

62523.3

62523-3

NO. 62523-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL
THE HONORABLE PALMER ROBINSON

SUPPLEMENTAL BRIEF OF RESPONDENT

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COURT OF APPEALS
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A. ADDITIONAL ISSUES PRESENTED

5. Whether Smith has established that his counsel's performance in acknowledging the comparability of four California burglary convictions in the trial court was deficient and not a reasonable tactical decision made after investigation of the factual comparability of the California burglaries.

6. Whether the record is insufficient to establish that any of Smith's five California burglary convictions and one California attempted burglary conviction are not factually comparable to Washington burglary.

7. Whether Smith has established that a deficiency in his counsel's performance caused him prejudice when he has not shown that the counted convictions were not comparable to Washington burglaries.

B. SUPPLEMENTAL STATEMENT OF THE CASE

The defendant, Tony Smith, had felony convictions prior to the convictions appealed from: five California burglary convictions, one California attempted burglary conviction, and two additional felony convictions. CP 96, 135. All of these convictions are listed

in Appendix B, Prosecutor's Understanding of Defendant's Criminal History, in the State's Presentence Report in this case. CP 135.

As pretrial motions in this case began, the parties were still discussing a possible resolution of the case by plea. 1RP 2-3, 6.¹ At that time, the deputy prosecutor represented that Smith's counsel had raised a question about the comparability of two or three of the California burglary convictions. 1RP 4-5. The prosecutor stated that if those prior burglaries were not counted in Smith's offender score and if Smith pled guilty to two counts of burglary, Smith's offender score would be eight. 1RP 4-5.

On August 29, 2008, the jury found Smith guilty of three counts of burglary in the second degree. 11RP 10-11.

Smith filed a presentence report agreeing that his score was "nine plus." CP 188-89. He agreed that three California burglary convictions and one California attempted burglary conviction should be included in his offender score. CP 188-89. He requested and was granted a Drug Offender Sentence Alternative sentence. CP 89-97; 12RP 4-8.

¹ The Verbatim Record of Proceedings will be cited in the same manner as in the State's initial brief: 1RP – 8/6/08; 12RP – 9/23/08.

The court included all of the felony convictions listed in the State's Appendix of Criminal History in calculating Smith's offender score. CP 96. In this appeal, Smith challenged the court's failure to perform a comparability analysis of the California burglary convictions. That argument was withdrawn in his reply brief, after the defense stipulation to inclusion of four of those convictions and agreement to the offender score of nine plus was established by supplementing the record. CP 187-89.

C. ARGUMENT

1. SMITH'S STIPULATION TO THE COMPARABILITY OF CERTAIN PRIOR CALIFORNIA BURGLARY CONVICTIONS DOES NOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Smith argues that his trial counsel was ineffective because California burglary convictions are not legally comparable to Washington burglary and Smith agreed to counting four prior California burglary² convictions in his offender score. That argument should be rejected. California burglary convictions are properly included if the particular crime was factually comparable to

² For ease of reference, the State will refer to all of the challenged California convictions as burglary convictions, although one of them was an attempted burglary conviction, as all count equally in Smith's offender score. See RCW 9.94A.525(4).

Washington burglary. There is no record to support the claim that trial counsel was not aware of the relevant Washington law or did not investigate the comparability of the convictions. Moreover, there is no evidence that any of the six California burglaries were not factually comparable to Washington burglaries, and inclusion of only two would result in a score over nine, so Smith cannot show that the agreement to a score of nine plus was deficient representation or that he was actually prejudiced by that failure.

To establish ineffective assistance of counsel, Smith must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced Smith. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

a. Smith Has Not Shown Deficient Performance Of Counsel.

With respect to deficient performance of counsel, the court must begin with "a strong presumption counsel's representation was effective," and must base its determination on the record

below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); accord Hutchinson, 147 Wn.2d at 206. “[T]his presumption will only be overcome by a clear showing of incompetence.” State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Smith has not shown that his attorney's performance was deficient.

The record does not support Smith's claim that his trial counsel was not aware of the comparability issue³ or did not investigate it. The proceedings in this case occurred in the summer and fall of 2008 and the decision holding that California burglary is not legally comparable to Washington burglary was published in October of 2006. State v. Thomas, 135 Wn. App. 474, 144 P.3d 1178 (2006), rev. denied, 161 Wn.2d 1009 (2007). There is nothing in the record that suggests that Smith's counsel was unaware of that case.

Any claim of deficient investigation of factual comparability must be rejected because there was investigation of the comparability of the California convictions and the nature of the investigation has not been established. In re Gentry, 137 Wn.2d 378, 403-04, 972 P.2d 1250 (1999). Even though a California

³ Pursuant to RCW 9.94A.525(3), for purposes of the offender score, out-of-state convictions are classified according to the comparable offense definitions and sentences provided by Washington law.

burglary conviction is not legally comparable with Washington burglary, it is still properly counted in the offender score if the California crime was factually comparable to a Washington burglary. State v. Lucero, 152 Wn. App. 287, 293, 217 P.3d 369 (2009). Without evidence that there was no investigation of factual comparability or evidence as to why the decision was made to agree to the score of nine plus, the record does not support a claim that counsel neglected that issue. Gentry, 137 Wn.2d at 404.

To the contrary, the record reflects that Smith's trial counsel did investigate the factual comparability of the California burglary convictions. Defense counsel, prior to an August 8, 2008, pretrial hearing, had asserted that some but not all of the California burglary priors should not be included in Smith's offender score. 1RP 4-5. This distinction in defense counsel's comparability analysis as to the various California burglary convictions establishes that defense counsel knew that California burglary is not legally comparable, because if it were legally comparable, there would be no distinction that would result in some of the California burglary convictions not counting.

Smith's counsel may have had tactical reasons that she did not force the State to produce proof of comparability. If defense

counsel's conduct can be characterized as legitimate strategy or tactics, it does not constitute ineffective assistance. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); State v. Silva, 106 Wn. App. 586, 596-99, 24 P.3d 477, rev. denied, 145 Wn. 2d 1012 (2001) (in trial, even counsel's concession of guilt on some counts may be reasonable tactic). At sentencing, it may be reasonable to concede damaging facts to avoid drawing attention to them by a contested hearing. State v. Zatkovich, 113 Wn. App. 70, 83-84, 52 P.3d 36 (2002) (reasonable tactic to concede facts relating to stalking, to avoid highlighting defendant's behavior).

Because Smith was requesting a Drug Offender Sentencing Alternative (DOSA),⁴ and because his score would be nine plus even if only two of the California burglaries were comparable, it was a reasonable strategy to concede the comparability of the four that Smith and his attorney apparently believed were comparable. This strategy diverted the court's focus from Smith's high offender score, because of which the judge could have sua sponte imposed an

⁴ RCW 9.94A.660.

exceptional sentence higher than the standard range based on the multiple current convictions. RCW 9.94A.535(c).

This strategy also may have been intended to convey the impression that Smith was taking responsibility for his behavior, a factor a judge could consider relevant to the request for a DOSA. A DOSA sentence confers a substantial benefit—the court imposes only half of the standard prison term, ordering supervised release (community custody) for the other half. RCW 9.94A.660(5). The defense strategy was successful, as despite a history that included nine convictions for burglary, the court did impose a Drug Offender Sentencing Alternative over the State's objection, reducing Smith's prison term by half. CP 89-97.

A defendant may stipulate that an out-of-state crime was factually comparable to a Washington crime. State v. Ross, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004); State v. Hickman, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003). When a defendant does stipulate to the comparability of the prior conviction, the State is relieved of its burden of proving that the crime is comparable. Ross, 152 Wn.2d at 230. It defies logic to conclude, as Smith asserts, that the State's failure to prove comparability when the

defendant stipulated to it establishes that the California burglaries were not factually comparable.

The decision to stipulate to the comparability of four California burglary convictions as a tactical matter makes sense because Smith had six California burglary convictions and including only two would result in a score of nine plus. Smith had three current burglary convictions, so on each he had a score of four before any prior convictions were counted (two points for each of two other current burglary convictions). RCW 9.94A.525(16), RCW 9.94A.589. Smith does not contest the court's inclusion of his two prior felony convictions that were not burglaries, and they increase his offender score to six. RCW 9.94A.525. As each prior burglary counts two points,⁵ including only two more burglaries would increase his score to ten.

Smith erroneously asserts that if a defendant claims ineffective assistance of counsel in stipulating to the comparability of priors, this Court must conduct a comparability analysis based on the trial court record, citing State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007). In Thiefault, the defendant did not stipulate to the comparability of the prior conviction, which established his status as

a persistent offender. Id. at 413. The trial court in that case did conduct a comparability analysis. Id. On resentencing after a successful appeal, defense counsel did not object to comparability because he believed "that's already been determined." Id. The Supreme Court found that the failure to object was ineffective assistance because the Montana crime at issue was not legally comparable and factually comparability had not been established. Id. at 414-17. Thiefault is inapplicable when a defendant affirmatively acknowledges the out-of-state conviction was properly included in his score and the trial court did not conduct a comparability analysis, as is true in the case at bar. State v. Birch, 151 Wn. App. 504, 519-20, 213 P.3d 63 (2009).

Because Smith has not established the facts upon which the claim of deficient performance is premised and the decision to stipulate appears to be a reasonable strategy, the claim of deficient performance must be rejected.

⁵ RCW 9.94A.525(16).

b. Smith Has Not Shown Actual Prejudice.

Further, Smith has not established the prejudice prong of his ineffective assistance claim. Even if counsel's performance was deficient, there must be a showing that but for counsel's errors, the result of the proceeding would have been different. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006).

There is no evidence that the California burglary convictions at issue were not factually comparable to Washington burglary and would not be properly included in Smith's offender score.⁶ Speculation that a different result might have occurred is not sufficient. Crawford, 159 Wn.2d at 99-102. The defendant must "*affirmatively prove prejudice*" to establish ineffective assistance of counsel. Id. at 102 (emphasis in original). Without that showing of prejudice, Smith's ineffectiveness claim must be rejected.

As discussed in the previous section, inclusion of only two of the California burglary convictions would have resulted in an offender score of ten. The four convictions as to which Smith affirmatively stipulated to comparability gave him a score of

⁶ As to the type of property entered, the four charging documents in the record indicate that these convictions were comparable to Washington burglary, which applies to entry into any building. RCW 9A.52.030. All of the charging documents specify that the property entered was a building. CP 151, 158, 165, 174; California Penal Code § 459.

fourteen. The six burglary convictions actually included would give Smith a score of eighteen. Whether Smith's score was ten, fourteen, or eighteen, the legal effect on his sentence was the same: a score of nine plus is the maximum effective offender score. RCW 9.94A.510. Absent a showing that at least five of the six prior burglaries were not comparable, Smith has not established prejudice.

The specific offender score over nine is irrelevant when the court is imposing a standard range sentence. State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008). The specific score over nine cannot have affected the term imposed here because the confinement term on a Drug Offender Sentence Alternative is mandated by statute. RCW 9.94A.660(5).

Smith's reliance on In re Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002), is unwarranted. That case held that a defendant cannot waive an objection to a legal error in calculation of a sentence. Id. at 874. The court in that case specifically noted that a defendant may waive an alleged error that involved an agreement to facts, later disputed. Id. See Ross, 152 Wn.2d at 231-32 (limiting Goodwin rule to legal errors). The factual

comparability of out-of-state convictions is just such an agreement to facts—stipulation to factual comparability precludes later challenge.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Smith's convictions and sentences.

DATED this 18th day of December, 2009.

Respectfully submitted,

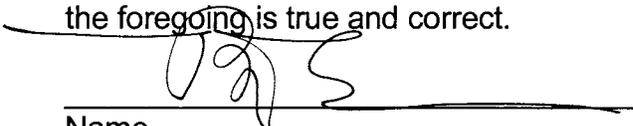
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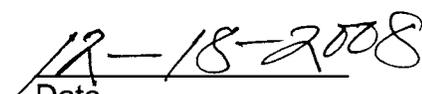
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. TONY SMITH, Cause No. 62523-3-I, in the Court of Appeals, Division I, for the State of Washington.

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


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