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**The defendant waived his right to have the State prove his prior conviction beyond a reasonable doubt.**

The Washington Supreme Court has held that once a defendant calls attention to the alleged unconstitutionality of a prior felony conviction used by the State to support a charge, the State must thereafter prove beyond a reasonable doubt that the prior conviction was constitutionally valid. *State v. Swindell*, 93 Wash.2d 192, 196, 607 P.2d 852, 854 (1980). The defendant claims that even though he did not raise this issue at trial, he can raise it on appeal as challenge to the sufficiency of the evidence. Appellant's Corrected Brief at 13. However, this is incorrect, by failing to raise this issue in the trial court the defendant has waived the issue.

Where the question as to whether defendant's prior convictions, relied upon by the State to prove his current charge, were based upon guilty pleas that were not shown to be constitutionally valid beyond a reasonable doubt never came up before the trial court, question could not be considered on appeal. *State v. Prater*, 30 Wash.App. 512, 516, 635 P.2d 1104 (1981).

If this Court finds that the defendant can raise this issue, then it should be remanded for an evidentiary hearing in the trial court. As the issue was not raised in the lower court, there is evidence that was not given in the trial that would be pertinent to the issue of a voluntary plea. For instance, the defendant argues that "the plea form does not include

notification of the community placement term that followed conviction.” Appellant’s Brief at 14. However, there was a Plea Agreement entered contemporaneously with the plea that laid out this requirement. Because the defendant failed to raise the issue, the State did not produce evidence that would not have been relevant to the issue of the defendant’s guilt.

**The defendant received effective representation.**

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

*Strickland v. Washington* explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

#### Performance at 3.5 Hearing

The defendant complains that “defense counsel sought to exclude Mr. Hayter’s statements, but did not investigate Mr. Hayter’s case prior to the 3.5 hearing, and thus failed to provide evidence bearing on the circumstances under which Mr. Hayter’s statements were made. Appellant’s Brief at 18. However, there is no evidence in the record to support this. There is no indication what trial counsel had done, or not done, at the point of the 3.5 hearing.

Further, even if trial counsel failed to investigate the case adequately prior to the 3.5 hearing, the defendant cannot show any resulting prejudice. Only two statements were presented at the 3.5 hearing for admission at trial. The officer asked the defendant where he was

registered to be living, and the defendant responded “the Mission.” 4/20/09 RP at 8. When the officer pointed out that the defendant hadn’t been there in some time, the defendant stated he thought he had ten days in which to change his address. 4/20/09 RP at 8.

At trial, the defendant took the stand and testified that at the end of February 2009 he registered his address as being the Mission. 11/5/09 RP at 66. Further, the State introduced the Grays Harbor Sheriff’s Office form showing that the defendant made a February 26, 2009 registration at the Mission address. Exhibit 5. Therefore, the substance of the first statement was proven by independent evidence and the defendant’s own testimony.

As to the second statement, that the defendant believed he had 10 days to register a new address, it is irrelevant to the outcome of the trial. The defendant’s testimony was that the Mission was his residence through the time period charged, and that all of his stuff was there. 11/5/09 RP at 75. Further, the defendant left the Mission on March 1, 2009, and was not arrested until March 19, 2010; therefore, even by the defendant’s incorrect version of his requirement, he was out of compliance. 11/5/09 RP at 29, 41.

The defendant claims that if evidence produced at trial regarding his supposed “anxiety, agoraphobia, and panic disorder, that he was heavily medicated at the time of the interrogation, that he had an IQ of 70 and that he could not read” had been produced at the 3.5, the outcome would have been different. (This testimony was given by Mr. Haga and

Dr. Trowbridge). Appellant's Brief at 20, 11/5/09 RP at 54-61, 76-86. However, the Court's ruling at trial does not support this argument. The Court stated, "I am not at all persuaded by the testimony of either Mr. Haga or Dr. Trowbridge that Mr. Hayter lacked the capacity to know what he was doing...I'm convinced that Mr. Hayter was aware of his obligations to register and that he knowingly failed to do so..." 11/5/09 RP at 96.

The defendant's statements were non-custodial, so *Miranda* was not required. There was no evidence to indicate that the defendant was unable of deciding whether or not to answer brief inquiries while not in custody.

Further, suppression of these statements would not have changed the outcome of this trial. Trial counsel was not ineffective at the 3.5 hearing, and even if the Court found he was ineffective, it is harmless beyond a reasonable doubt.

The defendant was not prejudiced by trial counsel's delay of the trial.

Trial counsel's delay may have been undue; however, the defendant was not prejudiced by the delay. In fact, the defense attorney sought continuances in order to build a defense and obtain evaluations and expert testimony. In the end, the defendant was convicted and sentenced to 57 months confinement. CP at 7-17. The defendant was given credit for the approximately 8 months served pre-trial against this sentence. The defendant does not state how this prejudiced the presentation of his defense. Further, the requested remedy of remand for new trial is absurd.

Curing a claimed speedy trial violation, created by the defense, by remanding for a new trial is an unnecessary waste of resources. Nothing about the delay in this case gives cause to question the validity of the verdict and it was not done at the hands of the State.

**The waiver of jury trial was proper in this case.**

Criminal defendants enjoy a state constitutional right to a jury trial. Wash. Const. art. 1, sec. 21; *State v. Stegall*, 124 Wash.2d 719, 728, 881 P.2d 979 (1994). Waiver may be made only by a knowing, intelligent, and voluntary act, and is valid only upon a showing of either defendant's personal expression or an indication the court or defense counsel has discussed the issue with the defendant before the attorney's own waiver. *Stegall*, 124 Wash.2d at 724-25, 729, 881 P.2d 979. Absent an adequate record to the contrary, courts must presume a valid waiver did not occur. *State v. Wicke*, 91 Wash.2d 638, 645, 591 P.2d 452 (1979). Both the right to a jury, as well as the right to a 12-person jury, are protected by article 1, section 21 of the state constitution. *State v. Stegall*, supra.

Washington courts have long recognized the validity of jury waivers where the trial court did not advise the defendant that he or she had the right to participate in jury selection, that the jury must be impartial, and that the jury would presume the defendant innocent until that presumption is overcome. In *State v. Brand*, the reviewing court upheld the jury waiver as valid where the colloquy only generically addressed waiving the right to a jury. *State v. Brand*, 55 Wash.App. 780, 780 P.2d

894 (1989), review denied 114 Wash.2d 1002, 788 P.2d 1077, grant of post-conviction relief reversed 65 Wash.App. 166, 828 P.2d 1, review granted 119 Wash.2d 1013, 833 P.2d 1390, reversed 120 Wash.2d 365, 842 P.2d 470, reconsideration denied. There was no mention of the number of jurors, that they would have to agree on a verdict, or that the defendant would be able to participate in jury selection. *Id.* at 789-90.

Similarly, in *State v. Valdobinos*, the court upheld the validity of the jury waiver where the colloquy consisted of the court asking whether the defendant understood he was “giving up [the] right to a jury trial,” conferring with counsel, then acknowledging that he was giving up this right. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993). There was no mention even of the number of jurors vis-à-vis the judge, or that the jurors would all have to agree on the verdict. *Id.* at 287-8.

In *State v. Lund*, the court's colloquy only advised the defendant that he was giving up the right to have 12 persons hear his case, rather than one judge. *State v. Lund*, 63 Wash.App. 553, 821 P.2d 508, review denied 118 Wash.2d 1028, 828 P.2d 563 (1991). Although the trial judge mentioned the process of jury selection, there was no mention of the defendant's participation therein. Indeed, the trial judge indicated that the defendant's attorney and the State's attorney would select the jury. The defendant indicated that he had an opportunity to discuss the issue with counsel, and a written waiver was filed. The reviewing court found this colloquy sufficient. *Id.* at 556-559.

As the foregoing authority establishes, Washington courts have long recognized that the right to a trial by jury can be waived, and there is no particular “laundry list” of rights into which the trial court must inquire. Indeed, the list of rights the defendant asserts must be acknowledged has specifically been rejected in *State v. Pierce*.

The Court’s ruling in *State v. Pierce* controls in this case. *State v. Pierce*, 134 Wn.App. 763, 142 P.3d 610 (2006). The defendant makes a brief argument that “[b]ecause *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be reconsidered.” Appellants Brief at 35, footnote 11. However, the defendant offers no authority or analysis to support this assertion and it should be disregarded.

The *Pierce* court held that:

A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *State v. Woo Won Choi*, 55 Wash.App. 895, 904, 781 P.2d 505. An attorney’s representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Woo Won Choi*, 55 Wash.App. at 904, 781 P.2d 505. Courts have not required an extended colloquy on the record. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979; *State v. Brand*, 55 Wash.App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979.

*State v. Pierce*, 134 Wash.App. 763, 771, 142 P.3d 610, 613 - 614 (2006).

This case should be decided in the same manner as *Pierce*. The defendant in this case executed a proper written waiver as required by CrR 6.1(a). CP at 22. Further, the court went over this written waiver with the defendant in open court. 8/20/09 RP at 4-6. During this hearing, the defendant acknowledged that he understood the waiver, that he had discussed it with counsel, and that he had no further questions. 8/20/09 RP at 4-6.

The Defendant's Sentencing Was Proper and Did Not Shift the Burden to the Defendant

First, the defendant claims that “[t]he trial court violated [his] right to remain silent by forcing him to acknowledge criminal history.” Appellant’s Brief at 37. He also claims that “the trial judge relied on the prosecutor’s assertions and [his] forced acknowledgment (apparently without the assistance of counsel) and sentenced [him] with an offender score of nine. Brief of Appellant at 39. This is a gross misstatement of the proceedings. The exchange at issue between the defense and the court is as follows:

The Court: Mr. Farra, have you and your client reviewed the criminal history set forth on Page 2 of the statement of prosecuting attorney?

Mr. Farra: I did give a copy to Mr. Hayter. I did not review it, and he is shaking, yes, he thinks that is the number of points he has.

The Court: Mr. Hayter, do you believe that this correctly sets forth your criminal history?

The Defendant: Yes, sir.

This is hardly a “forced” statement by any stretch of the imagination. Further, it is obvious that the defendant had the assistance of counsel and that he chose freely to respond to the court’s question.

Also, the defendant’s reliance on *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999) is misplaced. This case came out prior to the 2008 amendment of RCW 9.94A.500 and RCW 9.94A.530. Prior to the amendment, the prosecutor’s statement was not evidence; however, after the amendment “[a] criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. RCW 9.94A.500(1).

“In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.” RCW 9.94A.530(2).

In this case, the court properly relied on the criminal history provided by the State that was not only not objected to but was acknowledged by the defendant. Further, requiring the defendant to object

to the criminal history in order to trigger an evidentiary hearing does not shift the burden of proof. The analysis of *Ford* just no longer applies. Under the law in place at the time of *Ford* the State's report was not evidence, now it is. The defendant can challenge that and then the court can order a full evidentiary hearing.

### CONCLUSION

The defendant's appeal should be denied and the trial court verdict and sentence affirmed.

Dated this 8<sup>th</sup> day of September, 2010.

Respectfully Submitted,

By:   
KATHERINE L. SVOBODA  
Sr. Deputy Prosecuting Attorney  
WSBA # 34097

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 40018-9-II

v.

**DECLARATION OF MAILING**

JERALD A. HAYTER, JR.,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 8<sup>th</sup> day of September, 2010, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Jerald A. Hayter, Jr., #954742; Airway Heights Corrections Center; P.O. Box 1899; Airway Heights, WA 99001-1899, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman