

62523-3

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No. 62523-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

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

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SUPPLEMENTAL BRIEF OF APPELLANT

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COURT OF APPEALS  
DIVISION ONE  
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ELAINE L. WINTERS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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A. ADDITIONAL ASSIGNMENT OF ERROR

5. Mr. Smith's constitutional right to effective assistance of counsel was violated when his attorney did not object to the inclusion of California burglary and attempted burglary convictions in computing his offender score and standard sentence range.

B. ISSUE PERTAINING TO ADDITIONAL ASSIGNMENT OF ERROR

5. A criminal defendant's right to counsel includes the right to the effective assistance of counsel at sentencing. Mr. Smith's attorney agreed Mr. Smith's criminal history included five California burglaries and one California attempted burglary and that his offender score was nine or more. In 2006, this Court held that California's burglary statute is not comparable to Washington's because it does not require an unlawful entry and covers property other than buildings. State v. Thomas, 135 Wn.App. 474, 144 P.3d 1178 (2006), rev. denied, 161 Wn.2d 1009 (2007). Was Mr. Smith's constitutional right to effective assistance of counsel violated where his attorney agreed to include California convictions in the computation of his offender score, resulting in a higher sentence range, when those convictions were not comparable to Washington burglaries as required by the Sentencing Reform Act?

### C. STATEMENT OF THE CASE

Tony Smith was convicted of three counts of second degree burglary. CP 45-47, 57-59. Five California burglary convictions and one California attempted burglary conviction were included in Mr. Smith's criminal history, although it appears only two were included in the State's computation of his offender score. CP 96; SuppCP 125-27. Based upon an offender score of 9 or over, Mr. Smith's standard sentence range for each count was 51 to 68 months in prison. CP 90; SuppCP 132-34. The court imposed a prison-based DOSA sentence of 59 and one-half months. CP 92; 9/23/08RP 8.

In his Brief of Appellant, Mr. Smith assigned error to the court's inclusion of California burglaries in his offender score. Brief of Appellant at 1, 31-39. Prior to filing its response brief, the State successfully moved to (1) supplement the record with the Defense Presentence Report and (2) correct the sentencing hearing transcript. SuppCP 186-89. In the defense presentence report, Mr. Smith's attorney included three California burglary convictions and one California attempted burglary conviction in a list of prior convictions "that score." SuppCP 188-89. His attorney added "the above listed burglaries are comparable to the Washington state

burglary statute in the manner in which they were charged.”

SuppCP 189. Defense counsel also conceded Mr. Smith’s offender score was nine or above. SuppCP 187, 189.

In light of the new information provided by the State, Mr. Smith submits this Supplemental Brief.

D. ARGUMENT

4. MR. SMITH’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY AGREED TO INCLUDE CALIFORNIA BURGLARY AND ATTEMPTED BURGLARY CONVICTIONS IN HIS OFFENDER SCORE, RESULTING IN A HIGHER SENTENCE RANGE

This Court has held that California burglary convictions are not comparable to convictions under Washington’s burglary statutes and thus should not be included in a defendant’s offender score. State v. Thomas, 135 Wn.App. 474, 144 P.3d 1178 (2006), rev. denied, 161 Wn.2d 1009 (2007). Mr. Smith’s attorney was apparently unaware of the Thomas case, because she agreed that three burglary and one attempted burglary conviction from California were properly included in her client’s offender score and that the score was therefore nine or above. In light of controlling case law, defense counsel’s performance was deficient and, as a result of her deficient performance, Mr. Smith received a higher

sentence than that authorized by statute. Mr. Smith's constitutional right to effective assistance of counsel was violated, and this Court should vacate his sentence and remand for new sentencing hearing.

a. The accused has the constitutional right to effective assistance of counsel. The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law.<sup>1</sup> U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Sentencing is a critical stage of the proceeding where the defendant is entitled to counsel. State v. Saunders, 120 Wn.App. 800, 819-25, 86 P.3d 232 (2004); In re Personal Restraint of Morris, 34 Wn.App. 23, 658 P.2d 1279 (1983); CrR 3.1(b)(2). "Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process." State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999).

The right to counsel necessarily includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S.

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<sup>1</sup> The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Article I, § 22 provides in part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The right to effective counsel is not met simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685.

When a defendant alleges he did not receive effective assistance of counsel, the appellate court must determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-88; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In reviewing the first prong, courts presume counsel's representation was effective. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must show a reasonable probability that the deficient performance altered the outcome of the case. Strickland, at 693-94; Thomas, 109 Wn.2d at 226.

b. Mr. Smith's attorney's performance was deficient because she did not challenge the inclusion of California burglary and attempted burglary convictions in his offender score even though those crimes are not comparable to a Washington burglary. Competent trial counsel is aware of the sentencing law applicable to his client's case. Saunders, 120 Wn.App. at 825 (counsel deficient for not making same criminal conduct argument supported by case law). Washington's Sentencing Reform Act (SRA) creates a grid of sentence ranges based upon the statutorily established seriousness of the current offense and the defendant's offender score. RCW 9.94A.510; RCW 9.94A.515 (2007); RCW 9.94A.525 (2007); RCW 9.94A.530 (2007); Ford, 137 Wn.2d at 479. To properly calculate the offender score, the court must determine the defendant's criminal history, which is defined as a list of the defendant's prior criminal convictions and juvenile adjudications. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004); RCW 9.94A.030(14). Out-of-state convictions are included in the offender score only if they are for crimes that are comparable to a Washington criminal statute in effect at the time the foreign crime was committed. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007); Ross, 152 Wn.2d at 229.

In order to determine if defense counsel's performance was deficient for failing to object to the inclusion of out-of-state offenses in a client's offender score, the appellate court must conduct a comparability analysis. Thiefault, 160 Wn.2d at 414-15. This determination is made by comparing the elements of the out-of-state crime with the elements of the potentially comparable Washington offense. Id. at 415. If the elements of the out-of-state crime are broader than its Washington counterpart, the court may look at whether the crime is factually comparable – whether the defendant's conduct, as found in the record, would have violated the comparable Washington statute. Id. This determination, however, must be based only upon facts that were admitted, stipulated to, or proved beyond a reasonable doubt. Id. (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005)); Thomas, 135 Wn.App. at 486.

i. California's burglary statute is not legally comparable to Washington's. The California Penal Code section outlawing burglary does not contain an element that is found in Washington's burglary statute and also covers property not included in Washington. Cal. Penal Code § 459; RCW 9A.52.030; Thomas, 135 Wn.App. at 483-84. In Washington, a person is guilty

of second degree burglary if he unlawfully enters or remains in a building with the intent to commit a crime against persons or property in the building. RCW 9A.52.030. In contrast, California's burglary statute does not require an unlawful entry and includes property not included within Washington's definition of building.<sup>2</sup> Cal. Penal Code § 459; RCW 9A.04.110(5). The California statute reads in pertinent part:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, ... floating home, ... railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, ... any house car, ... inhabited camper, ... vehicle, ... when the doors are locked, aircraft, ... or mine or underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. ...

Cal. Penal Code § 459 (2009).<sup>3</sup> Thus, the two statutes are not legally comparable for purposes of determining an SRA offender score. Thomas, 135 Wn.App. at 483.

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<sup>2</sup> RCW 9A.04.110(5) defines "building" to include, in addition to its ordinary meaning, "any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building shall consisting of two or more units separately secured or occupied is a separate building."

<sup>3</sup> Statutory amendments in 1989 and 1991 do not affect Mr. Smith's case.

ii. Mr. Smith's California convictions are not factually comparable to a Washington burglary. Although Mr. Smith's attorney did not contest the comparability of the California prior convictions, the State attached copies of various documents concerning the California convictions to its presentence report.<sup>4</sup> SuppCP 144-75.

Mr. Smith's Judgment and Sentence lists a 1999 California second degree burglary with cause number VCR 14468, but nothing containing that case number appears in the information presented by the prosecutor. The complaints charging Mr. Smith with the attempted burglary and three of the five burglaries listed on the Judgment and Sentence are included in the prosecutor's packet of information. SuppCP 151-53, 157-60, 165-66, 174-75. The prosecutor, however, did not include any guilty plea statements or nolo contendere pleas.

The three informations alleging burglary do not include unlawful entry, as that is not statutorily required in California. SuppCP at 158, 165, 174. The information alleging attempted burglary charges Mr. Smith "did unlawfully attempt to enter" a building. SuppCP 151. No guilty plea statement, however, is

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<sup>4</sup> It is unclear if the attached information includes certified copies or copies of certified copies.

included, so this Court cannot determine if Mr. Smith agreed that his attempted entry was unlawful. SuppCP 149-53; Thomas, 135 Wn.App. at 486-87 (even if unlawful entry mentioned in charging document, record does not establish defendant adopted that allegation in pleading guilty).

The information provided by the State did not establish the California burglary and attempted burglary convictions were factually comparable to Washington's. Thomas, 135 Wn.App. at 487. Mr. Smith's attorney's "affirmative acknowledgment" of the comparability of his out-of-state convictions, however, satisfied the State's burden of proof on that issue. Ross, 152 Wn.2d at 233. Mr. Smith has thus satisfied the deficient performance prong of the Strickland test. Thiefault, 160 Wn.2d at 417.

c. Mr. Smith was prejudiced by his attorney's deficient performance. Looking on the information provided by the State in its presentence report, the State was not prepared to prove that Mr. Smith's California burglary convictions were comparable to Washington burglaries. Thus, had counsel challenged the comparability of the convictions, the sentencing court could not have counted them as burglaries in computing his offender score. RCW 9.94A.500; RCW 9.94A.525(3); Thiefault, 160 Wn.2d at 415.

Mr. Smith was thus prejudiced by his attorney's deficient performance.

When an offender is sentenced for burglary, prior burglary convictions are counted as two points in his offender score. RCW 9.94A.525(16). Thus, absent the two California convictions that appear to have been included in Mr. Smith's offender score, his offender score would be four points lower. SuppCP 132-34. Instead of an offender score of nine, Mr. Smith would have an offender score of five. This would lower his sentence range from 51 to 68 months to 17 to 22 months. RCW 9.94A.510 (Table 1) (effective July 1, 2004); RCW 9.94A.515 (Table 2) (effective July 1, 2004).

The State may argue that Mr. Smith's acknowledgment of the comparability of the California burglary and attempted burglary convictions is irrelevant because the State relied upon his 2003 stipulation to these offenses to provide the necessary proof. The prosecutor's packet of sentencing information includes three copies of an SRA scoring form taken from the 2000 Adult Sentencing Guidelines Manual. In the section for adult history, the prosecutor filled in two burglary convictions and one other felony conviction. Because burglaries are scored as two points, the total points for

prior criminal history was five. Written in next to the calculation are the words, "Based on 2003 stipulation by defendant." SuppCP 132-35. It thus appears that when Mr. Smith was convicted of malicious mischief in the first degree in King County Superior Court in 2003, he signed a felony plea agreement and the box stating he agreed to the prosecutor's understanding of his criminal history was checked. SuppCP 137 (prosecutor's understanding of criminal history), 184 (signed plea agreement); CP 96 (Judgment and Sentence listing malicious mischief conviction).

Mr. Smith's 2003 stipulation to his criminal history is not sufficient to establish the convictions are comparable to Washington offenses. It was not until 2006 that this Court decided Thomas, supra, holding that the California burglary statute is broader than Washington's burglary statute, encompassing a broader range of property and lacking a requirement that the defendant enter or remain unlawfully. Thomas, 135 Wn.App. at 478. This opinion was a significant change in the law. In re Personal Restraint of Rowland, 149 Wn.App. 496, 506-07, 204 P.3d 953 (2009). As a result, any 2003 stipulation would not be an intelligent one. Moreover, a defendant may not stipulate to a

sentence in excess of that authorized by statute. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Because of his attorney's failure to challenge the inclusion of California burglary and attempted burglary convictions in his offender score, Mr. Smith was sentenced under a higher sentence range than actually authorized by the SRA. He has thus demonstrated prejudice. Thiefault, 417.

d. Mr. Smith's sentence should be reversed and his case remanded for a new sentencing hearing. Mr. Smith's attorney apparently did not research the California burglary statute and was not familiar with Thomas. Her performance was deficient because she was not familiar with the sentencing law applicable to Mr. Smith's case. As a result of his attorney's mistakes, Mr. Smith's offender score, corresponding sentence range, and resulting sentence were greater than that authorized by the SRA, and he thus demonstrates prejudice. Because Mr. Smith was not afforded the effective assistance of counsel guaranteed by the federal and state constitutions, this Court must vacate his sentence and remand for a hearing where he will be represented by competent counsel. Thiefault, 160 Wn.2d at 417; Saunders, 120 Wn.App. at 825.

E. CONCLUSION

Mr. Smith's sentence must be vacated and his case remanded for a new sentencing hearing with competent counsel.

DATED this 16<sup>th</sup> day of November 2009.

Respectfully submitted,



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Elaine L. Winters – WSBA #7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62523-3-I
v.	)	
	)	
TONY SMITH,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED IN THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] DONNA WISE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] TONY SMITH 865893 WASHINGTON STATE PENITENTIARY 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_ *[Signature]*

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

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