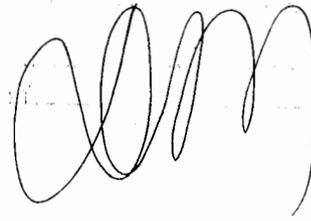


NO. 35572-8-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GREGORY STEVEN ROBINSON, Appellant.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT IN REPLY

Mr. Robinson did not waive his right to have the court conduct a comparability analysis of his out-of-state convictions. Mr. Robinson and his attorney made very clear to the court his objection to the inclusion of his prior out-of-state convictions in his offender score and his request that the Court comply with the law and conduct a comparability analysis. Because the court failed to compare his out-of-state convictions to Washington law and make findings on which Washington laws would have been violated, the court erred by including those convictions in Mr. Robinson's offender score. Therefore, the offender score found by the court is erroneous and Mr. Robinson's sentence must be reversed.

II. STATEMENT OF THE CASE

The full facts of the case are set out in Mr. Robinson's Appellant's Brief and are hereby incorporated by reference. The facts relevant to this Reply Brief are set forth below.

On November 8, 2006, Mr. Robinson was sentenced on five counts arising from the same series of events: Unlawful Imprisonment, Burglary in the First Degree, Robbery in the First Degree, Theft in the Second Degree, and Possession of Stolen Property in the Second Degree. CP 116.

His offender score was very much in dispute at sentencing, especially with regard to the inclusion of Mr. Robinson's six prior out of state convictions from California. According to the criminal history listed in the Judgment and Sentence, Mr. Robinson's prior out of state convictions were as follows:

“ROBB 1”, 11/3/89

“RAPE”, 11/3/89

“ORAL COP—14/ETC BY FORCE”, 11/3/89

“SODOMY W/ PERSON BY FORCE”, 11/3/89

“SEX, PENETRATION FOREIGN OBJECT W/ FORCE”,
11/3/89

CP 116.¹ All of these convictions arose from the same series of events. Following defense counsel's argument, the court held that all but the robbery count constituted the same criminal conduct for purposes of calculating the offender score. CP 116.

At sentencing, defense counsel put on the record the fact that her client disagreed with her offender score calculation and had his own arguments to make to the court. RP13 827, 834. The first opportunity Mr. Robinson had to make his argument to the court was during allocution,

¹ Another alleged conviction for “ATT BURGLARY” in 1981 was not counted in the offender score pursuant to the agreement of the parties. CP 116.

during which he requested that the court perform a comparability analysis on the California convictions. Mr. Robinson told the court:

I'm asking the Court, as far as the offender score is concerned, to do a Comparable Test, as far as analysis goes. My understanding is, as far as the purpose in the SRA's—I believe that's what it's called, right—is to—let me see. I wrote that down. "The purpose of the offender score statute is to ensure that a defendant with equivalent prior convictions are treated in the same way, regardless of whether the prior convictions were incurred in Washington or elsewhere."

RP13 844.

So I'm asking the Court to do a Comparability Test on the out-of-state crimes, first to see if they are—he mischaracterizes my statement as far as the 1981 attempted burglary that he's indicated on my record. I did not say that it was anything less. I don't know what it is that he's talking about.

RP13 845.

Mr. Robinson's legal argument was then rebutted by the State, which is not normally permitted to defendant's allocution. RP13 846. The Court then ruled: "I'm not going to accept Mr. Robinson's suggestion that we do some type of a comparative analysis with California. That doesn't make sense to me." RP13 850.

No comparability analysis was done on the California conviction, which was counted as a Washington First Degree Robbery conviction without any comparison to the California Statute. No comparability analysis was done on the four convictions, counted as same criminal

conduct, and scored as a violent offense without reference to what degree of rape these convictions were comparable to in Washington.

The five California convictions were considered in setting Mr. Robinson's offender score. RP13 116. Mr. Robinson was given an offender score of seven for counts one, four and five and an offender score of "9+" on counts two and three. RP13 116.

III. ARGUMENT

A. MR. ROBINSON DID NOT WAIVE HIS RIGHT TO HAVE THE COURT CONDUCT A COMPARABILITY ANALYSIS OF HIS OUT-OF-STATE CONVICTIONS.

The State has argued that Mr. Robinson waived his right to have the court conduct a comparability analysis because his counsel calculated his offender score including those convictions. However, it is very clear from the record that Mr. Robinson, both through his counsel and directly, stated that he was not waiving his due process right to have the State prove his prior criminal history. Mr. Robinson's counsel stated that Mr. Robinson did not agree with her calculation of his offender score and he himself explained that he wanted the Court to conduct a comparability analysis of the California convictions. RP13 827, 834, 844-45. Both the State and the court treated Mr. Robinson's argument at sentencing as legal argument, but the court declined to conduct a comparability analysis.

RP13 846, 850. Mr. Robinson never affirmatively acknowledged the out-of-state convictions, nor did he agree to their inclusion in his offender score.

Under Washington law, the trial court was required to compare the California convictions to Washington law and determine (1) if the conduct would have been a felony under Washington law and (2) what Washington law would have been violated. Where a defendant's criminal history includes out-of-state convictions, the SRA requires these convictions be classified "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). The use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible only if the State proves the existence of the prior conviction by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, *cert. denied* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986); *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452, (1999), *review denied on appeal after remand* 142 Wn.2d. 1003, 11 P.3d 824 (2000).

Where the state seeks to use prior out-of-state convictions to calculate an offender score, the State must prove the conviction would be a felony under Washington law and must identify what Washington law would be violated by the conduct "according to the comparable offense

definitions and sentences provided by Washington law.” *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452, (1999), *review denied on appeal after remand* 142 Wn.2d. 1003, 11 P.3d 824 (2000). Further, “[t]o properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” *Ford*, 137 Wn.2d at 479, 973 P.2d 452. None of this was done in this case (See Appellant’s Brief for full argument on this point).

Mr. Robinson asked that the Court comply with the law and require the State to prove what Washington law was violated by his California convictions when he asked for a comparability analysis. RP13 844-45. The Court declined to do that and has included convictions in his offender score that have not been classified according to Washington law. RP13 850. Mr. Robinson did not sign a waiver of his rights, nor did he sign a stipulation to his prior history. His attorney did not specifically contest the prior convictions, but nor did she stipulate to them on his behalf, explicitly telling the court that it was only her opinion she was expressing and that Mr. Robinson did not agree. RP13 827, 834.

Thus, Mr. Robinson has not waived his right to require proof of his prior out-of-state convictions. The Washington Supreme Court has held, in a case where no stipulation was signed, that a petitioner could raise a

challenge to his sentence for the first time on appeal “to the extent he [or she] was sentenced on the basis of an incorrect calculation of his [or her] offender score.” *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). This is because “[a] sentencing court acts without statutory authority . . . when it imposes a sentence based on a miscalculated offender score.” *Id.* Moreover, a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. *Johnson*, 131 Wn.2d at 569. This is true even where the sentence imposed is actually within the correct standard range, if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score. *Id.* at 558. As in *Johnson*, in this case, the offender score was miscalculated and Robinson did not waive his right to challenge the sentence based on that miscalculated offender score.

The State cites the recent Division One case, *State v. Lucero*, 2007 Wn. App. LEXIS 2638 (2007), for the proposition that Mr. Robinson waived his right to contest the inclusion of his out-of-state convictions included in his offender score. However, *Lucero* is distinguishable. In *Lucero*, both defense counsel and the defendant “affirmatively acknowledged that both crimes were properly included in his offender

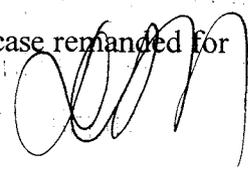
score.” *Lucero*, at 9. Both defense counsel and the defendant in *Lucero* conceded that the convictions were valid and comparable, but argued one washed out. *Lucero*, at 9.

In *State v. Ross*, 152 Wn.2d 220, 95 P.2d 1225 (2004), the other case cited by the State, the defendants also failed to request a comparability analysis at sentencing. Further, the *Ross* court states that all three defendants “affirmatively acknowledged” their out-of-state convictions. *Ross*, at 230.

Yet, unlike Mr. *Lucero* and the defendants in *Ross*, Mr. *Robinson* did object to the inclusion of the out-of-state convictions in his offender score at the sentencing hearing. And, unlike Mr. *Lucero* and the defendants in *Ross*, Mr. *Robinson* did ask the court to conduct a comparability analysis, which the Court acknowledges, but declines to do. RP13 850. Thus, Mr. *Robinson*, unlike Mr. *Lucero* and the defendants in *Ross*, did not waive his right to raise this issue on appeal.

The offender score in this case was miscalculated because the trial court included convictions from California without complying with RCW 9.94A.525(3) and Washington case law, which requires proof of comparability with Washington offenses. Mr. *Robinson* did not waive this issue because he did ask the court to conduct a comparability analysis.

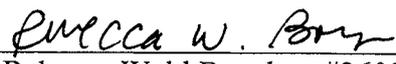
Therefore, his sentence must be reversed and this case remanded for resentencing.

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BY: 

V. CONCLUSION

Because the trial court included out-of-state convictions in Mr. Robinson's offender score without first conducting a comparability analysis, his sentence is in error. Mr. Robinson requests that this court reverse his sentence and remand for resentencing, as well as the relief requested in his Appellant's brief.

DATED: October 12, 2007.

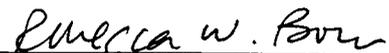
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CERTIFICATE OF SERVICE

I certify that on the 12 day of October 2007, I caused a true and correct copy of this Appellant's Reply Brief to be served on the following via prepaid first class mail:

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