculating Mr. Sawyer's offender score, although Mr. Sawyer maintained the theft offense was a misdemeanor. CP 173; 9/12/11RP 6-7, 10/6/11RP 44-45. Mr. Sawyer appeals from the bail jumping conviction and resulting 33-month sentence. CP 170; 184-85.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Sawyer was guilty of bail jumping.**

a. The State was required to prove beyond a reasonable doubt that Mr. Sawyer failed to appear for court as required. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.¹ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Brown, 162 Wn.2d 422, 428, 173 Pd 245 (2007).

¹ The Fourteenth Amendment states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

Article I, Section 3 of the Washington Constitution states, “No person shall be deprived of life, liberty, or property, without due process of law.”

Article I, Section 22 provides specific rights in criminal cases. “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury”

Mr. Sawyer contests his conviction for bail jumping. The bail jumping statute reads, in relevant part:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of the state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). The elements of the crime thus are that the defendant (1) was held for, charged with, or convicted of a particular crime, (2) was released by court order or admitted to bail with the requirement of subsequent personal appearance, and (3) knowingly failed to appear as required. RCW 9A.76.170(1); State v. Williams, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007); State v. Coleman, 155 Wn.App. 951, 964, 231 P.3d 212 (2010), rev. denied, 170 Wn.2d 1016 (2011).

b. The State did not prove beyond a reasonable doubt that Mr. Sawyer failed to appear. The State introduced certified copies of various pleadings from the court file and called a superior court clerk to read them and explain what they meant. Ex. 7-12; 8/9/11RP 73-87; Ex. 16-27. The documents showed:

- On December 21, 2009, Mr. Sawyer was charged with violating the Uniform Controlled Substances Act by possession cocaine with intent to deliver. Ex. 7.
- He was released on personal recognizance on December 30, 2009, with the condition that he “appear for court.” Ex. 8.
- A second order releasing Mr. Sawyer was entered on October 28, 2010. Ex. 9. This order did not include appearing for court as a condition of release, but both orders state that failing to appear for court constitutes bail jumping. Ex. 8-9.
- The omnibus hearing order entered on January 21, 2011, states that Mr. Sawyer’s trial date was February 3, 2011. The order was not signed by Mr. Sawyer and did not otherwise indicate he was present. Ex. 10.
- Clerk’s minutes for February 7, 2011, state that Mr. Sawyer was present in court when it convened at 9:35, but he did not return to the courtroom after a recess from 9:47 to 10:04. Ex. 11.
- Judge Middaugh issued a warrant for Mr. Sawyer’s arrest on February 7, 2011, stating he failed to appear for trial. Ex. 12.

In addition, Mr. Sawyer testified that he did appear in court for his trial, but left when he learned his seriously ill wife had been taken to the hospital. 8/10/11RP 120-22, 135-37.

Thus, the evidence produced at trial proved that Mr. Sawyer did appear on February 7 as ordered. Ex. 12; 8/10/12RP 120. While Mr. Sawyer did not remain for the entire day of trial due to his wife’s sudden hospitalization, the bail jumping statute does not require him to appear and remain until the end of the trial. In fact, the trial court could

have conducted the trial without Mr. Sawyer if the court concluded his absence was a waiver of his constitutional right to be present. State v. Garza, 150 Wn.2d 360, 365, 77 P.3d 347 (2003) (“Once trial has begun in the defendant’s presence, a subsequent *voluntary* absence operates as an implied waiver, and the trial may continue without the defendant.”) (emphasis in original); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (“A voluntary absence after trial has begun operates as a waiver of the right to be present.”); CrR 3.4(b) (“The defendant’s voluntary absence after trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of verdict.”).

c. Mr. Sawyer’s bail jumping conviction must be reversed and dismissed. In Coleman, this Court reversed a bail jumping conviction where the clerk’s minutes showed the defendant was not present at 8:30 a.m., but he had been told to appear at 9:00 a.m. Coleman, 155 Wn.App. at 963-64. Looking at all of the evidence, this Court concluded that “nothing before the jury established that Coleman was absent at the time specified in his notice.” Id. at 964. Here, the evidence before the jury proved that Mr. Sawyer *was present* at the time the trial began at 9:35 a.m. Ex. 11; 8/9/10RP 87; 8/10/11RP 120. Mr. Sawyer’s bail jumping conviction must be reversed and dismissed.

Coleman, 155 Wn.App. at 964; State v. Dixon, 150 Wn.App. 46, 50, 53, 207 P.3d 459 (2009) (bail jumping conviction reversed in absence of proof of notice).

2. The Illinois theft conviction was not comparable to a Washington felony and should not have been counted in calculating Mr. Sawyer's offender score.

a. A prior out-of-state conviction may only be included in an offender's criminal history if the State proves the out-of-state offense is comparable to a Washington felony. Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily-established seriousness of the current offense and the defendant's offender score. RCW 9.94A.510, .515, .525, .530; State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). To properly calculate the offender score, the court must determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); RCW 9.94A.030(11). The State must prove the existence and nature of any prior offenses by a preponderance of the evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); Ford, 137 Wn.2d at 480-81; RCW 9.94A.500(1).

Out-of-state convictions are included in the offender score if they are for crimes that are comparable to a Washington criminal statute in effect at the time the foreign crime was committed. Ross, 152 Wn.2d at 229; RCW 9.94A.525(3). The sentencing court first determines if the out-of-state crime is legally comparable to a Washington offense, which means “the elements of the foreign offense are substantially similar to the elements of the Washington offense.” State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). If the elements of the out-of-state crime are broader than the similar Washington offense, the court must determine if the offense is factually comparable – “whether the conduct underlying the foreign offense would have violated the comparable Washington Statute.” Id. In making this determination, the court may rely only upon facts in the record of the out-of-state conviction “that are admitted, stipulated to, or proved beyond a reasonable doubt.” Id.; accord In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). This Court conducts de novo review of the sentencing court’s calculation of an offender score. Bergstrom, 162 Wn.2d at 92.

The sentencing court included an Illinois theft conviction in Mr. Sawyer’s criminal history and included that conviction in determining

Mr. Sawyer's offender score was seven. CP 168, 173. Mr. Sawyer's standard range for bail jumping was therefore 33 to 43 months. CP 168. Absent that conviction, his offender score would have been 6 and his standard sentence range 22 to 29 months. RCW 9.94A.510, .515. .525, .530.

b. Mr. Sawyer's Illinois theft conviction is not comparable to a Washington felony. The prosecutor provided copies of parts of the Illinois court file for the theft conviction. The file shows that a grand jury charged Mr. Sawyer with "theft from person," alleging that on September 21, 2004, Mr. Sawyer knowing took property "not exceeding \$300" "from the person of Pedro Velasco" in violation of 720 ILCWS 5/16 (a)(b)(4)."² CP 144. What appears to be the first page of a Judgment states that Mr. Sawyer pled guilty to "theft from person (Class 3[)]." CP 143. The prosecutor did not provide the rest of the Judgment or a copy of the guilty plea statement. CP 143.

In 2004, Illinois's theft statute, 820 ILCS 5/16-1 read in part:

- (a) A person commits theft when he knowingly:
 - (1) Obtains or exerts unauthorized control over property of the owner; or
 - (2) Obtains by deception control over property of the owner; or

² A copy of the information addressing the Illinois conviction, CP 142-46, is attached as Appendix A.

(3) Obtains by threat control over the property of the owner; or

(4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him or her to believe that the property was stolen; or

(5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen; and

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such a manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

720 ILCS 5/16-1(a) (2004).³ The term “theft from the person” is used only in the penalty section of the statute, subsection (b). Mr. Sawyer was sentenced for a Class 3 felony under subsection (b)(4). CP 144.

This subsection reads:

Theft of property from the person not exceeding \$300 in value, or theft of property exceeding \$300 and not exceeding \$10,000 in value, is a Class 3 felony.

720 ILCS 5/16-1(b)(4) (2004).

³ A copy of 720 ILCS 5/16-1(2004) is attached as Appendix B.

In Washington, theft of property of any value is theft in the first degree, a Class B felony, if the property is “taken from the person.” RCW 9A.56.030(1)(b). In 2004, the first degree theft statute read:

A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined at RCW 9.41.010; or

(b) Property of any value other than a firearm as defined at RCW 9.41.010 taken from the person of another.

RCW 9A.56.030(1)(2004).⁴

i. Illinois’ theft from a person statute is not legally comparable to a Washington felony. If the elements of an out-of-state conviction are broader than the equivalent Washington felony, the elements are not legally comparable. Thieffault, 160 Wn.2d at 415. The relevant section of the Illinois theft statute is broader than Washington’s first degree theft from the person provision, and thus the statutes are not legally comparable.

In Washington, first degree theft must be from the person, not simply a theft in the person’s presence. See State v. Nam, 136

⁴ A copy of the 2004 versions of Washington’s theft in the first degree and theft in the second degree statutes are attached as Appendix C.

Wn.App. 698, 705, 150 P.3d 617 (2007) (holding language “from the person of another” does not include property taken from seat next to person, interpreting robbery statute); United States v. Jennings, 515 F.3d 980, 989 (9th Cir. 2008) (“we conclude that theft from the person of another under Washington law means theft of ‘something on or attached to a person’s body or clothing,’” and concluding this means of committing theft in the first degree is a crime of violence for purposes of federal sentencing); compare RCW 9A.56.030(1)(b) (“property taken from the person of another”) and RCW 9A.56.190 (definition of robbery includes taking property “from person of another or in his presence”).

In Illinois, in contrast, “theft of property from the person” includes taking property that is only within the person’s control or protection. People v. Pierce, 226 Ill.2d 470, 877 N.E.2d 408, 411, 414, 315 Ill.Dec. 656 (2007) (resolving split in Illinois cases and citing three court of appeals cases prior to 2004 to support holding). “We hold that the offense of theft from the person includes the taking of property that is in the possession of or under the control and protection of the victim.” Id. at 414. Thus, the elements of Illinois’ theft of person

crime are not legally comparable to Washington's theft in the first degree.

Nor is the Illinois theft statute legally comparable to Washington's second degree theft. In 2004, any theft of an item or service worth more than \$250 and less than \$1,500 constituted theft in the second degree in Washington. RCW 9A.56.040 (2004). Mr. Sawyer, however, was charged with taking property worth up to \$300. CP 144. Thus, the Illinois statute is broader than Washington's second degree theft and comparable to third degree theft, a gross misdemeanor. RCW 9A.56.050 (2004). Thus, unless Mr. Sawyer took property worth more than \$250, he could not have been convicted of second degree theft in Washington.

ii. Mr. Sawyer's Illinois conviction is not factually comparable to a Washington felony. If the elements of the out-of-state conviction are not comparable to a Washington felony, the sentencing court may examine the defendant's conduct to determine if the conduct violates a Washington felony. Thiefault, 160 Wn.2d at 415. In making the factual comparison, the court may rely upon facts that are admitted, stipulated to, or proven beyond a reasonable doubt. Id.

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated

to, nor proved to the finder beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those of under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258.

The documents produced by the State do not include a guilty plea statement, a stipulation to any facts, or a statement of any facts that were proven to a jury beyond a reasonable doubt. Instead, the State provided only the indictment and judgment. There are no facts from which a court could conclude Mr. Sawyer's Illinois theft conviction was factually comparable to a Washington felony.

c. Mr. Sawyer may raise this issue on appeal. This Court has the power and the obligation to correct an erroneous offender score calculation. In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 920-21, 205 P.3d 113 (2009); Ford, 137 Wn.2d at 477.

Mr. Sawyer repeatedly told the court that the Illinois theft from the person conviction should not be included in his offender score, and the sentencing hearing was continued twice to resolve this and other disputes concerning the calculation of his offender score. 9/12/11RP 2,

6-9; 9/26/11RP 25-26, 29-30; 10/6/11RP 44-45. Defense counsel did not mention the theft conviction in his sentencing memorandum, but at the final sentencing hearing counsel initially agreed the Illinois theft conviction was comparable to a Washington felony. CP 175-77; 10/6/11RP 31. Later, however, defense counsel withdrew his concession in light of Mr. Sawyer's objections. 10/6/11RP 41-42.

[M]y client insists that an attempted – excuse me, a theft from a person that he says is a misdemeanor. I conceded this point before and I'm going to qualify my concession to satisfy my client. The standard as I understand it and the State understands it is whether or not it would be a comparable felony in Washington State. The language for the theft from a person is taking money from the actual person himself, which qualifies as theft first degree, is my understanding, in Washington and I did look at the statute. I did the best I could to find holes in the arguments Mr. Sawyer [sic] has proffered and I can't. But if I'm wrong, I'm saying so on the record so some bright appellate lawyer can stomp on me, that's fine. But I have to say I was satisfied when I looked at this that that is the standard and it applied to the theft from a person that Mr. Wynne has counted.

10/6/11RP 41-42. Given Mr. Sawyer's clear and repeated *pro se* statements to the court and defense counsel's "qualification" of his agreement to include the Illinois theft in Mr. Sawyer's offender score calculation, the issue was not waived.

d. Mr. Sawyer's sentence must be vacated and the case remanded for the correct sentence. Mr. Sawyer's Illinois theft conviction is not comparable to a Washington felony offense. This Court must therefore vacate Mr. Sawyer's sentence and remand for sentencing within the correct standard sentence range. Lavery, 154 Wn.2d at 261.

At resentencing the State should be held to the current record. Mendoza, 165 Wn.2d at 930 (State held to record at original sentencing when defendant raises specific objection and State fails to respond). Mr. Sawyer put the State on notice that he was contesting the inclusion of the Illinois theft conviction in the calculation of his offender score. The State therefore presented the sentencing court with legal argument as to why the Illinois theft conviction was comparable to Washington's first degree theft and provided certified copies of portions of the court record for that and other prior convictions. CP 88-89, 93-161. Thus, the State had the opportunity to present the evidence and legal authority necessary to support its argument, and it is equitable to remand the case without providing the State with an additional opportunity to present evidence. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002).

3. Mr. Sawyer did not receive the effective assistance of counsel guaranteed by the constitution.

a. The accused has the constitutional right to effective assistance of counsel. The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. The right to counsel necessarily includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

When a defendant alleges he did not receive effective assistance of counsel, the appellate court must determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In reviewing the first prong, courts presume counsel's representation was effective. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 226. To show

prejudice under the second prong, the defendant must show a reasonable probability that the deficient performance altered the outcome of the case. Strickland, at 693-94; Thomas, 109 Wn.2d at 226.

b. Mr. Sawyer's constitutional right to effective assistance of counsel was denied when his attorney failed to move for an exceptional sentence below the standard range based upon the failed statutory defense to bail jumping. Sentencing is a critical stage of the proceeding where the defendant is entitled to counsel. State v. Saunders, 120 Wn.App. 800, 819-25, 86 P.3d 232 (2004); In re Morris, 34 Wn.App. 23, 658 P.2d 1279 (1983); CrR 3.1(b)(2); see Ford, 137 Wn.2d at 484 (“Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process.”). Mr. Sawyer’s counsel was ineffective when he asked for an exceptional sentence based upon an untenable reason rather than the valid reason suggested by Mr. Sawyer’s trial testimony.

Mr. Sawyer testified that he appeared in court on his trial date but left early because of a family emergency. Washington’s bail jumping statute includes the affirmative defense that uncontrollable circumstances prevented the defendant from appearing in court. RCW

9A.76.170(2). The defendant must show (1) uncontrollable circumstances prevented him from appearing, (2) he did not contribute to those circumstances in reckless disregard of his obligation to appear, and (3) he appeared as soon as the circumstances ended. Id. The statutory defense replaces the common law necessity defense. State v. Diana, 24 Wn.App. 908, 914, 604 P.2d 1312 (1979). Mr. Sawyer's testimony suggests but does not prove this statutory defense.

An exceptional sentence below the standard sentence range may be ordered based upon a failed defense such as duress. RCW 9.94A.535(1)(c) ("The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct."). Mr. Sawyer's defense attorney did not request a sentence below the standard sentence range on this basis, however. Instead, he asked the court to sentence Mr. Sawyer below the standard sentence range because his actions were the result of anxiety cause by overcharging by the prosecutor's office. 10/6/11RP 42-43. Mr. Sawyer, however, told the sentencing court that his attorney was wrong, and it was his wife's health and not a disagreement with the criminal justice system that caused him to leave the courthouse. 10/6/11RP 47.

Competent trial counsel is aware of the law applicable to his client's case. Saunders, 120 Wn.App. at 825 (counsel deficient for not making same criminal conduct argument supported by case law); Thomas, 109 Wn.2d at 229 (reasonably competent counsel would have been sufficiently aware of relevant legal principles to propose jury instruction based upon pertinent cases); State v. Ermert, 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980) (competent counsel know elements of charged crime and object to instructions that did not set out all elements). Mr. Sawyer's attorney, however, appeared to be unaware of the statutory provisions governing exceptional sentences as well as the statutory defense for bail jumping. In fact, when asked at trial if he was proposing jury instructions on the statutory defense, defense counsel answered that Mr. Sawyer was not claiming self-defense or alibi. 8/10/12RP 146. Defense counsel apparently did not read RCW 9A.76.170(2) and thus did not suggest an exceptional sentence below the standard range on that basis. Defense counsel's performance was thus deficient.

Additionally, even if Mr. Sawyer's counsel made a tactical decision not to request an exceptional sentence based upon the circumstances of Mr. Sawyer's wife's hospitalization, it was not a

reasonable tactical decision. Not all tactical decisions are immune from attack. State v. Grier, 171 Wn.2d 17, 33-34, 224 P.3d 1260 (2011); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (no tactical reason to propose jury instructions that could lead to conviction under a statute not in effect during charging period). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Defense counsel could have presented both arguments in support of his request for an exceptional sentence.

A proper request for an exception sentence below the standard sentence range may have been granted. Mr. Sawyer’s case had been pending in King County Superior Court for 14 months before the incident that led to bail jumping charges, and he had appeared in court countless times on this and another charge. 10/31/11RP 67. Had defense counsel listened to his client and researched the applicable law, he could have crafted a viable request for an exceptional sentence below the standard range. Mr. Sawyer’s sentence must be vacated and his case remanded for a new sentencing hearing. Morris, 24 Wn.App. at 25.

c. Defense counsel violated his duty of loyalty to Mr. Sawyer by arguing that the jury should disregard his testimony. Defense counsel's overarching duty is to advocate for his client's cause, and he owes his client a duty of loyalty. Strickland, 466 U.S. at 688. In explaining counsel's responsibilities to his client, the Strickland Court referred to the "duty of loyalty" as "perhaps the most basic of counsel's duties." 466 U.S. at 692.

Mr. Sawyer testified that he appeared in court for his trial but left suddenly because his wife, who was suffering from cancer, had been rushed to the hospital. In closing argument, defense counsel acknowledged his client's testimony, but quickly added, "I don't care whether you believe him or not." 8/11/11RP 52. Counsel then asked the jury to "consider the mindset of somebody immeasurably overcharged who is afraid of the prison sentence that will come with something he didn't do, something far worse than mere possessing drugs." 8/11/11RP 52. Defense counsel went on to assure the jury that "the Fugitive" was not charged with bail jumping because he was not guilty of the charged crime. 8/11/11RP 53.

In closing argument, counsel may argue from the testimony presented at trial. Defense counsel's argument, however, was in

conflict with his client's testimony and based upon facts not in evidence. By telling the jury it did not matter to him if they believed his client and asserting a defense at odds with his client's testimony, thus suggesting his client was not believable. Defense counsel thus undermined his client and violated his duty of loyalty. Again, even if defense counsel made a strategic decision to contradict his client's testimony and imply it was not believable, such a tactic was not reasonable. Flores-Ortega, 528 U.S. at 481; Grier, 171 Wn.2d at 33-34.

Defense counsel undermined Mr. Sawyer's only defense to bail jumping, thus prejudicing Mr. Sawyer. The bail jumping conviction must be reversed and remanded for a new trial. Thomas, 109 Wn.2d at 232.

E. CONCLUSION

Mr. Sawyer appeared for his trial, and his conviction for bail jumping must be reversed and dismissed. In the alternative, Mr. Sawyer's lawyer did not provide effective assistance of counsel at his trial and sentencing hearing, and the case should be remanded for a new trial and/or sentencing hearing.

In addition, resentencing is required because Mr. Sawyer's Illinois theft conviction is not comparable to a Washington felony and should not have been included in the computation of his offender score.

DATED this 21st day of September 2012.

Respectfully submitted,



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX A

**Sentencing Information
Addressing Illinois Theft Conviction**

CP 143-45

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY

MITTİMUS FOR STATE PENAL INSTITUTIONS

PLEAS before said Circuit Court held in the city of Waukegan, Illinois on February 18
2005

Present: HONORABLE James K. Booras, Judge of the Circuit Court
Michael J. Waller, State's Attorney
Gary Del. Re, Sheriff

Attest: Sally D. Coffelt
(Clerk of the Circuit Court)

FEB 18 2005

BE IT REMEMBERED that on said date the following, among other proceedings, were had and entered of record in said Court:

THE PEOPLE OF THE STATE OF ILLINOIS)
vs.) No. 04CF3938
Gary L. Sawyer)
Defendant)

JUDGMENT AND SENTENCE

Now come THE PEOPLE OF THE STATE OF ILLINOIS, by Michael J. Waller,
State's Attorney of Lake County, and the defendant, in person and by counsel, Christopher Lombardo
Private Counsel, and now neither the defendant nor defendant's counsel
saying anything further why the judgment of the court should not be pronounced against said
defendant on the Plea of guilty heretofore entered to the charge of

Theft from Person, Class 3 ^(plea or verdict) as charged in the ~~complaint~~
~~xxx~~ indictment returned in this cause on November 17, 2004;

Therefore, it is ordered and adjudged by the court that said defendant is guilty of the
crime of Theft from Person (Class 3)
as charged in the indictment ~~of~~ ~~complaint~~ herein.

The court finds the age of said defendant to be 43 years.

The court having offered to hear evidence in aggravation and mitigation of the offense as
to the moral character, life, family, occupation, and criminal record of defendant, and the
presentation of evidence having been heard by the court

the defendant having nothing further to say, the court hereby
sentences said defendant to imprisonment in a penitentiary and fixes the term of imprisonment
at 2 years, with credit for time served in the Lake County Jail plus time served awaiting transport
to the Department of Corrections. Defendant to receive good time credit as administered by the
Department of Corrections. (insert definite period or indeterminate term as required)

171-39 5/00

STATE OF ILLINOIS)
) SS GENERAL NO. 04 CF 3938
COUNTY OF LAKE)

DCN#: L35426227
OF THE AUGUST 2004 TERM OF THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT COURT OF THE
COUNTY OF LAKE IN THE STATE OF ILLINOIS

Count I. That the Grand Jurors chosen, selected and sworn, in and for the County of Lake, in the State of Illinois, having been duly called, in the name and by authority of the People of the State of Illinois, upon their oaths present that GARY L. SAWYER, DOB: 04-20-1961, hereinafter called the defendant, on or about September 21, 2004, in the County of Lake and State of Illinois, committed the offense of ROBBERY, in that the said defendant, knowingly took property, being United States Currency, from the presence of Pedro Velasco; by the use of force, in violation of 720 ICS 5/12-1; contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

Asset from person

Person

NOT exceeding \$300

in value

*Class 3
Indict
2/10/05*

Amended at 7

FILED

NOV 17 2004

[Signature]
CLERK

Count II. That the Grand Jurors chosen, selected and sworn, in and for the County of Lake, in the State of Illinois, having been duly recalled, in the name and by authority of the People of the State of Illinois, upon their oaths present that GARY L. SAWYER, DOB: 04-20-1961 hereinafter called the defendant, on or about October 22, 2004, in the County of Lake and State of Illinois, committed the offense of RETAIL THEFT (Enhanced), in that the said defendant knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment, Megaflo, located in Waukegan, Illinois, said property being phone calling cards, having a total value not in excess of \$150.00, with the intention of depriving the merchant, Megaflo, permanently of the merchandise without paying the full retail value of such merchandise, and the said defendant had been previously convicted of the offense of Retail Theft in the Circuit Court of Lake County, Illinois, in 03 CF 100, in violation of 720 ILCS 5/16A-3(a); contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

A TRUE BILL


FOREPERSON

APPENDIX B

2004 Washington Theft Statutes

West's RCWA 9A.56.030

West's Revised Code of Washington Annotated Currentness
 Title 9A. Washington Criminal Code (Refs & Annos)
 Chapter 9A.56. THEFT and Robbery (Refs & Annos)
9A.56.030. Theft in the first degree—Other than firearm

(1) A person is guilty of **theft** in the **first degree** if he or she commits theft of:

(a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010; or

(b) Property of any value other than a firearm as defined in RCW 9.41.010 taken from the person of another.

(2) **Theft** in the **first degree** is a class B felony.

CREDIT(S)

[1995 c 129 § 11 (Initiative Measure No. 159); 1975 1st ex.s. c 260 § 9A.56.030.]

HISTORICAL AND STATUTORY NOTES

Findings and intent—Short title—Severability—Captions not law—1995 c 129: See notes following RCW 9.94A.510.

Laws 1995, ch. 129, § 11, in subsec. (1), in the introductory paragraph inserted “or she”; and, in subsecs. (1)(a) and (1)(b), inserted “other than a firearm as defined in RCW 9.41.010”.

Source:

Laws 1909, ch. 249, § 353.

RRS § 2605.

Former § 9.54.090.

Laws 1955, ch. 97, § 1.

Laws 1963, ch. 133, § 1.

Former § 9.61.220.

CROSS REFERENCES

Certificates of land registration, theft is grand larceny, see § 65.12.730.

Civil action for shoplifting by adults, minors, see § 4.24.230.

Destruction or removal of mortgaged property, see § 9.45.060.

Dog guides or service animals, wrongful obtaining or exerting unauthorized control over dog guide or service animal with intent to deprive user of dog guide or service animal, **theft** in the **first degree**, see § 9.91.170.

Embezzlement by county officers, see § 36.18.170.

Embezzlement by state treasurer, see § 43.08.140.

West's RCWA 9A.56.040

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.56. THEFT and Robbery (Refs & Annos)

9A.56.040. Theft in the second degree—Other than firearm

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm as defined in RCW 9.41.010, but does not exceed one thousand five hundred dollars in value; or

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or

(c) An access device; or

(d) A motor vehicle, of a value less than one thousand five hundred dollars.

(2) Theft in the second degree is a class C felony.

CREDIT(S)

[1995 c 129 § 12 (Initiative Measure No. 159); 1994 sp.s. c 7 § 433; 1987 c 140 § 2; 1982 1st ex.s. c 47 § 15; 1975 1st ex.s. c 260 § 9A.56.040.]

HISTORICAL AND STATUTORY NOTES

Findings and intent—Short title—Severability—Captions not law—1995 c 129: See notes following RCW 9.94A.510.

Finding—Intent—Severability—1994 sp.s. c 7: See notes following RCW 43.70.540.

Effective date—1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW 9.41.010.

Severability—1982 1st ex.s. c 47: See note following RCW 9.41.190.

Laws 1994, 1st. Sp.Sess., ch. 7, § 433, deleted a former subsec. (1)(e) which read: "A firearm, of a value less than one thousand five hundred dollars.", and neutralized gender.

Laws 1995, ch. 129, § 12, in subsec. (1)(a), inserted "other than a firearm as defined in RCW 9.41.010".

Source:

Laws 1909, ch. 249, § 353.

RRS § 2605.

Former §§ 9.26A.030, 9.54.090.

West's RCWA 9A.56.050

West's Revised Code of Washington Annotated Currentness
 Title 9A. Washington Criminal Code (Refs & Annos)
 Chapter 9A.56. THEFT and Robbery (Refs & Annos)
9A.56.050. Theft in the third degree

(1) A person is guilty of **theft** in the **third degree** if he or she commits theft of property or services which (a) does not exceed two hundred and fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

(2) **Theft** in the **third degree** is a gross misdemeanor.

CREDIT(S)

[1998 c 236 § 4; 1975 1st ex.s. c 260 § 9A.56.050.]

HISTORICAL AND STATUTORY NOTES

Laws 1998, ch. 236, § 4, in subsec. (1), designated subd. (a); and added subd. (b).

Source:

Laws 1909, ch. 249, § 353.
 RRS § 2605.
 Former § 9.54.090.
 Laws 1955, ch. 97, § 1.
 Laws 1963, ch. 133, § 1.
 Former § 9.61.220.

CROSS REFERENCES

Civil actions for shoplifting by adults, minors, see § 4.24.230.

LIBRARY REFERENCES

2000 Main Volume

Larceny  24.
 Westlaw Topic No. 234.
 C.J.S. Larceny § 66 et seq.
 Jury instructions, **theft, third degree**,
 Definition, see Wash.Prac. vol. 11A, WPIC 70.10.
 Elements, see Wash.Prac. vol. 11A, WPIC 70.11.

RESEARCH REFERENCES

West's RCWA 9A.56.020

West's Revised Code of Washington Annotated Currentness
 Title 9A. Washington Criminal Code (Refs & Annos)
 Chapter 9A.56. THEFT and Robbery (Refs & Annos)
9A.56.020. Theft—Definition, defense

(1) "Theft" means:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or
- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.

CREDIT(S)

[1975-'76 2nd ex.s. c 38 § 9; 1975 1st ex.s. c 260 § 9A.56.020.]

HISTORICAL AND STATUTORY NOTES

Effective date—Severability—1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

CROSS REFERENCES

Civil action for shoplifting by adults, minors, see § 4.24.230.

LIBRARY REFERENCES

2000 Main Volume

False Pretenses  15.

Larceny  24.

Westlaw Topic Nos. 170, 234.

C.J.S. False Pretenses § 30.

C.J.S. Larceny § 66 et seq.

Criminal law,

Burglary and trespass, defense, see Wash.Prac. vol. 13B, Fine and Ende, § 506.

Theft, defenses, practical considerations, see Wash.Prac. vol. 13B, Fine and Ende, §§ 2613, 2614.

Theft by taking and embezzlement, judicial interpretation, see Wash.Prac. vol. 13B, Fine and Ende, § 2607.

APPENDIX C

2004 Illinois Theft Statute

720 ILCS 5/16-1

Formerly cited as IL ST CH 38 ¶ 16-1

West's Smith-hurd Illinois Compiled Statutes Annotated Currentness

Chapter 720. Criminal Offenses

Criminal Code

Act 5. Criminal Code of 1961 (Refs & Annos)

Title III. Specific Offenses

Part C. Offenses Directed Against Property

Article 16. Theft and Related Offenses (Refs & Annos)

5/16-1. Theft

§ 16-1. Theft.

(a) A person commits theft when he knowingly:

- (1) Obtains or exerts unauthorized control over property of the owner; or
- (2) Obtains by deception control over property of the owner; or
- (3) Obtains by threat control over property of the owner; or
- (4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; or
- (5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen, and
 - (A) Intends to deprive the owner permanently of the use or benefit of the property; or
 - (B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
 - (C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

(b) Sentence.

- (1) Theft of property not from the person and not exceeding \$300 in value is a Class A misdemeanor.
 - (1.1) Theft of property not from the person and not exceeding \$300 in value is a Class 4 felony if the theft was committed in a school or place of worship.
- (2) A person who has been convicted of theft of property not from the person and not exceeding \$300 in value who has been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4-103, 4-103.1, 4-103.2, or 4-103.3 of the Illinois Vehicle Code [FN1] relating to the possession of a stolen or converted motor vehicle, or a violation of Section 8 of the Illinois Credit Card and Debit Card Act [FN2] is guilty of a Class 4 felony. When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a felony. The fact of such prior conviction is not an element of the offense and may not be disclosed to the jury during trial unless otherwise permitted

by issues properly raised during such trial.

(3) (Blank).

(4) **Theft of property** from the **person** not exceeding \$300 in value, or theft of property exceeding \$300 and not exceeding \$10,000 in value, is a Class 3 felony.

(4.1) **Theft of property** from the **person** not exceeding \$300 in value, or theft of property exceeding \$300 and not exceeding \$10,000 in value, is a Class 2 felony if the theft was committed in a school or place of worship.

(5) Theft of property exceeding \$10,000 and not exceeding \$100,000 in value is a Class 2 felony.

(5.1) Theft of property exceeding \$10,000 and not exceeding \$100,000 in value is a Class 1 felony if the theft was committed in a school or place of worship.

(6) Theft of property exceeding \$100,000 and not exceeding \$500,000 in value is a Class 1 felony.

(6.1) Theft of property exceeding \$100,000 in value is a Class X felony if the theft was committed in a school or place of worship.

(6.2) Theft of property exceeding \$500,000 in value is a Class 1 non-probationable felony.

(7) Theft by deception, as described by paragraph (2) of subsection (a) of this Section, in which the offender obtained money or property valued at \$5,000 or more from a victim 60 years of age or older is a Class 2 felony.

(c) When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value.

CREDIT(S)

Laws 1961, p. 1983, § 16-1, eff. Jan. 1, 1962. Amended by Laws 1967, p. 1802, § 1, eff. July 20, 1967; P.A. 77-2638, § 1, eff. Jan. 1, 1973; P.A. 78-255, § 61, eff. Oct. 1, 1973; P.A. 79-840, § 1, eff. Oct. 1, 1975; P.A. 79-973, § 1, eff. Oct. 1, 1975; P.A. 79-1454, § 16, eff. Aug. 31, 1976; P.A. 82-318, § 1, eff. Jan. 1, 1982; P.A. 83-715, § 1, eff. July 1, 1984; P.A. 84-950, § 1, eff. July 1, 1986; P.A. 85-691, § 1, eff. Jan. 1, 1988; P.A. 85-753, § 1, eff. Jan. 1, 1988; P.A. 85-1030, § 2, eff. July 1, 1988; P.A. 85-1209, Art. II, § 2-23, eff. Aug. 30, 1988; P.A. 85-1296, § 1, eff. Jan. 1, 1989; P.A. 85-1440, Art. II, § 2-9, eff. Feb. 1, 1989; P.A. 89-377, § 15, eff. Aug. 18, 1995; P.A. 91-118, § 5, eff. Jan. 1, 2000; P.A. 91-360, § 5, eff. July 29, 1999; P.A. 91-544, § 5, eff. Jan. 1, 2000; P.A. 92-16, § 88, eff. June 28, 2001; P.A. 93-520, § 5, eff. Aug. 6, 2003.

FORMER REVISED STATUTES CITATION

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 16-1.

[FN1] 625 ILCS 5/4-103, 5/4-103.1, 5/4-103.2, 5/4-103.3.

[FN2] 720 ILCS 250/8.

HISTORICAL AND STATUTORY NOTES

The words “or under such circumstances as would reasonably induce him to believe that the property was stolen” were inserted in subd. (a)(4) by the 1967 amendment.

The amendment by P.A. 77-2638 was necessary to conform penalties under this section with the Unified Code of Corrections.

The 1973 Revisory Act, P.A. 78-255, stated in § 61 that in each of the sections enumerated therein, amended by

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67873-6-I
v.)	
)	
GARY SAWYER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GARY SAWYER 318775 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF SEPTEMBER, 2012.

X _____ 

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