IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31641-6-III

STATE OF WASHINGTON, Respondent,

v.

THOMAS RALPH LEVITON, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

In its Respondent's Brief, the State argues that Leviton "proffered insufficient support of his motion" to withdraw his guilty plea, contending that Leviton's "unwavering insistence" on obtaining a DOSA sentence and subsequent failure to comply with the DOSA sentence somehow obviated his counsel's obligation to render effective assistance of counsel. *Respondent's Brief*, at 6. The State's characterizations are utterly unsupported by its citations to the record, which are simply citations to entire court hearings in which the issue of comparability was argued by counsel. Nor does the State provide any citation to any legal authority supporting its position that Leviton's offender score stipulation was "justified" (which, presumably, means knowing, intelligent and voluntary) when his counsel failed to evaluate the comparability of the out-of-state convictions.

The State further contends, without any support from a citation to the record, that "All three of defendant's counsel addressed the issue of the comparability of defendant's out-of-state convictions." *Respondent's Brief*, at 2. Then apparently conceding that the record did not support the claim that Ms. Hagara, who represented Leviton at the time his guilty plea was entered, made any argument at all with respect to the offender score, the State cites to the hearing upon entry of the guilty plea and Leviton's

motion to withdraw his guilty plea in support of its claim that "Defendant's first counsel successfully gained the concessions from the State that some of the defendant's out-of-state convictions constituted the same course of criminal conduct and others 'washed out' under the sentencing statutes." *Respondent's Brief*, at 2. Again, the State's factual contentions are entirely unsupported by its citations to the record. Moreover, even if factually correct, the State fails to cite authority supporting the proposition that counsel's evaluation of certain issues pertaining to the offender score calculation somehow excused counsel from also evaluating the comparability of the out-of-state convictions.

The State further argues that the offenses should not have been considered comparable because the Montana forgery statute contains a means of committing the crime by way of counterfeiting. *Respondent's Brief*, at 10. While the State is correct that RCW 9.16.035 criminalizes counterfeiting, the State fails to point out that (1) counterfeiting is a gross misdemeanor unless additional elements not set forth in the Montana forgery statute are shown; and (2) Subsection (d) of the Montana forgery statute criminalizes the possession of instruments of counterfeiting, which has no equivalent under any Washington statute. The Montana forgery statute accordingly includes a means of commission that is not comparable to any criminal act in Washington. *See Appellant's Brief*, at 12-13.

Similarly, the State argues that the Montana burglary statute criminalizing entry into a vehicle is comparable to Washington's first degree vehicle prowling statute. *Respondent's Brief*, at 10. Washington's first degree vehicle prowling statute is limited to unlawful entry into motor homes or vessels containing a cabin with sleeping quarters or cooking facilities. RCW 9A.52.095(1). Montana's burglary statute contains no similar restriction on the type of vehicle. Accordingly, Montana's burglary statute would encompass vehicle entries that would constitute only second degree prowling, a gross misdemeanor, in the State of Washington. RCW 9A.52.100; *see also Appellant's Brief*, at 14-15.

VI. CONCLUSION

The State fails to establish how Leviton's stipulation to his offender score could have been knowing, intelligent and voluntary when it effectively concedes that the attorney who represented him when the stipulation was entered never raised the issue of comparability. Accordingly, the State fails to persuasively demonstrate that Leviton's counsel properly investigated potential challenges to Leviton's offender score that would have direct and measurable consequences in the case such that Leviton could properly evaluate the State's plea offer. *See State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Thiefault*, 160

Wn.2d 409, 417, 158 P.3d 580 (2007). As a result, the State has failed to show that Leviton's representation met the minimal constitutional requirements. Leviton should, accordingly, receive the relief he requested.

RESPECTFULLY SUBMITTED this 13 day of February, 2014.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of February, 2014 in Walla Walla, Washington.

Kristin McCaffrey