

NO. 43053-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICKY L. FIEVEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Amber L. Finlay, Judge
Cause No. 11-1-00258-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence of Fievez's driving record.
02. The trial court erred in permitting Fievez to be represented by counsel who failed to object to the introduction of evidence of Fievez's driving record.
03. The trial court erred in failing to grant Fievez's motion for a continuance to secure a material witness.
04. The sentencing court erred in calculating Fievez's offender score.
05. The sentencing court erred in permitting Fievez to be represented by counsel who failed to object to the sentencing court's calculation of Fievez's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether evidence of Fievez's driving record violated his right of confrontation? [Assignment of Error No. 1].
02. Whether Fievez was prejudiced by his his counsel's failure to object to the introduction of evidence of his driving record. [Assignment of Error No. 2].
03. Whether trial court's failure to grant Fievez's motion for a continuance to secure the presence of a material witness denied him a fair trial? [Assignment of Error No. 3].
04. Whether the sentencing court erred in calculating Fievez's offender score where Fievez stipulated to his criminal history but the sentencing court

failed to address the comparability of Fievez's prior criminal convictions from Arizona on the record? [Assignment of Error No. 4].

05. Whether the sentencing court erred in permitting Fievez to be represented by counsel who failed to object to the sentencing court's calculation of Fievez's offender score where Fievez stipulated to his criminal history but the sentencing court failed to address the comparability of Fievez's prior criminal convictions from Arizona on the record? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Ricky L. Fievez (Fievez) was charged by first amended information filed in Mason County Superior Court on November 3, 2011, with unlawful possession of methamphetamine, count I, driving while under the influence, count II, and driving while license suspended in the third degree, count III, contrary to RCWs 69.50.4013, 46.61.502 and 46.20.289, respectively. [CP 62-63].

The court denied Fievez's pretrial motion to suppress evidence under CrR 3.6. [RP 61-62, 72-73]. Trial to a jury commenced on November 4, the Honorable Amber L. Finlay presiding. The jury returned verdicts of guilty as charged, Fievez was sentenced within his standard range, and timely notice of this appeal followed. [CP 4-20, 26-29].

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02. Substantive Facts: CrR 3.6 Hearing

On Thursday, July 28, 2011, at approximately two in the afternoon, Trooper Joshua Merritt stopped a vehicle driven by Fievez containing a female passenger for a traffic infraction. [RP 2, 6-10]. Following a records check, Fievez was asked to step out of the car where he was arrested for driving while license suspended in the third degree, handcuffed and placed in the back seat of Merritt's patrol vehicle. [RP 12-13, 17].

After advisement of his rights under Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) [RP 13-14], Fievez admitted to having used methamphetamine the previous Monday or Tuesday and heroin within the last couple of weeks. [RP 16-17].

At that point we - - I had the defendant perform voluntary field sobriety tests. I ultimately placed him in custody for the driving under the influence, as well as for driving while license suspended.

[RP 17].

A PBT (portable breath test) showed no alcohol in Fievez's system. Fievez declined to take the voluntary DRE (drug recognition evaluation). [RP 21-22]. He said there were no drugs or weapons in his car and consented to its warrantless search and was advised of his rights

under State v. Ferrier, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). [RP 22-23].

A search of the vehicle initially produced a syringe that field tested positive for heroin [RP 24]. According to Merritt, Fievez subsequently gave him further consent to search the locked trunk, saying there was nothing in the trunk that was his. [RP 26]. In the trunk, Merritt secured a bag containing drug paraphernalia and a substance that field-tested tested positive for methamphetamine. [RP 26-27]. Fievez denied ownership of the purple bag and refused to provide a blood sample. [RP 27, 30].

Fievez testified that he had given Merritt permission to search the front of the vehicle but not the locked trunk. [RP 42-43, 50].

The court denied Fievez's motion to suppress, determining there were only two areas of dispute: (1) whether Fievez was advised that he could limit the scope of the search and (2) whether he consented to the search of the trunk of the vehicle. [RP 61-62].

The Court will find that during the contact, the Trooper did provide all of the Ferrier warnings, including that Mr. Fievez could limit the scope of the search. And the Court will further find that on the other disputed fact that Mr. Fievez did consent separately to a search of the locked trunk.

The Court, as I said, doesn't find the other facts that were set out were in dispute, and they can simply be listed in the findings of fact.

[RP 61].

With regard to the legal issues, the court held:

(T)he first issue is whether or not in addition to the consent, the State is required to show that the officer had a reasonable suspicion based upon articulable facts that contraband would be found, and or a crime was being committed. And the Court will find that these are two separate and independent exceptions to the warrant requirement. And so the officer was not required to have a reasonable suspicion based on articulable facts to ask Mr. Fievez if he would consent to search to follow the requirements that are require under that process, and that the two are separate and distinct.

Secondly the Court will find that even if they were not separate and distinct, the Trooper had a reasonable suspicion of the presence of heroin based upon articulable facts such as the stop of the car, the defendant's demeanor, what was said to the Trooper in answer to questions about drug usage, the odor that the Trooper did identify, as well as the PBT coming up .000. And the Court will find that even if there was a tie between those two requirements, that on this stop, the Trooper did have a reasonable suspicion based upon articulable facts.

Therefor the Court will find that the consent to search was given both to the interior of the car and to the trunk or the car; that is was given knowingly, intelligently and voluntarily. And the contents will be admissible at trial.

[RP 61-62].

The court subsequently reconsidered its ruling:

Well the Court will reconsider in part. And that is my initial decision was in the alternative. and I will strike the second alternative. I will find, as I did originally, that there where there is a valid consent to search, and the Court

did find a valid consent to search in this case, there is no additional requirement to show that there is a reasonable articulable suspicion that criminal activity is afoot. But I will strike the portion in which I found that even though you didn't need that, it was present.

[RP 72-73].

03. Substantive Facts: Trial

At trial, Merritt reiterated much of his CrR 3.6 testimony, further describing Fievez's uneven driving, fidgety movements, hurried speech, dilated eyes and difficulty with the field sobriety test. [RP 115-17, 118-19, 121, 124, 134-38]. He particularly noted that Fievez acknowledged that it was his suitcase in the backseat of the vehicle in which the syringe was found and that he initially denied having a key to the trunk where the purple bag was eventually located. [RP 148, 150-51, 158]. The substance in the syringe and items in the purple bag subsequently tested positive for methamphetamine. [RP 52-57, 165-66, 169, 209, 211-12].

Regarding the driving while license suspended charge, the State introduced into evidence a Notice of Suspension regarding Fievez's driving privilege and an affidavit from a legal custodian of the records. [RP 220-24; State's Exhibits 10-11]. The affidavit states: "After a diligent search, our official records indicates that the status on July 28, 2011, was: ... Suspended in the third degree(.)" [State's Exhibit 11].

Fievez denied consuming any intoxicants on the day of his arrest or that his driving was impaired as a result of any such consumption or that he was aware his license was suspended at the time of the stop. [RP 239-240, 245-46]. He believed that he had “passed the (field sobriety) test just fine, that’s what my understanding was.” [RP 258]. He admitted to consenting to the search of the vehicle, which belonged to his nephew’s wife, but denied any knowledge of the syringe seized therein. [RP 241-43]. He further asserted that the purple bag containing methamphetamine found in the trunk belonged to the passenger, Nina Lawrence, and that he was unaware of its contents. [RP 244].

D. ARGUMENT

01. THE ADMISSION OF EVIDENCE OF FIEVEZ’S DRIVING RECORD VIOLATED HIS RIGHT OF CONFRONTATION.

The State’s introduction into evidence of the aforementioned Department of Licensing’s Notice of Suspension and affidavit of suspension of Fievez’s license violated Fievez’s right of confrontation, as such constitutes testimonial statements in violation of the Sixth Amendment and Article I, Section 22 of the Washington State Constitution. State v. Jasper, 174 Wn.2d 96, 109-117, 271 P.3d 876 (2012); State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (2009) (Article I, Section 22 is more protective than the Sixth Amendment with regard to

a defendant's right of confrontation). The same rationale is applicable to the testimony of Trooper Merritt that he learned from dispatch that Fievez's license had been suspended in the third degree. [RP 120].

Such a violation is reviewed de novo. Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). The right to confront adverse witnesses is an issue of constitutional magnitude, which may be considered for the first time on appeal. RAP 2.5(a); State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); State v. Price, 158 Wn.2d 630, 639 n.3, 146 P.3d 1183 (2006).

A violation of a defendant's constitutional right of confrontation may be harmless error if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). The error argued here was not harmless, since Fievez denied any knowledge that his license was suspended [RP 240] and since the only evidence bearing on the reason his license was suspended came solely from the unconstitutionally admitted documents and testimony of Trooper Merritt. See State v. Jasper, 174 Wn.2d at 118.

Fievez's conviction for driving while license suspended in the third degree should be reversed.

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02. FIEVEZ WAS PREJUDICED BY HIS
COUNSEL'S FAILURE TO OBJECT
TO THE INTRODUCTION OF
EVIDENCE OF FIEVEZ'S DRIVING
RECORD.¹

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v.

¹ While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented should this court disagree with this assessment.

Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the error claimed and argued in the preceding section by failing to object to the introduction of evidence of Fievez's driving record, then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel allowed the State to introduce evidence of Fievez's driving record as set forth in the preceding section. And the prejudice is self-evident as previously articulated, given that sans the unconstitutionally admitted documents and testimony of Trooper Merritt, no evidence was presented as to reason Fievez's license was suspended. See State v. Jasper, 174 Wn.2d at 118.

Counsel's performance was deficient because he failed to object to the introduction of evidence of Fievez's driving record with the result that Fievez was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for driving while license suspended in the third degree.

03. THE TRIAL COURT'S FAILURE
TO GRANT FIEVEZ'S MOTION FOR
A CONTINUANCE TO SECURE A
MATERIAL WITNESS DENIED
FIEVEZ A FAIR TRIAL.

On the third day of trial, Fievez intended to offer the testimony of Nina Lawrence, the passenger in the vehicle at the time of his encounter with Trooper Merritt. Lawrence had been served with a subpoena [RP 292], and the trial court had determined her to be a material witness prior to issuing a material witness warrant the previous day. [RP 294-97]. The State and counsel for Fievez had interviewed Lawrence and agreed she said she was going to testify that the purple bag containing methamphetamine found in the trunk belonged to her. [RP 292-93, 302].

The next day, counsel for Fievez asked the court for a continuance to secure Lawrence's appearance, saying that Lawrence was not there, although he had talked with her by telephone after "we broke yesterday" and informed her that the material witness warrant had been issued. [RP 301]. "I told her that she'd be released as soon as she was done testifying.

She said she would meet me (at the jail)” this morning. [RP 301]. The prosecutor added: “(A)s the Court can see from the witness list that was filed, it indicates that she was going to testify that the methamphetamine was hers, and that she’d been advised of her rights. And of course, she has separate counsel.” [RP 302]. Without further comment from the court, Fievez’s motion for a continuance was not granted. [RP 302-03].

The constitutional right to compulsory process includes the right to present a defense, and the defense bears the burden of establishing the relevance and admissibility of proposed testimony. State v. Roberts, 80 Wn. App. 342, 350-51, 908 P.2d 892 (1996). “Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry.” State v. Downing, 151 Wn.2d 265, 275, 87 P.3d 1169 (2004). This inquiry includes consideration of the “various factors such as diligence, materiality, due process, a need for an orderly procedure and the possible impact on the result of the trial.” State v. Kelly, 32 Wn. App. 112, 114-15, 645 P.2d 1146 (1982) (citing State v. Eller, 84 Wn.2d 90, 524 P.2d 242 (1974)).

The denial of a continuance to secure a key defense witness is reversible error where upon a showing that the defendant was prejudiced or the result of the trial would likely have been different had the motion been granted. Kelly, 32 Wn. App. at 114.

The proposed testimony was admissible and relevant and went to the heart of the defense: the methamphetamine in the purple bag belonged to Lawrence, as claimed by Fievez. [RP 244]. This was not a collateral matter. Lawrence's testimony, in addition to corroborating Fievez's version of the events, would have tipped the scales in favor of reasonable doubt. The court's failure to grant more time to secure her presence effectively precluded Fievez from presenting his primary defense and in the process denied him a fair trial, with the result that his case should be reversed and remanded for a new trial

04. THE SENTENCING COURT ERRED IN CALCULATING FIEVEZ'S OFFENDER SCORE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). Illegal or erroneous sentences, including the improper inclusion of out-of-state convictions, may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). A

sentencing court's calculation of a defendant's offender score is a question of law and is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

The SRA requires the trial court to treat out-of-state convictions “according to the comparable offense definitions and sentences provided by Washington law.” State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994) (quoting former RCW 9.94A.525(3)). Such a conviction counts toward a defendant's offender score as if it were the equivalent Washington offense. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). The State bears the burden of providing sufficient evidence to prove the comparability of prior out-of-state convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d at 480.

A foreign conviction is equivalent to a Washington offense if there is either legal or factual comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). An out-of-state offense is legally comparable if “the elements of the foreign offense are substantially similar to the elements of the Washington offense.” State v. Thieffault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). A foreign conviction is factually comparable where the defendant's conduct would have violated a comparable Washington statute. Lavery, 154 Wn.2d at 255.

At the sentencing hearing, Fievez stipulated to a statement of his prior criminal history, which included the following: possession of a dangerous drug, methamphetamine, sentenced in Arizona on 07/15/08; assault (domestic violence), sentenced in Arizona on 04/17/2002; assault in the fourth degree (domestic violence), sentenced in Washington on 09/29/1999; unlawful possession of a controlled substance, methamphetamine, sentenced in Washington on 12/12/96. [RP 363; CP 21-22]. This resulted in an offender score of 6, which included three other current convictions under a different cause number that are not relevant to this discussion. [CP 3, 7].

A defendant must affirmatively acknowledge the “facts and information” the State introduces at sentencing in order to relieve the State of its burden of proof. State v. Mendoza, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009). In this context, it can not be asserted that Fievez’s stipulation to his criminal history was an acknowledgment of the “facts and information” the State was required to prove in order to establish that Fievez’s Arizona convictions were the equivalent of Washington offenses. Even assuming the Arizona offenses are legally or factually comparable to Washington offenses, remand is required given that the sentencing court failed to address the comparability of the offenses on the record. State v. Labarbera, 128 Wn. App. 343, 350, 115 P.3d 1038 (2005).

05. FIEVEZ'S WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE SENTENCING COURT'S CALCULATION OF HIS OFFENDER SCORE WHERE FIEVEZ STIPULATED TO HIS CRIMINAL HISTORY BUT THE SENTENCING COURT FAILED TO ADDRESS THE COMPARABILITY OF FIEVEZ'S PRIOR CRIMINAL CONVICTIONS FROM ARIZONA ON THE RECORD.²

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the sentencing court's failure to address the comparability of Fievez's prior criminal convictions from Arizona on the record, then both elements of ineffective assistance of counsel have been established.³

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the trial court's failure to address the comparability issue on the record for the reasons set forth in the preceding section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270

² While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented out an abundance of caution should this court disagree with this assessment.

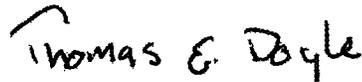
³ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

(1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly made the objection, the sentencing court would not have imposed the sentence without first addressing the comparability of the Arizona offenses on the record.

E. CONCLUSION

Based on the above, Fievez respectfully requests this court to reverse his convictions and/or remand for resentencing consistent with the arguments presented herein.

DATED this 2nd day of August 2012.



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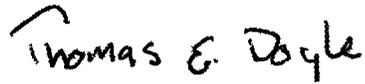
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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