

FILED
March 12, 2014
Court of Appeals
Division III
State of Washington
No. 31895-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

KORY L. ZIELKE

Appellant.

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

The Honorable Kathleen M. O'Connor

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Kory Zielke was convicted of possession of a stolen vehicle and attempting to elude a police officer. He had several prior convictions, two groups of which were sentenced on the same dates. In addition, Mr. Zielke admitted in court to having recently suffered a prior conviction in Idaho for “forgery.” In sentencing Mr. Zielke, the trial court included the Idaho forgery conviction without determining whether the foreign conviction was comparable, and counted each of the prior convictions separately without determining whether some of the prior convictions were based on the same criminal conduct. Mr. Zielke submits these two errors by the trial court require reversal of his sentence and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to determine whether Mr. Zielke’s prior convictions sentenced on the same date constituted the same criminal conduct.

2. The trial court erred when it failed to determine whether Mr. Zielke’s self-confessed Idaho prior conviction for forgery was comparable to a Washington felony.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where evidence establishes a defendant's prior convictions were sentenced on the same date, the trial court has an independent duty to determine whether those prior convictions constituted the same criminal conduct. Mr. Zielke had two groups of prior convictions that had been sentenced on the same dates. The trial court failed to determine whether these prior convictions were based on the same criminal conduct. Is Mr. Zielke entitled to remand for the trial court to make this independent finding?

2. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated to, or proven beyond a reasonable doubt. The court here accepted Mr. Zielke's admission he had a prior Idaho forgery conviction without determining whether the prior foreign conviction was comparable to a Washington offense. In addition, the State failed to provide any additional evidence to establish comparability. Did the trial court err in

including the Idaho prior conviction thus requiring reversal of Mr. Zielke's sentence?

D. STATEMENT OF THE CASE

Kory Zielke was charged with attempting to elude a police officer and possession of a stolen vehicle. CP 7. Following a jury trial, Mr. Zielke was convicted as charged. CP 39-40.

Mr. Zielke's criminal history consisted of ten prior felony convictions. CP 55. At the sentencing hearing, Mr. Zielke admitted an additional forgery conviction from Idaho.¹ CP 45; RP 211-16. Among these prior convictions were three forgery convictions from Spokane County that were all sentenced on the same date: November 14, 2011. CP 45, 55. In addition, Mr. Zielke had residential burglary and malicious mischief convictions from Spokane County which were also sentenced on the same date: March 1, 2006. CP 45, 55. Mr. Zielke did not request that the trial court find these groups of prior convictions to be the same criminal conduct. Nor did the trial court engage in a same criminal conduct analysis for these two groups of prior convictions.

¹ The court accepted Mr. Zielke's admission that he had this Idaho prior conviction without more. The State provided nothing in support of this prior conviction, and the court did not engage in any analysis regarding the comparability of this Idaho prior conviction. The court merely included it in Mr. Zielke's offender score. CP 45.

The trial court calculated Mr. Zielke's offender score as a "12" on the possession of a stolen vehicle count and an "11" on the attempting to elude conviction and sentenced him accordingly. CP 46-47.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO DETERMINE WHETHER MR. ZIELKE'S PRIOR CONVICTIONS SENTENCED ON THE SAME DATES CONSTITUTED THE SAME CRIMINAL CONDUCT

To properly calculate a defendant's offender score, the Sentencing Reform Act (SRA) requires that sentencing courts determine a defendant's criminal history based on his prior convictions. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A .589(1)(a)²; *State v. Williams*, 176 Wn.App. 138, 141, 307 P.3d

² RCW 9.94A.525 states in relevant part:

819 (2013), *review granted*, ___ Wn.2d ___ (February 27, 2014). If a prior sentencing court found that multiple offenses encompassed the same criminal conduct, the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i); *Williams*, 176 Wn.App. at 141. If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must *independently* evaluate whether those prior convictions encompass the same criminal conduct and, if they do, must count them as one offense. RCW 9.94A.525(5)(a)(i); *see also State v. Torngren*, 147 Wn.App. 556, 563, 196 P.3d 742 (2008) (sentencing court must apply same criminal conduct test to multiple prior convictions that a court has not already

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations; . . .

concluded amount to the same criminal conduct), *abrogated on other grounds by State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013).

A sentencing court “has no discretion” regarding whether to apply this same criminal conduct test to multiple prior convictions that a court has not already concluded amount to same criminal conduct. *Torngren*, 147 Wn.App. at 563. And, “the language of [RCW 9.94A.525(5)(a)] appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses.” *State v. Reinhart*, 77 Wn.App. 454, 459, 891 P.2d 735, *review denied*, 127 Wn.2d 1014 (1995).

Where the trial court fails to make the required ruling, this Court cannot decide this issue because the trial court failed to exercise discretion required under the same criminal conduct test. *Williams*, 176 Wn.App. at 142. As a result, the remedy is to remand for the trial court to make the required finding whether the prior convictions sentenced on the same date constituted the same criminal conduct. *Id.*

Here, despite the fact that the two groups of prior convictions were sentenced on the same dates, the trial court made no finding regarding whether the offenses were the same criminal conduct. The

court had an independent duty to conduct this analysis and it failed to do so. Mr. Zielke's sentence must be remanded to the trial court.

The "Understanding of Defendant's Criminal History" signed by the parties did not act as a stipulation that the offenses did not constitute the same criminal conduct nor did it waive this issue. CP 55-56. In this document, Mr. Zielke only stipulated that he agreed that he had the prior convictions listed; nothing more. *Id.* The document made no mention of same criminal conduct. *Id.*

The trial court failed to make its required independent finding regarding the same criminal conduct of the prior convictions sentenced at the same time. As a consequence, this Court must remand the matter to the trial court to make this finding. *Williams*, 176 Wn.App. at 142.

2. THE TRIAL COURT FAILED TO DETERMINE WHETHER MR. ZIELKE'S SELF-CONFESSED IDAHO PRIOR CONVICTION WAS COMPARABLE TO A WASHINGTON FELONY CONVICTION

a. The State is required to prove, and the trial court is required to find, that the Idaho conviction was comparable to a current Washington felony offense. When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court reviews the classification of an out-of-state conviction *de novo*. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, when engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are comparable, a sentencing

court must treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether the out-of-state court found each fact necessary to liability for the Washington crime (factual comparability). *Morley*, 134 Wn.2d at 605-06. "If a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt." *State v. Johnson*, 150 Wn.App. 663, 676, 208 P.3d 1265 (2009). *See also* RCW 9.94A.530(2) ("In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.").

An illegal or erroneous sentence, including the improper inclusion of out-of-state convictions, may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 484-85.

b. The Idaho forgery statute is broader than Washington's offense of forgery. Mr. Zielke admitted to an Idaho conviction for "forgery" without any further elaboration. There are multiple Idaho statutes involving "forgery." *See infra.* The State made no attempt to determine the specifics of the prior conviction to determine whether it was comparable to a Washington offense. As a consequence, the trial court erred.

Washington defines "forgery" as:

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He or she falsely makes, completes, or alters a written instrument or;

(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

RCW 9A.60.020.

Idaho defines the crime of "forgery" as:

Every person who, with intent to defraud another, falsely makes, alters, forges or counterfeits, any charter, letters, patent, deed lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, federal reserve note, United States currency or

United States money, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any state controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit action demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine any of the above named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court, or the return of any officer to any process of any court, is guilty of forgery.

Idaho Code § 18-3601.

Besides “forgery,” Idaho also has statutes which criminalize, for example, Offering false or forged instrument for record (Idaho Code § 18-3203); Forging or Counterfeiting Public Seals (Idaho Code § 18-3603); Making, passing, uttering, or publishing fictitious bills, notes, and checks (Idaho Code § 18-3606); and Forging or counterfeiting trade-marks (Idaho Code § 18-3614). Without further information, it is impossible to determine under which Idaho statute Mr. Zielke was convicted. In addition, the State offered no information about this Idaho prior conviction, and the court failed to engage in any comparability analysis. Without a determination that the foreign prior conviction was comparable, the trial court erred in including it in Mr. Zielke’s offender score.

c. Mr. Zielke is entitled to reversal of his sentence and remand for resentencing. An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is equivalent to a felony in Washington. *State v. Weiland*, 66 Wn.App. 29, 31-32, 831 P.2d 749 (1992). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state convictions should be included in the

offender score. *Ford*, 137 Wn.2d at 480-81. An erroneous sentence must be reversed and remanded for resentencing. *Id.* at 485.

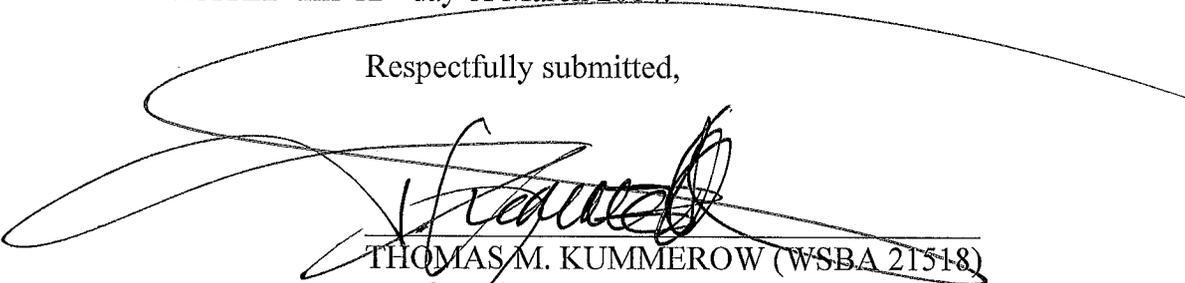
Here, Mr. Zielke's sentence is illegal as it contains an out-of-state prior conviction where there was no finding the foreign conviction was comparable to a Washington offense. This Court must reverse Mr. Zielke's sentence and remand for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Zielke asks this Court to remand this matter to the trial court for the court to determine whether the prior convictions sentenced on the same date constituted the same criminal conduct.

DATED this 12th day of March 2014.

Respectfully submitted,



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