

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

LEESHAWN REDIC,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

No. 45464-5-II

STATEMENT OF ADDITIONAL

GROUND; RAP 10.10

1.

OPENING STATEMENT

The State cannot assert an equitable estoppel defense, nor can any court rely on that defense to steal Mr. Redic's Constitutional day in court. The SRA requires that prior out-of-state convictions be classified "according to the comparable offense definitions and sentences provided by Washington Law." RCW 9.94A.525(3). This places a mandatory legal & factual burden on the State.

The State committed Constructive Fraud when failing to perform this mandatory duty it presented a stipulated criminal history to the court as a factually and legally accurate representation of Mr. Redic's criminal history for calculation purposes. The State forced Mr. Redic to stipulate to a legally and factually fraudulent criminal history, in order to benefit from a plea bargain. It is constructive fraud to force Mr. Redic to stipulate to a criminal history, and then present that fraudulent criminal history to the court for offender score calculation without performing the mandatory obligations imposed in RCW 9.94A.525(3).

Since the state proposed the fraudulent fact's that Mr. Redic and the court relied on for the erroneous calculation of his offender score, equitable estoppel bars the state from benefiting from the fraudulent misrepresentations. Mr. Redic is the injured party who is authorized to assert the equitable estoppel defense, which bars the state and the courts from using the fraudulent stipulation to prevent full adjudication of Mr. Redic's claim; and returns Mr. Redic to the original state prior to the stipulation. This issue is properly before this court, and the merits have never been addressed, so collateral estoppel and Judicial estoppel do not prevent this court from adjudicating on the full merits.

Mr. Redic ask that this court give this statement of additional grounds liberal interpretation because he is not a lawyer. Maleng v. Cook, 489 U.S. 488 (1989). The relevant fact's will be incorporated into the applicable arguments below.

2.

ARGUMENT

A. THE REVIEWING COURT'S IGNORED CRITICAL ELEMENTS OF THE ESTOPPLE DOCTRINE

Mr. redic pleaded guilty via Alford plea in 2003 to second degree murder. The Superior court imposed a standard range prison sentence of 335 months, which included a firearm enhancement. In July 2011 Mr. Redic filed a motion in Superior Court to correct his sentence. The Superior Court transferred the motion to this Court for treatment as a personal restraint petition under CrR 7.8(c)(2). This Court did not address the merits of Mr. Redic's challenge to the calculation of his offender score. This Court accepted the State's equitable estoppel defense, and barred Mr. redic from his constitutional day in court. "We ... agree with the State that Redic's stipulation relieved the State of its burden of presenting proof of the comparability of his Florida conviction."

Mr. Redic appealed this Court's decision via Rap 13.5A to the State Supreme Court. The Commissioner erroneously applied State v. Ross, 152 Wn.2d 220, 231-32, 95 P.3d 1225 (2004) and State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000 (2000), in upholding the state's equitable estoppel defense. Following remand from this Court, the trial court determined the prior juvenile conviction is constitutionally invalid, and ordered a resentencing to correctly calculate Mr. Redic's offender score.

Mr. Redic properly filed Motions at the trial court level that challenged the sufficiency of the evidence supporting the legal and factual comparability of his prior Nevada conviction for possession of marijuana with intent to sell. Nevada only requires mere possession to constitute intent to sell, unlike in Washington State mere possession is not enough, there are additional elements. State v. Goodman, 150 Wash.2d 774, 783 (2004). The trial Judge exercised independent discretion and addressed the claim. However, the Honorable Judge Edmund Murphy, erroneously relied on this Court's and the Supreme court Commissioner's decision discussed above to reject Mr. Redic's claim. 9/13/13 RP 28-32.

"Equitable estoppel "arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. Fleckenstein v. Citizens Mutual Automobile Ins Co, 326 Mich. 591, 599-600; 40 N.W.2d 733 (1950)." Lichon v. American Universal Ins. Co., 435 Mich. 408, 459 M.W.2d 288 (1990).

Since, the State did not perform their duty under RCW 9.94A.525(3), that would ensure the stipulation was legally and factually comparable to a Washington Felony, the State is estopped from relying on the fraudulent stipulation as proof of Mr. Redic's Nevada conviction being comparable to a Washington Felony because it is not legally nor factually comparable. The State's culpable negligence amounts to constructive fraud because it induced the Sentencing Judge to rely on the fraudulent stipulation as a legal basis to prejudicially calculate Mr. Redic's offender score.

Thus, the State is estopped from asserting the equitable defense, not Mr. Redic, and this renders the ReSentencing Judge's decision an abuse of discretion. This Court cannot agree with the State's fraudulent defense to bar Mr. Redic from presenting his claim.

On the 2nd day of August and the 13th day of September 2013, in the in the Superior Court for the County of Pierce (No. 00-1-00810-6), the most Honorable Edmund Murphy reasoned:

"THE COURT: Well, at the time that Mr. Redic was sentenced, he signed a stipulation on his prior record and his offender score. He stipulated that the 2001 Clark County, Nevada conviction of the class that was indicated, which was a Class C felony.

"The Court of Appeals in its decision in April of 2012, stated, I quote, 'They agreed with the State that Redic's stipulation will relieve the State of its burden of presenting proof of the comparability' ... The court of Appeals, in its decision, indicated and directed that this case be remanded back to the trial court with an offender score of 4 instead of the 5 that he was sentenced to. Subsequent to that, Judge van Doorninck's action has reduced it further down to an offender score of 3.

"So, the court of appeals has taken and granted relief on the part that they can grant relief on based upon the time barring of raising claims, which was validity on its face ... The Court of Appeals said in its face those two could not be counted, which would count as one point, but it also made it clear that they felt that the stipulation he was agreeing that these were comparable and that they should be counted separately.

"I feel that I am bound by the Court of Appeals' decision. However, if I looked at the comparability of it, it is clear that it was a plea in Nevada to unlawful possession with intent to sell. If it is cocaine, clearly takes it out of the analysis that Mr. Redic has asked that Court to take. Even if it is marijuana, IF IT IS WITH INTENT TO SELL, IT IS A FELONY. It does not count as a misdemeanor. Has to be a simple possession without intent to sell. The plea was to the crime with the intent to sell. It would be comparable to the Washington Felony." 9/13/13 RP 28-30.

Judge Murphy did address the merits of the comparability analysis claim, and a Superior Court determination of a petition on the merits is treated identically with any other final superior court order. RAP 16.14(b). This Court has the right to review the decision of Judge Murphy, which is the first time any Judge has addressed the merits, so it is the equivalent of a final judgment on this issue. Mr. Redic is entitled to an appeal as of right from this final judgment. RAP 2.2(a)(1). This issue is properly raised in the trial court, so review is not barred by this court under RAP 2.5(a).

Judge Murphy's decision is an abuse of discretion because it is manifestly unreasonable, exercised on untenable grounds, and for untenable reasons. State ex. rel. Carroll V. Junker, 79 Wn.2d 12, 482 P.2d 775 (1991).

A Court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. As discussed above the State cannot assert an equitable estoppel defense because it enables a party to avoid litigating, in a second proceeding, claims which are plainly inconsistent with those litigated in a prior proceeding. "However, 'because the doctrine is intended to ensure fair dealing between the parties the courts will apply the doctrine only if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon his opponent's prior position.' *Edwards v. Aetna Life Ins Co*, 690 F.2d 595, 598 (CA 6,1982)." Lichon Supra. Because the State failed to perform their duty, and via culpable negligence forced Mr. Redic to stipulate to an offense that is not factually nor legally comparable to a Washington State Felony, and then induced the Sentencing Judge to prejudicially calculate Mr. Redic's offender score to increase punishment, the State cannot rely on equitable estoppel, nor can any court bar Mr. Redic from raising this claim. It is in fact the state who is barred by equitable estoppel.

The Court's reliance on the equitable estoppel bar prevented the merits of the claim from being seriously addressed. The principles of issue preclusion, an aspect of collateral estoppel do not apply because two fundamental elements of the collateral estoppel doctrine are that there be mutuality of estoppel and that the issue foreclosed actually be litigated.

Collateral estoppel applies when an issue of fact or law is actually litigated and determined by a valid and final judgment, a judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. So as this court can see Judge Murphy's decision was outside the range of acceptable choices, a serious adjudication of the merits should have taken place.

B. JUDGE MURPHY'S DECISION IS BASED ON UNTENABLE GROUNDS AND FACTS

The decision is based on untenable grounds because the factual finding is not supported by the record. The Equitable and Collateral Estoppel bar is not factually supported by the record. Most importantly the record before the court proved that Mr. Redic was in simple possession of 3.5 grams of personal smoke, marijuana, on 6-20-00. This by Judge murphy's own admission is merely simple possession. "Possession of forty grams or less of marihuana ... is a misdemeanor." RCW 69.50.4014. No additional baggies, scales, notebooks with names and amounts, or etc. were found on Mr. Redic in Clark County to establish intent to sell under Washington law.

The decision is untenable reasons because it is based on an incorrect standard and the facts do not meet the requirement of the correct standard. State v. Runquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995). Judge Murphy did not compare the elements between NRS 453.337 - Felony - Possession of controlled substance with intent to sell, and the Washington State Possession with intent to sell. Instead Judge Murphy erroneously held that because Mr. Redic plead guilty to the Nevada Possession with intent to sell, the crime is comparable.

That is not only crazy, but there is no authority to support that position. "Comparability of a prior out of state conviction is reviewed De Novo. To determine whether a foreign offense is comparable to a Washington offense, we first consider if the elements of the foreign offense are substantially similar to the Washington Counter part. If so, the inquiry ends. If not, we determine whether the offenses are factually comparable, that is, whether the underlying conduct for the foreign offense would have violated the comparable Washington Statute." State v. Thelefault, 160 Wash.2d 409, 414-15 (2007).

The Nevada NRS 453.337 allows for intent to be established from mere possession. In Washington State mere possession is not enough to constitute possession with intent to sell. Goodman Supra. The legal elements are different, and as discussed above the factual basis only supports simple possession. Judge Murphy's decision is manifestly unreasonable and based on untenable reasons, Mr. Redic cannot plead guilty in Nevada to possession with intent to sell, or deliver, when the comparable Washington offense is a misdemeanor simple possession.

C. THE STATE NEVER MET ITS BURDEN AND ROSS IS IN MR. REDIC'S FAVOR

The State Supreme Court recently clarified what scope of issue's may be raised on remand for resentencing in a time barred PRP. In Re Adams, 2013 WL 4857948 (WASH.2013). The Supreme Court clearly stated that any issue can be raised that fall's within the scope of the exception's to the Statute of Limitations enumerated in RCW 10.73.090 and RCW 10.73.100. Mr. Redic has never received his De Novo review of this issue, which clearly falls into RCW 10.73.100(5), and is facially invalid for the same reason.

Mr. Redic is entitled to invoke the waiver analysis in Goodwin, as the State Supreme court reasoned in State v. Ross, 152 Wn.2d 220, 96 P.3d 1225 (Wash.2004).

In Ross, the Supreme Court established that a stipulation to a prior criminal history can be overcome, however, to invoke the waiver analysis set forth in Goodwin, the Ross Court places the burden on Mr. Redic to establish that an error of fact or law exist within the four corners of the Judgment and Sentence. Mr. Redic has met this burden by establishing both factual and legal error, and can therefore invoke the waiver analysis in Goodwin. In Ross none of the Petitioner's met this initial requirement.

The Ross Court reiterated that "We have established that 'illegal or erroneous sentences may be challenged for the first time on appeal'" Id. 95 P.3d at 1229. "The SRA requires that prior out-of-state convictions be classified 'according to the comparable offense definitions and sentences provided by Washington Law.' RCW 9.94A.525(3)." Id. at 1230.

Waiver can be found where the alleged error involves an agreement to facts later disputed, however, this rule cannot hold true in the case at bar because under the equitable estoppel Doctrine the state cannot be allowed to benefit from the fraudulent stipulated facts. If the state would have performed their duty under the SRA'S it would have been discovered that there is no factual nor legal basis to calculate the Nevada conviction in the offender score. The State is barred under the Doctrine of Equitable Estoppel from relying on the fraudulent factual stipulation. Also, the alleged error does not involve a matter of trial court discretion. This issue is outside the discretion of the Judge, it involves what punishment is authorized by the SRA'S. Besides, only when the trial court has not erred in finding the facts, or in applying the correct legal standard, is the ruling truly "discretionary" in any meaningful sense. Assessing cases for Appeal, page 6, (June 2010), By David B. Zuckerman.

"It is the obligation of the State not the defendant, to assure that the record before the sentencing court supports the criminal history determination. FORD, 137 P.2d 480. This reflects fundamental principles of due process, which requires that a sentencing court base its decision on information bearing 'some minimal indicium of reliability beyond mere allegation.' Id. at 481, 973 P.2d 452." State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113, 116 (Wash.2009).

As discussed above the State Supreme court commissioner erroneously applied Ross and Nitsch, here is why. The case at bar is like Ford and not Nitsch because the challenge is to the legal and factual sufficiency of the criminal history. The ROSS Court made this distinction between Ford and State v. Nitsch, 100 Wash.App. 512, 997 P.2d 1000 (2000), in Fn 7.

"Nitsch made an argument that some of his criminal history constituted same criminal conduct, but Nitsch did 'not challenge the evidentiary sufficiency of the record.' Id. at 420, 997 P.2d 1000. Same criminal conduct involves both factual determinations and the exercise of discretion. Id. at 523, 997 P.2d 1000. For this reason the Court of Appeals in Nitsch was able to distinguish Ford: 'What constitutes same criminal conduct is not merely a calculation problem, or a question of whether the record contains sufficient evidence to support the inclusion of'" an out of state conviction. Id. Fn 7.

This case, in contrast, is similar to Ford because the challenge goes directly to the sufficiency of the evidence and whether or not the State has met its burden? Unlike Mr. Redic, the Petitioner in FORD introduced no evidence to support the classification of the disputed out of state conviction as to the comparability to Washington state Law. The Motion Mr. Redic filed at resentencing, the same motion Judge Murphy addressed on the merits, is filled with all the evidence proving the Nevada conviction is not comparable.

The SRA demands that out of state convictions are properly classified. The General rule is that issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). By its own terms, however, the rule is discretionary rather than absolute. This rule never operates as an absolute bar to review. However, that rule is not applicable because Mr. Redic did raise the issue in the trial court.

This Court has the power and duty to correct the error upon its discovery even where the parties not only failed to object but agreed with the sentencing Judge. Mendoza Supra. Constitutional Due Process requires the State to meet its burden at sentencing. State v. Hunley, No. 86135-8 (Wash.2d 11/01/12).

The Court appointed direct Appeal attorney in this case David B. Koch, is ineffective for failing to make the above arguments, and instead filing an Anders brief. This Court must appoint competent representation.

CONCLUSION

Mr. Redic respectfully request that this court address the merits under the appropriate standards, and reverse and remand for resentencing instructing the Sentencing court that the Nevada conviction is not comparable. Mr. Redic also request that competent Counsel be appointed so that he may receive an adequate direct appeal brief from competent and effective representation to this appeal of right.

D. ALLEYNE SUB SILENTIO OVERRULES KELLEY

The recent United States Supreme Court decision Alleyne v. U.S., No. 11-9335 (6/17/13), sub silentio overturns State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010). The FASE is now placed in the element category. An element that is part of the charging document cannot be used twice, this violates double Jeopardy. State v. Freidrich, 4 Wash. 204, 224-25, 29 P. 1055 (1892); State v. Gilbert, 842 P.2d 1029; RCW 10.73.100(3).

The Petitioner asserts that when a new decision overturns an old decision, and that old decision was used to deny the requested relief on direct review, the new decision under RCW 10.73.100(6) constitutes a substantial and significant change in the law, that is material to a determinative issue, and requires retroactive application. The Alleyne Rule overturns Kelley, and represents a significant change in the law on that basis alone.

The Ninth circuit heard a similar case to Kelley, on February of 2013, in Smith v. Hedgpeth, 706 F.3d 1099 (9th.Cir.(cal)2013), just five month before the U.S. State Supreme Court decided Alleyne v. U.S., No. 11-9335 (U.S. Supreme Court 6/17/13).

If Alleyne would have been available during the Hedgpeth decision, the Ninth Circuit would have ruled that the Statutory system involved in Hedgpeth violated Double Jeopardy when adding the Firearm enhancement, to the underlying crime that is already aggravated by the use of the firearm.

This is especially true in the Petitioner's case, under the SRA's the use of the Firearm, is the fact that imposes the core crime, and increases the punishment by determining the seriousness level and degree of Washington State's aggravated criminal statutes, separating core crimes into different degree based on the use of the firearm. The Homicide in this case was imposed for the use of the Firearm, and increased in classification and degree because of the use of the Firearm. That increases the amount of time the Petitioner is incarcerated.

The core fact is the use of the Firearm, and the increase in punishment is based from the same fact, this constitutes an element of an aggravated new crime, and is not a sentencing factor.

In Apprendi Justice Thomas correctly observed that the Apprendi rule was much too narrow for what is required under the Constitution. "The elements of a crime include every fact that is by law a basis for imposing or increasing punishment. Id. at 501, 120 S.Ct. 2348." Hedgpeth at 706 F.3d 1104. The illusion of Sentencing Factors was not removed by the Narrow Apprendi Rule.

Finally, a more broad version of the Apprendi Rule has been announced in Alleyne, holding that any fact that increases the amount of time for the core crime is an "element" of a new aggravated offense. "This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime..." Alleyne.

The Alleyne Court applied Apprendi to the floor and the ceiling, and overruled Harris v. U.S., 536 U.S. 545 (2002), where the court previously held that sentencing factors were not elements of the crime.

The views of Justice Thomas are expressed in the Alleyne Rule, the fact used to impose the core crime, is different than the fact used to increase the punishment of the core crime. When the Alleyne rule is applied to Washington State Law, the same fact used to impose the core crime, is the same fact used to increase the punishment within the underlying crime itself making the criminal statute an aggravated offense. When the additional Firearm enhancement is added, the punishment is twice increased for the same element, does this violate Double Jeopardy?

The FASE is now an element of an aggravated crime, and falls under the Rule announced in In Re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004). In that case, Orange was charged with first degree attempted murder and first degree assault. Id. at 820. The Supreme Court concluded that firing the bullet was the act that proved both the assault and the attempted murder, "Proving one necessarily proved the other." State v. Mandanas, No. 65208-7-I (Wash.Div.1 2011). The Deadly Weapon Enhancements do violate Double Jeopardy under the Orange Rule.

Before the Alleyne Rule was announced the McMillan, 477 U.S. at 88-89, era reigned supreme, and placed the FASE under the illusion of a "Sentencing factor." The Legislature has the power to define and codify the punishment for "Sentencing Factors" in anyway it pleases, and the Double Jeopardy Protection does no more than stop the courts from sentencing the convicted beyond what the legislature intended.

The Alleyne rule takes the Aggravated element out of the legislatures jurisdiction, and places any factor that increases punishment for the core crime into the protection of the double jeopardy Doctrine's bar against multiple punishment, or twice punished for the same crime.

The Alleyne Rule is a watershed rule of criminal procedure, and is a substantive rule, not procedural. Schriro v. Summerlin, 542 U.S. 348 (2004).

The scope and function of the Alleyne Rule substantially increases the Fundamental Fairness of the criminal process, even affecting the indictment process, therefore the right to present a defense, and the Fair administration of Justice. The Alleyne Rule is a Watershed and Substantive Rule that serves as a reminder to the American Justice System of a Fundamental Principle of the Constitution, that "the powers of the legislature are defined and limited, and that those limits

may not be mistaken or forgotten, the constitution is written.... Every Law enacted by congress must be based on one or more of its powers enumerated in the Constitution.... The Constitution is superior to ordinary acts of the legislature." Marbury v. Madison, 5 U.S. 137, 176 (1803)(Marshall C.J.). Only lawfully enacted Statutes are "The Supreme law of the land." U.S.C. Article VI.

The Alleyne Rule "Defines the facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.... It also preserves the historic role of the jury as an intermediary between the State and Criminal defendants." Alleyne.

This Watershed and Substantive Rule protects a criminal defendant from being oppressed by the tyranny of over zealous prosecutors and Bias Judges:

"Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime; the defendant's 'expected punishment has increased as a result of the narrow range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish....' It is obvious for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the elements for larceny." Alleyne.

In State v. Ruth, 167 Wn.2d 889 (2010), the Supreme Court pointed out that the legal basis supporting the Ruth Rule, (which is identical to the Alleyne Rule), has existed in Washington State since 1972. A "New Rule" is one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not dictated by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989). "The Court must 'survey the legal landscape as it then existed,'" and "'determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution.'" Saffle v. Parks, 494 U.S. 484, 488 (1990).

The Ruth rule is identical to the Alleyne, and the Ruth rule is based on a Washington State rule that has been around since 1972, State v. Fraiser. The U.S. Supreme Court declined to give retroactive effect to the narrow Apprendi Rule that was not in full compliance with what the constitution requires. That decision is immaterial to the broad Alleyne Rule which is much more in compliance.

The Seventh and Tenth circuit erroneously applied the U.S. Supreme Courts analysis of the narrow Apprendi Rule that declined to give retroactive effect to the expanded version in Alleyne. In Re Payne, 2013 WL 5200425 (C.A.10(Okla)2013).

The Double Jeopardy clause is the constitutional safeguard of Substantive Due process that prevents legislation that twice punishes for the same offense.

The Double Jeopardy clause safeguard is a freedom specifically enumerated against congress. This fact entitled it to greater respect against the state than other liberties protected by the Due Process clause. Carolene products Co., 304 U.S. 144, 152-53 n.4 (1938). The Alleyne rule activates the Double Jeopardy clause as a substantive and Procedural Due Process safeguard.

The Constitution is designed to protect the rights of the minorities against the arbitrary actions of those in power. Extending the 5th amendment protections to the Alleyne and Ruth Rule protects and maintains the application of that design. The coextensive safeguard requires court action to check the legislative and executive tyranny and oppression that is actively inflicted on the people of Washington State, by the application of the FASE increasing punishment for the same element that has already increased the punishment within the statute of the aggravated crime's standard range (the higher serious level).

Conclusion

Mr. Redic respectfully ask that this Most Honorable Court vacate his 60 month
Firearm sentencing enhancement.

Sincerely Submitted,

This 20 Day of MAR, 2014

X

Leeshawn Redic

PIERCE COUNTY PROSECUTOR

March 20, 2014 - 1:23 PM

Transmittal Letter

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