

NO. 43021-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

THOMAS FLOYD, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 11-1-02808-1

Appellant's Corrected Opening Brief

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A. ASSIGNMENTS OF ERROR.

1. The trial court abused its discretion when it failed to make an independent calculation of defendant's offender score.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it relied on the doctrine of collateral estoppel to determine defendant's offender score rather than making an independent analysis as required under the SRA?

C. STATEMENT OF THE CASE.

Procedure

On August 23, 2011, the State charged Thomas Floyd, hereinafter "defendant," with violation of a domestic violence court order and one count of stalking by way of an amended information. CP¹ 5-7. On November 21, 2011, a jury found defendant guilty as charged. CP 10, 11.

¹ Citations to Clerk's Papers will be to "CP." There were two sentencing hearings in this case, but the transcripts were not sequentially numbered. Therefore references to the verbatim report of proceedings will be to "RP" followed by the date of the hearing and the page number.

On December 2, 2011, the parties appeared before the Honorable Garold E. Johnson for sentencing. RP (12/2/11) 1. Defendant represented himself, with standby counsel present. RP (12/2/11) 1. The State requested that sentencing be continued, as the certified copies of the judgment and sentences for defendant's criminal history had been sent to the Court of Appeals in a prior case, and the State needed additional time to reacquire the copies. *See* RP (12/2/11) 2-3. Defendant also filed a motion to dismiss during the hearing. RP (12/2/11) 6. The court found good cause to continue the hearing. RP 17.

On January 13, 2012, the parties again appeared for sentencing. RP (1/13/12) 1-2. The court denied defendant's motion to dismiss which he had filed at the last hearing. RP (1/13/12) 24. The sentencing court then raised the issue of collateral estoppel with respect to defendant's offender score. RP (1/13/12) 24. The court believed that a prior Pierce County judge had addressed identical arguments and was concerned about reaching a different conclusion. RP (1/13/12) 27. The State informed the court that it had to make an independent calculation of defendant's offender score. RP (1/13/12) 25. The State also informed the court that regardless of issues of collateral estoppel, defendant's offender score should be five for the current offenses, giving him a standard range of 33-43 months on each count. RP (1/13/12) 28; CP 31-45. The State also informed the court that Judge McCarthy's ruling was currently subject to appellate review. RP (1/13/12) 28.

Defendant objected to the State's calculation and argued that his offender score should have been zero. RP (1/13/12) 30. Defendant then attempted to collaterally attack his current conviction. *See* RP (1/13/12) 30-32. The trial court found defendant had an offender score of five, after accepting the "offender score that Judge McCarthy found." RP (1/13/12) 36. The State presented certified copies of judgment and sentences for defendant's prior felonies, as well as documentation of his misdemeanor history. *See* RP (1/13/12) 37-41. Defendant objected on the grounds of zealous prosecution and collateral estoppel. RP (1/13/12) 38-39.

Defendant again argued that he was innocent of the charges. RP (1/13/12) 45-46. Over the State's objection, the court allowed defendant's standby counsel to argue that his offender score should be two, rather than five, based in part on Judge McCarthy's ruling that the 1972 robbery conviction was unconstitutional, and that the 1972 assault 2 conviction should be treated as a Class C felony. RP (1/13/12) 47-52. After additional argument from defendant relating to his innocence, the trial court acknowledged that it had read counsel's sentencing memorandum from Judge McCarthy's case and ruled that defendant's offender score was two. RP (1/13/12) 64.

The court sentenced defendant to a high-end, standard-range sentence² of 17 months in custody, together with standard fines and conditions. RP 64-65.

The State filed a timely notice of appeal. CP 46-63.

D. ARGUMENT.

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO MAKE AN INDEPENDENT CALCULATION OF DEFENDANT'S OFFENDER SCORE AND RELIED INSTEAD ON THE DOCTRINE OF COLLATERAL ESTOPPEL.

Ordinarily review is limited to determining whether the trial court's calculation of the offender score represents a clear abuse of discretion or is based on a misapplication of the law. *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The trial court has considerable discretion in sentencing, but its discretion does not extend to categorically refusing to entertain a request falling within the strictures of the Sentencing Reform Act of 1981, chapter 9.94A RCW (SRA), and principles of due process of law. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Any sentence imposed under the SRA shall be determined in accordance with the law in effect when the current offense was committed.

² With an offender score of two, defendant's standard range was 13-17 months. RP 59.

RCW 9.94A.345. “A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed.” RCW 9.94A.525(1). The State must prove prior convictions by a preponderance of the evidence in order for the trial court to consider them in calculating an offender score. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). Where a criminal defendant has out-of-state convictions, the sentencing court must conduct a comparability analysis to determine if the out-of-state conviction is either the legal or factual equivalent of a Washington crime. *State v. Calhoun*, 163 Wn. App. 153, 160, 257 P.3d 693 (2011).

The doctrine of collateral estoppel, or issue preclusion, applies in criminal cases. *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968); *State v. Blakey*, 61 Wn. App. 595, 598, 811 P.2d 965 (1991). Our Supreme Court has set forth the following collateral estoppel test:

Before the doctrine of collateral estoppel may be applied, the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Thompson v. Dep’t of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (quoting *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262–63, 956 P.2d 312 (1998)). Under the SRA, the current sentencing court is statutorily required to conduct an independent

sentencing inquiry as to the offender score value of prior offenses, without regard to prior sentencing decisions. *See* RCW 9.94A.345; *see also State v. Harris*, 148 Wn. App. 22, 28, 197 P.3d 1206 (2008) (“a future sentencing court may not simply rely on a criminal history from a previous judgment but must compute the offender score anew at any future sentencing hearing”).

Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(b). Assault 2 is a class B felony RCW 9A.36.021(2)(a).

Here, the State proved by a preponderance of the evidence that defendant’s offender score should have included his 1972 convictions for robbery and assault in the second degree, as well as a 1981 conviction for taking a vehicle without permission and a 2011 conviction for assault in the second degree. The State presented certified copies of judgment and sentences for the felonies. *See* Exhibit 1, 3. The State also presented certified copies of the dockets for district court convictions of various misdemeanor crimes showing that, since 1972, defendant had not spent 10 consecutive years in the community crime free. *See* Exhibit 3.

The certified copies of the judgment and sentences were sufficient to show that defendant should have had an offender score of four, not including his current convictions. The evidence of defendant's misdemeanor convictions were sufficient to prove that none of his felony convictions "washed" under the SRA. The sentencing court erred when it did not consider defendant's 1972 and 1981 convictions in his current offender score.

The trial court abused its discretion when it categorically refused to conduct its own analysis of defendant's offender score. Under the doctrine of collateral estoppel, the sentencing court adopted the findings of Judge McCarthy. *See* RP (1/13/12) 24-36. The sentencing court accepted that the 1972 conviction for robbery was unconstitutional on its face and that the 1972 conviction for assault in the second degree was comparable to a class C felony. *See* RP (1/13/12) 64. The sentencing court abused its discretion by failing to conduct its own determination of defendant's offender score.

In addition, the trial court abused its discretion when it applied the doctrine of collateral estoppel in adopting a prior judge's determination that defendant's prior convictions could not be counted as strike offenses. First, the issue decided was not identical to the one presented in the second action. Judge McCarthy was determining whether the prior convictions counted toward a persistent offender finding, not for the calculation of defendant's offender score. In fact, Judge McCarthy included the prior

convictions in the offender score despite his finding that they did not count toward a persistent offender determination. *See* RP (1/13/12) 28.

Second, the prior adjudication had not ended in a final judgment on the merits. The State filed a cross-appeal challenging Judge McCarthy's findings. That matter has not yet been decided by this Court and is not final.

Finally, the trial court abused its discretion when it failed to follow proper courtroom procedure and heard argument from defendant's standby counsel. There is no right to "hybrid representation, such as a pro se defendant serving as co-counsel with his attorney." *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (quoting *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987)). While standby counsel may engage in unsolicited participation in the defense, he or she may not interfere with significant tactical decisions, control the questioning of witnesses or speak instead of the defendant on material matters. *State v. Silva*, 107 Wn. App. 605, 627, 27 P.3d 663 (2001).

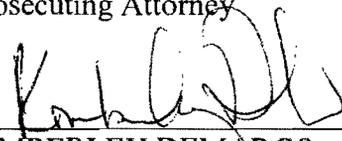
Here, the trial court ruled that defendant's offender score was a five, then inexplicably, heard argument from defendant's standby counsel. *See* RP (1/13/12) 36, 47-52. The court then accepted counsel's argument and determined defendant's offender score as a two. RP (1/13/12) 64. The trial court abused its discretion when it allowed stand by counsel to represent defendant without determining whether defendant wished to withdraw his request to proceed pro se.

E. CONCLUSION.

The State respectfully requests this Court to vacate defendant's sentence and remand for resentencing with a corrected offender score.

DATED: June 22, 2012.

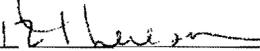
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