

71864-9

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NO. 71864-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER BRIGHTON,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Alexander Hamilton Brighton's Montana burglary and robbery convictions were not legally or factually comparable to Washington crimes. Yet the trial court counted these convictions in Brighton's offender score. This error requires vacation of Brighton's sentence and remand for resentencing. In addition, the State's failure to establish comparability in the trial court forecloses any opportunity to do so on remand.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Brighton's offender score.
2. The trial court erred in concluding that Brighton's Montana convictions were legally comparable.
3. The trial court erred in concluding that Brighton's Montana convictions were factually comparable.

Issues Pertaining to Assignments of Error

1. When out-of-state statutes under which a defendant is convicted are broader than Washington's counterparts, thereby criminalizing conduct that is not criminal in Washington, does it negate any conclusion that the out-of-state convictions are legally comparable in Washington?
2. When the State fails to establish that facts underlying out-of-state convictions were proven beyond a reasonable doubt, or stipulated

or agreed to by the defendant, does it negate any conclusion that the out-of-state convictions are factually comparable in Washington?

3. When the State has an opportunity to prove factual comparability, but fails to do so, and the defendant objects, must the State's failure preclude the State from attempting to prove factual comparability again on remand?

C. STATEMENT OF THE CASE

The State charged Brighton with one count of residential burglary for entering the dwelling of his neighbor and taking a camera, lenses, and an alto saxophone. CP 54-55, 58. Brighton pleaded guilty. CP 43-44, 46-50; 1RP¹ 7.

However, Brighton challenged the State's calculation of his offender score. CP 30-36, 38, 46-47; 1RP 5; 3RP 3-12. The State asserted Brighton's offender score was five based on three Montana convictions for burglary, attempted burglary, and robbery. CP 47, 51-52; 3RP 2. The judgment for these convictions was entered on March 13, 2008 in Montana's Fourth Judicial District Court in Missoula County. CP 76-84. The State calculated Brighton's offender score by counting two points each for Brighton's Montana burglary and attempted burglary convictions under RCW

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—January 22, 2014; 2RP—March 10, 2014; 3RP—March 17, 2014; 4RP—March 31, 2014.

9.94A.525(4) and (16), and one point for Brighton's Montana robbery conviction under RCW 9.94A.525(7) and (16). CP 52. With a seriousness level of four for the residential burglary, the State contended Brighton's standard range was 22 to 29 months. CP 38, 47; 3RP 2.

Brighton disagreed, asserting his offender score was zero. CP 30-36. Brighton argued the Montana statutes under which he was convicted were broader than their Washington counterparts and were not legally or factually comparable to Washington offenses. CP 33-36; 2RP 3-4; 3RP 3-7.

When the trial court first considered the comparability issue, the State had only provided copies of the Montana charging documentation. 2RP 2-3. Brighton argued the charging documents were not sufficient for factual comparability because they failed to provide any facts that were proven beyond a reasonable doubt or to which Brighton had stipulated. 2RP 3-4. To allow the State more time to gather the needed out-of-state documentation, the trial court granted a one-week continuance. 2RP 4-6.

A week later the State provided the Montana affidavit for probable cause and argued, "all three of the actions described in that affidavit are comparable to the burglary, and to robbery in Washington." 3RP 2; see also CP 64-70 (Montana affidavit and motion for leave to file information). Brighton asserted that the affidavit did not provide any facts to which he

stipulated and therefore could not be relied on to establish factual comparability. 3RP 4.

The trial court focused on a paragraph in Brighton's Montana plea agreement in which Brighton "accept[ed] the above offer and agree[d] to enter plea(s) of guilty to the charge(s) specified." CP 102; 3RP 12-13. The trial court also focused on waiver language in the plea agreement: "I hereby knowingly waive all objection to any substantive defect in said charge(s) and my right to a jury trial on the charge(s)." CP 102; 3RP 13. No recitation of facts regarding Brighton's commission of the Montana crimes appears in the plea agreement. Neither did the plea agreement reference any charging documentation. Nonetheless, the trial court concluded, "he's agreeing to plea as charged and that the facts as stated in the charges are the facts that he's agreeing to. So we have legal comparability and we have factual comparability, because the way the charges have been stated is what he agreed to." 3RP 13. The trial court concluded Brighton's offender score was five and that the standard range for residential burglary was 22 to 29 months. 3RP 14. The trial court imposed a 29-month sentence.² CP 22; 4RP 7. Brighton timely appeals. CP 1.

² The trial court continued sentencing a third time given Brighton's dispute that his Montana convictions had been deferred or dismissed and therefore should not be included in his offender score. 3RP 17-25. At the sentencing hearing that followed, the State presented a letter from the Missoula County attorney stating

D. ARGUMENT

THE TRIAL COURT SENTENCED BRIGHTON USING AN INCORRECT OFFENDER SCORE BASED ON OUT-OF-STATE CONVICTIONS THAT WERE NEITHER LEGALLY NOR FACTUALLY COMPARABLE TO WASHINGTON CRIMES

The State failed to prove that Brighton's Montana burglary convictions and robbery conviction were legally or factually comparable to Washington's. They are not legally comparable because Montana's statute criminalizes conduct that would not constitute burglary or robbery in Washington. The State failed to prove factual comparability because no facts regarding Brighton's offenses appear in the State's documentation that Brighton admitted or stipulated to, or that were proved beyond a reasonable doubt. The trial court erred in calculating Brighton's offender score and in imposing a 29-month sentence. This court must vacate Brighton's sentence and remand for resentencing using the correct offender score of zero.

"Washington law employs a two-part test to determine the comparability of a foreign offense." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, courts determine legal comparability: "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." Id. Second, if the out-of-state offense's elements are broader than the Washington offense's elements, courts turn to

that because Brighton's convictions had never been dismissed, "he stands convicted of those offenses." CP 106; 4RP 2.

factual comparability: “whether the conduct underlying the foreign offense would have violated the comparable Washington statute.” Id. (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.” Thiefault, 160 Wn.2d at 415 (citing In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 11 P.3d 837 (2005); State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); State v. Ortega, 120 Wn. App. 165, 171-74, 84 P.3d 935 (2004)). When a foreign conviction is neither legally nor factually comparable, it cannot be counted in an offender score. Thiefault, 160 Wn.2d at 415.

1. Brighton’s Montana convictions are not legally comparable

Montana’s burglary and robbery provisions criminalize broader conduct than Washington’s burglary and robbery provisions. Brighton’s Montana convictions are therefore not legally comparable.

Beginning with burglary, in Montana, “A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and: (a) the person has the purpose to commit an offense in the occupied structure; or (b) the person knowingly or purposely commits any other offense within that structure.” MONT. CODE ANN. § 45-6-204(1). Under the elements of Montana’s burglary statute, having the

purpose of committing or the commission of *any* offense within an occupied structure satisfies the elements of burglary.

In contrast, under Washington's burglary provisions, a burglary is committed only if a person enters or remains unlawfully in a building or a dwelling "with intent to commit a crime against *a person or property* therein." RCW 9A.52.020(1) (first degree burglary) (emphasis added); RCW 9A.52.025(1) (residential burglary) (emphasis added); RCW 9A.52.030(1) (second degree burglary) (emphasis added). Unlike Montana, the elements of a Washington burglary specifically require the intent to commit a crime against a person or against property.

Montana clearly criminalizes broader conduct than Washington. For example, as defense counsel pointed out below,

entering an occupied structure with an intent to possess a controlled substance (which is neither a crime against persons or property) could be a burglary in Montana; similarly entering a structure in an attempt to resist arrest (neither a crime against persons or property) could be burglary [in Montana], while it would not be in Washington.

CP 33. Because Montana's burglary statute is broader than Washington's counterparts, a Montana burglary conviction is not legally comparable.

Turning to robbery, in Montana, a person commits robbery if "in the course of committing a theft, the person: (a) inflicts bodily injury upon another; (b) threatens to inflict bodily injury upon any person or purposely or

knowingly puts any person in fear of immediate bodily injury; or (c) commits or threatens immediately to commit any felony other than theft.” MONT. CODE ANN. § 45-5-401(1). Under subsection (c) of this provision, the commission of any felony other than theft in the course of committing a theft constitutes robbery in Montana.

In Washington, by contrast,

A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190. Washington’s definition of robbery clearly requires the use or threatened use of force, violence, or fear of injury to take the personal property of another.

The Montana and Washington robbery provisions are not legally comparable, as the Montana provision is far broader than Washington’s. In Montana, the commission of any non-theft felony in the course of a theft constitutes a robbery. In Washington, robbery is theft specifically by use or threats of force, violence, or fear; a Washington robbery cannot be

accomplished by the commission of any non-theft felony in the course of a theft. The broader nature of Montana's robbery provision forecloses legal comparability.

The trial court determined that Brighton's Montana burglary and robbery convictions were legally comparable to Washington crimes by relying on Brighton's Montana plea agreement, as discussed below. 3RP 12-13. This demonstrates the trial court's misunderstanding of the proper legal comparability analysis. A Montana burglary and robbery are not legally comparable to a Washington burglary and robbery. In ruling otherwise, the trial court clearly erred. This court must reverse.

2. The State failed to prove Brighton's Montana convictions were factually comparable

The State bears the burden of proving factual comparability "based on facts [Brighton] admitted to, stipulated to, or that were proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 420; accord Lavery, 154 Wn.2d at 258. The State failed to carry its burden as no such facts appear in this record.

Because Brighton pleaded guilty to his Montana convictions, none of the facts underlying those charges was proved to a fact finder beyond a reasonable doubt. Thus, the only question here is whether Brighton admitted or stipulated to any facts pertaining to the Montana charges. He did not.

To support its erroneous finding of factual comparability, the trial court relied on Brighton's amended Montana plea agreement. See CP 98-103. Specifically, the trial court focused on one paragraph in the plea agreement titled "ACCEPTANCE," which reads, in its entirety:

I the undersigned Defendant, after full discussion of the charge(s) and penalties with my defense counsel, and after being fully advised of my rights to a jury trial, my understanding of my right to persist in my plea of not guilty and to demand a jury trial, do hereby accept the above offer and agree to enter plea(s) of guilty to the charge(s) specified. I hereby knowingly waive all objection to any substantive defect in said charge(s) and my right to a jury trial on the charge(s). I further understand that the offer made by the State is dependent upon the accuracy of my criminal history as I have represented it. My criminal history is as set out in the State's file. I understand that the Court is not bound by this Agreement and may impose the maximum penalty for the offense(s) charged, but that if the Court chooses not to follow this plea bargain, I shall be so informed and allowed to withdraw my plea(s) of guilty.

CP 102. The trial court ruled that the fact Brighton "agree[d] to enter pleas of guilty to the charges specified" constituted an agreement to the facts underlying the charges. 3RP 13. The trial court also believed Brighton's waiver of objection to substantive defects in the charges "would have to be either legal or factual or both, and [Brighton] is specifically waiving those objections." 3RP 13. The trial court concluded,

So those two things in concert mean to me that he's agreeing to plea as charged and that the facts as stated in the charges are the facts that he's agreeing to. So we have legal

comparability and we have factual comparability, because the way the charges have been stated is what he agreed to.

3RP 13. The trial court was mistaken.

Brighton's plea of guilty to the specified charges did not constitute a stipulation or agreement to any facts. No facts beyond the dates of Brighton's offenses appear in the plea agreement. CP 98-99. Rather, the guilty plea established only Brighton's agreement to plead guilty to the charges; the guilty plea sheds no light on whether or how Brighton committed the crimes. The fact that Brighton pleaded guilty, without more, cannot provide a basis for factual comparability.

The trial court and the State suggested that they could infer the pertinent facts from the Montana charging documents. 3RP 10, 12. But Brighton's plea agreement does not reference the charging documents even once. See CP 98-103. Neither do the Montana judgments. See CP 76-97. Thus, contrary to the trial court's ruling, the inclusion of facts in the Montana charging documentation supports no inference that Brighton stipulated or agreed to these facts. And, even assuming for the sake of argument that such an inference were supportable, there is no indication that the charging documentation had not been amended at the time of Brighton's plea, which the State conceded below. 3RP 10 ("I guess it is always possible that there was another subsequent amended information that didn't make it

to the court file or that he may have said something.”). Brighton’s plea agreement is not sufficient to conduct a factual comparability analysis.

Neither does Brighton’s waiver to substantive defects in the charges constitute a factual stipulation or agreement. The trial court indicated, “Any defect would have to be either legal or factual or both, and he is specifically waiving those objections.” 3RP 13. But a waiver of the right to challenge criminal charges is not the same as agreeing or stipulating to the factual basis of the charges. The waiver in his plea agreement notwithstanding, Brighton never adopted any facts underlying his Montana convictions.

The State failed to prove Brighton agreed or stipulated to the facts underlying his Montana convictions. The trial court erred in concluding Brighton’s Montana convictions were factually comparable to Washington crimes and in including the convictions in Brighton’s offender score.

3. The State should not be given another opportunity to prove comparability when it has already failed to do so

“Where a defendant specifically and timely objects that the evidence does not prove classification of prior out-of-state convictions used to calculate an offender score, the sentencing court should conduct an evidentiary hearing to allow the State to adduce additional evidence of classification.” State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). “If the State . . . fails to prove the requisite felony classifications, the

State will not have another opportunity to prove the classifications on remand following appeal.” Id. (emphasis added).

The State was given opportunities to prove the factual comparability of Brighton’s Montana convictions. 2RP 4-6; 3RP 2, 10-11. It failed to do so. Brighton objected, explicitly challenging legal and factual comparability. CP 30-36; 2RP 3-4; 3RP 3-12. On remand, the State does not deserve another chance. This court must vacate Brighton’s sentence and remand with instructions to resentence Brighton with an offender score of zero.

E. CONCLUSION

Brighton’s Montana burglary and robbery convictions were not legally or factually comparable and the trial court should not have included them in Brighton’s offender score. Accordingly, Brighton asks this court to vacate his unlawful sentence and remand for resentencing using the correct offender score of zero.

DATED this 24th day of November, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON)

Respondent,)

v.)

ALEXANDER BRIGHTON,)

Appellant.)

COA NO. 71864-9-1

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 24TH DAY OF NOVEMBER 2014, 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.

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P.O. BOX 769
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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF NOVEMBER 2014.

X *Patrick Mayovsky*