

NO. 37691-1-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARNARD LASHELL PINSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 07-1-03625-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the certified copies of court records regarding the defendant's prior convictions in Mississippi and Ohio, combined with his stipulations to those convictions in three prior Pierce County Washington cause numbers, were sufficient for the sentencing court to conclude that the defendant's offender score is 5?

2. Whether defense counsel who correctly calculated the defendant's offender score and successfully argued that two additional felonies should not be included in the offender score provided ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On July 11, 2007, the Pierce County Prosecuting Attorney charged the defendant with one count of Escape in the first degree. CP 1-2. The Prosecuting Attorney later amended the Information to charge the defendant with one count of Escape in the first degree for knowingly escaping from custody while under community custody. CP 12.

The defendant proceeded to a jury trial before the Hon. Thomas J. Felnagle. On March 5, 2008, the jury found the defendant guilty as charged. CP 38

On April 17, 2008, Judge Felnagle held a sentencing hearing. RP 4/17/08. After determining the criminal history and offender score, and hearing from the defendant, Judge Felnagle sentenced the defendant to 29 months in prison, the high end of the standard range. RP 4/17/08 11-12, CP 60-71.

The defendant filed this timely appeal from the sentence imposed. CP 72-84.

2. Facts

On June 22, 2007, the defendant was sentenced in Pierce County cause number 07-1-02256-4. RP II 170, CP 117-143. Part of his incarceration was converted to BTC, a community alternative confinement program. CP 134, RP II 129.

The defendant began the BTC program on June 26, 2007. RP II 141. He left the BTC program June 29, 2007, and failed to return to the program or custody. RP II 146. He was arrested July 14, 2007. RP II 102. As recounted above, he was charged and convicted of escape in the first degree.

At the sentencing hearing in the present escape case, the State presented certified copies of court documents from Chicksaw County, Mississippi, Lucas County, Ohio, and Pierce County, Washington, to prove the defendant's criminal history. CP 87-193. The documents from Chicksaw County, Mississippi were certified copies of an indictment for Armed Robbery and a Judgment and Sentence for a plea to Accessory before the fact to Armed Robbery. CP 88-89. The documents showed that the defendant had been convicted of Accessory to Armed Robbery and had been sentenced to 15 years in prison; 8 Years of which were suspended. CP 90.

The documents from Lucas County, Ohio showed that the defendant had been convicted of Theft from an elderly person. CP 92-94.

The State also presented a certified copy of a Lucas County Ohio court docket showing that the defendant had been charged and convicted of Robbery. CP 103-116. Despite repeated requests from the Pierce County Prosecutor, the court in Lucas County Ohio was unable to locate the actual file regarding the defendant's robbery conviction. RP 4/17/08 5.

In addition to the out-of-state convictions, the State also provided certified copies of the defendant's prior Washington convictions in Pierce County cause numbers 07-1-02256-4, 06-1-03813-6, and 06-1-03516-1. CP 117-193. The certified documents in all three cause numbers included copies of the defendant's signed stipulations to the validity and

authenticity of his Robbery convictions from Mississippi and Ohio. CP 125-127, 153-155, 189-191.

The defense attorney argued that the two Ohio convictions did not count in the offender score. RP 4/17/08 4-5. He argued that the Theft from an elderly person had no monetary limit, so it could be a misdemeanor in Washington. RP 4/17/08 3. He argued that the certified docket from Lucas County, Ohio was insufficiently detailed to prove the robbery conviction. RP 4/17/08 4-5.

The court agreed with defense counsel. The sentencing judge excluded both the Ohio Theft and Robbery convictions. RP 4/17/08 7.

The defense attorney calculated the score as 5, with a standard range of 22-29 months. RP 4/17/08 3, 7. The court agreed with his analysis. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY CALCULATED THE DEFENDANT'S OFFENDER SCORE AT 5, BASED IN PART UPON THE DEFENDANT'S PRIOR ACKNOWLEDGEMENT OF HIS OUT OF STATE CONVICTIONS.

At sentencing, the State has the burden to prove the defendant's prior criminal history by a preponderance of evidence. RCW 9.94A.500; *State v. Ammons*, 105 Wn. 2d 175, 186, 713 P.2d 719 (1986). Likewise,

the State has the burden to prove by a preponderance the existence and comparability of a defendant's prior out-of state-convictions. *State v. Ross*, 152 Wn. 2d 220, 230, 95 P.3d 1225 (2004). The appellate court reviews the sentencing court's calculation of the offender score de novo. *State v. Rivers*, 130 Wn. App. 689, 128 P.3d 608 (2005).

To prove the defendant's prior criminal history, the State may introduce a certified copy of a judgment or other comparable documents of record of prior proceedings. *State v. Ford*, 137 Wn. 2d 472, 480, 973 P. 2d 452 (1999), citing *State v. Cabrera*, 73 Wn. App. 165, 868 P. 2d 179 (1994). In cases where the defendant does not challenge the previous criminal history, the state may introduce Washington judgments that used out-of-state convictions to calculate the offender score to prove an out-of-state conviction is comparable to a Washington felony. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005).

In the present case, the State presented certified copies of an indictment from Chicksaw County, Mississippi charging the defendant with two counts of "Robbery with a deadly weapon", and defendant's Plea of Guilty and Judgment to "Accessory Before the fact to Armed Robbery". CP 90. The State presented a certified copy of a lengthy Clerk of Court Docket from Lucas County, Ohio showing the history of the defendant's Aggravated Robbery conviction there. CP 103-116.

To further prove the Mississippi and Ohio robbery convictions, and to prove the Washington convictions, the State also presented certified

copies of Pierce County judgments against the defendant in cause numbers 07-1-02256-4, 06-1-03813-6, and 06-1-03516-1. CP 117-193. Each judgment lists his previous Mississippi and Ohio robbery convictions as part of the calculation of his offender score in those cause numbers. CP 131, 157, 180. Further, the defendant signed stipulations in these cause numbers that these out-of-state convictions were valid and comparable to Washington felonies. CP 126, 154, 189.

If the State alleges the existence of prior convictions and the defense not only fails to object, but agrees with the State's depiction of the defendant's criminal history, the defendant waives his right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn. 2d 87, 94, 169 P.3d 816 (2007). At sentencing on the current case, defense counsel did not object to inclusion of the Mississippi robbery in his offender score. He only objected to the Ohio convictions. RP 4/17/08 3, 5. The defendant himself objected to the Mississippi robbery being included. However, he did not assert that it was invalid, only that it was too old to be included in the offender score. RP 4/17/08 10. The defendant should not now be permitted to challenge the validity of prior out-of state convictions that he had stipulated to in three prior sentencings.

The robbery conviction does not "wash out". Robbery in the first degree is a class A felony in Washington. RCW 9A.56.200(2). Class A offenses are always included in the offender score. RCW 9.94A.525(2)(a). Therefore, the Mississippi conviction counts in the offender score.

Although the defendant's Mississippi conviction is for "Accessory before the Fact of Armed Robbery", the offense in Washington would be robbery in the first degree. The distinction between an accessory and a principal in Washington was abolished in the early 20th century. *See, e.g. State v. Brumett*, 116 Wash. 407, 199 P. 726 (1921). Accomplices and principals are viewed as equally culpable in Washington. RCW 9A.08.020(3).

In the present case, the defendant has a score of 5. One point for the Mississippi robbery, one each for his three Pierce County, Washington convictions, and one point for being on community custody when he committed the new crime. His standard range was 22-29 months in prison. The court sentenced him to 29 months within the standard range. The court committed no error.

2. TRIAL COUNSEL ADEQUATELY AND EFFECTIVELY REPRESENTED THE DEFENDANT AT THE SENTENCING HEARING.

The Supreme Court recently examined the issue of ineffective assistance of counsel where counsel failed to object to an out-of-state conviction. It laid out the basic standard:

To prevail on his claim of ineffective assistance of counsel, [the defendant] must overcome the presumption of effective representation and demonstrate (1) that his lawyer's performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes, and (2) that

there is a reasonable probability that the deficient performance prejudiced his defense.

State v. Thiefault, 160 Wn. 2d 409, 414, 1518 P.3d 580 (2007).

In the present case, defense counsel correctly calculated the offender score as 5. Counsel had before him the certified copies of the defendant's 3 prior Pierce County judgments which all reflected that the Mississippi and Ohio robbery convictions were used to calculate the offender scores. He also had the defendant's stipulations from those cause numbers, which stated that the defendant agreed that they were his valid convictions, and that the offenses were comparable to Washington statutes. Defense counsel was successful in arguing that the Ohio robbery conviction, twice previously stipulated and three times included, should be dropped from the calculation of the offender score in this cause number. RP 4/17/08 4-5, 7. It cannot be argued that there is ineffective assistance of counsel where defense counsel correctly calculated and even got the defendant's offender score reduced.

D. CONCLUSION.

The trial court correctly calculated the defendant's offender score and sentenced him within the standard range. For the reasons argued above, the State respectfully requests that the judgment of the court be affirmed.

DATED: February 9, 2009

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-9-09 Theresa
Date Signature

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