

FILED
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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 93869.5
(Court of Appeals No. ~~74221-2-1~~)

741128

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRENDA NICHOLAS,

Petitioner.

PETITION FOR REVIEW

BRENDA NICHOLAS
Pro se petitioner

DOC #339217
WCC for Women
9601 Bujacich Road NW
Gig Harbor, WA 983321

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A. IDENTITY OF PETITIONER AND OPINION BELOW

Pursuant to RAP 13.4(b)(1),(2), (3), and (4) Brenda Nicholas, *pro se*, asks this Court to accept review of the August 22, 2016 opinion of the Court of Appeals in State v. Nicholas, 74221-2-I, the decision terminating review designated in Part B of this petition. (A copy of the Opinion is attached as Appendix A.)

Ms. Nicholas was found to be indigent at trial, and on appeal, and asks that the Petition be accepted without a filing fee.

Under separate cover, a "Motion to Extend Time To File Petition for Review," written by petitioner's former appellate counsel, is also submitted to explain the delay in filing of this Petition.

B. ISSUES PRESENTED FOR REVIEW

1. In this appeal from a resentencing, the Court of Appeals granted appointed appellate counsel's Anders motion to withdraw.

Should this Court grant review to decide for itself if the Court of Appeals was correct in ruling that "the potential issues are wholly frivolous," granting the motion to withdraw, and dismissing the appeal?

2. The State bears the burden of proving criminal history, including comparability of out-of-state convictions, as a matter of due process.

"Out-of-state convictions for offenses shall be classified according to

the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3).

A foreign conviction for a crime that is *not* comparable to a Washington felony may not be included in the offender score. State v. Thomas, 135 Wn.App. 474, 477, 144 P.3d 1178 (2006); see also In re Personal Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005).

Should this Court grant review to decide for itself if the alleged California conviction for grand theft is comparable to second degree theft in Washington?

3. In the direct appeal from trial, Ms. Nicholas alleged, in her statement of additional grounds, that her trial counsel provided her with ineffective assistance of counsel. Her convictions were affirmed. See State v. Nicholas, 185 Wn. App. 1019 (2015) (unpublished decision in Case No. 70857–1–I), review denied, 183 Wn.2d 1010, 352 P.3d 188 (2015). Upon remand for resentencing, original counsel was re-assigned.

An accused has the right to be represented by conflict-free counsel. Should this Court grant review to decide for itself if Ms. Nicholas’s resentencing counsel had a conflict of interest?

C. STATEMENT OF THE CASE

On January 12, 2015, the Court of Appeals affirmed Brenda Nicholas's conviction for first degree murder and other offenses, but reversed and remanded for a resentencing. CP 20-31. In that appeal, the State conceded it was error to have included California convictions for "grand theft" and "theft and embezzlement" without first conducting a comparability analysis. A number of additional grounds raised by Ms. Nicholas *pro se* to challenge her conviction were rejected by the Court. These included assertions that trial counsel had been ineffective.

At the resentencing, the State asked the trial court to count a 2010 California conviction for "grand theft" as a point toward Ms. Nicholas' offender score. CP 34-35. In support of this request, the State submitted a California judgment and sentence. CP 37-38. The State also submitted a California charging document and copies of relevant statutes. CP 39-48; 10/9/15 RP 5-6.

The State argued the out-of-state prior was "legally comparable to Washington's Theft in the Second Degree statute." CP 34. Defense counsel conceded the State's analysis was "correct." 10/9/15 RP6.

The trial court included the conviction in Ms. Nicholas's offender score. CP 50, 55. The corresponding standard range was

calculated to be 281 to 374 months of incarceration. CP 50. The trial court sentenced Ms. Nicholas to the high end of this standard range, 374 months in prison to be followed by 24 months of deadly weapon enhancement time, for a total of 398 months of incarceration. CP 49-57 (“Corrected Judgment and Sentence Felony Following Reversal of Sentence.”).

Ms. Nicholas appealed from the entry of this judgment. CP 58. She was appointed appellate counsel at public expense. Appellate counsel reviewed the record from the resentencing and filed an Anders motion to withdraw.

The motion to withdraw identified as two potential appellate issues the following questions: (1) On resentencing, did the court mete out a lawful sentence?, and (2) Did trial counsel, at resentencing, operate under a conflict that implicated Ms. Nicholas Sixth Amendment right to counsel?

After independently reviewing the record, the Court of Appeals determined these potential issues “are wholly frivolous,” granted the motion to withdraw and dismissed the appeal.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should grant review to decide for itself whether on resentencing, the trial court handed down a lawful sentence.**

2. **This Court should grant review to decide for itself whether trial counsel, at resentencing, operated under a conflict that implicated Ms. Nicholas Sixth Amendment right to counsel.**

In reference to the question: Did the trial court issue a lawful sentence based on offender score, Ms. Nicholas contends that the state and the court failed to prove that her out of state crime comparability was not a thorough analysis and that her CA conviction of “grand theft” is not comparable to the WA crime of “Theft in the second degree.” As in *State v. Ford*, 137 Wn.2d 472; 973 P.2d 452 (1999), if a thorough comparability analysis is not presented, it cannot be used.

Ms. Nicholas also contends that her trial counsel was ineffective at her second sentencing. She requested new counsel during her resentencing due to her allegations of ineffective assistance of counsel from her first sentencing. She was still assigned the same counsel for her resentencing and believes her prior contentious relationship with her counsel negatively affected the proceedings. She believes her counsel, on resentencing, due to his ineffectiveness, did not raise the comparability question, which therefore resulted in prejudice. According to *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052 80 L.ed 2d 674

(1984); and *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996), counsel is ineffective when his/her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.


Lastly, Ms. Nicholas asserts that her appellate counsel was ineffective when he filed an Anders brief. She believes that he did not thoroughly examine the merits of her case before dismissing its merits.

E. CONCLUSION

Review should be granted under RAP 13.4(b)(1), (2), and (3) so that this Court can review for itself whether the Court of Appeals' decision to grant the Anders brief and dismiss the appeal was correct or not.

DATED this 14 day of November 2016

Respectfully submitted,


Brenda Nicholas
Pro se petitioner

DOC #339217
WCC for Women
9601 Bujacich Road NW
Gig Harbor, WA 983321

APPENDIX A:

AUGUST 22, 2016 OPINION OF COURT OF APPEALS IN
STATE OF WASHINGTON V. BRENDA NICHOLAS
74221-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BRENDA NICHOLAS,)
)
 Appellant.)

No. 74112-8-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: August 22, 2016

2016 AUG 22 AM 10:31
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

PER CURIAM. Brenda Nicholas appeals the sentence imposed on remand from our prior decision affirming her convictions for first degree murder, theft and identity theft. Nicholas's court-appointed attorney has filed a motion to withdraw on the ground that there is no basis for a good faith argument on review. Pursuant to State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the motion to withdraw must

[1] be accompanied by a brief referring to anything in the record that might arguably support the appeal. [2] A copy of counsel's brief should be furnished the indigent and [3] time allowed him to raise any points that he chooses; [4] the court--not counsel--then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Theobald, 78 Wn.2d at 185 (quoting Anders, 386 U.S. at 744).

This procedure has been followed. Nicholas's counsel on appeal filed a brief with the motion to withdraw. Nicholas was served with a copy of the brief and informed of her right to file a statement of additional grounds for review. She did not file a statement of additional grounds.

No. 74112-8-1/2

The facts are accurately set forth in counsel's brief in support of the motion to withdraw. The court has reviewed the briefs filed in this court and has independently reviewed the entire record. The court specifically considered the following potential issues raised by counsel:

1. Did the resentencing court err in concluding that Nicholas's California conviction for grand theft is comparable to second degree theft in Washington?
2. Did Nicholas's resentencing counsel have a conflict of interest?

The potential issues are wholly frivolous. Counsel's motion to withdraw is granted and the appeal is dismissed.

For the court:

Tickey, ACT
Schubert, J.
COX, J.

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) COA NO. 74112-8-I
)
 BRENDA NICHOLAS,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, BRENDA NICHOLAS, STATE THAT ON THE 18th DAY OF November, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY	<input checked="" type="checkbox"/> U.S. MAIL
APPELLATE UNIT	<input type="checkbox"/> HAND DELIVERY
KING COUNTY COURTHOUSE	<input type="checkbox"/> AGREED E-SERVICE
516 THIRD AVENUE, W-554	VIA COA PORTAL
SEATTLE, WA 98104	

SIGNED IN Spokane, WASHINGTON THIS 18 DAY OF November, 2016.

x Brenda Nicholas
BRENDA NICHOLAS

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF Pierce

THE STATE OF WASHINGTON)
COUNTY OF PIERCE) ss. DECLARATION OF MAILING

I, Brenda Nicholas, state that on this 18th day of November,
2016, I deposited in the mail of the United States of America a properly stamped
envelope containing a copy of the following described documents:

Petition for Review - WA Supreme Court

I further state that I sent these copies to the following addresses:

King County Prosecuting Attorney
Appellate Unit
W554 King County Courthouse
516 3rd Ave, Seattle, WA 98104-2385

Dated: 11/18/16

Brenda Nicholas

Signature

Brenda Nicholas 339217

Print Name & DOC

Washington Correction Center for Women
9601 Bujacich Rd. N.W.
Gig Harbor, Washington 98332-8300