

NO. 77753-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GAYLON THIEFAULT,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Was trial counsel deficient for failing to anticipate a change in the law which occurred months after the defendant's sentencing hearing?

2. Is the defendant entitled notice of the prior convictions which result in a sentence of life in prison without the possibility of parole in the information?

3. Is the defendant entitled to have a jury determine whether prior convictions should be counted when sentencing him as a persistent offender?

II. STATEMENT OF THE CASE

The facts of this case have been adequately outlined in the Court of Appeals opinion and the States Response, Supplemental Response, and Answer to Petition for Review.

III. ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN COUNSEL'S CONDUCT WAS DEFICIENT, OR THAT HE WAS PREJUDICED.

Defense counsel is not ineffective for failing to anticipate a change in the law. In re Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). The defense relies on three cases to support his claim that his trial counsel's performance was deficient for either agreeing that the out of state convictions were comparable, or for failing to object

to the comparability of those out of state conviction. Two cases relied upon by the defendant were decided after the defendant's sentencing hearing held on September 30, 2003; State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Ortega was the first case to address the application of Apprendi¹ to a comparability analysis for foreign convictions. Similarly, this Court has recognized that Blakely announced a new rule. State v. Evans, 154 Wn.2d 438, 448 1140 P.3d 627 (2005). Because these cases represented a change in the manner in which trial courts approached a comparability analysis, the defense attorney was not deficient for agreeing the out of state conviction was a "strike".

The third case relied upon by the defendant was State v. Bunting, 115 Wn. App. 135, 61 P.3d 375 (2003). It pre-dated his sentence hearing by several months. However, that case does not establish counsel was deficient.

In Bunting the Court found that the elements for Washington's robbery statute and the Illinois robbery statute were

¹ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)

different; Washington required intent to steal while Illinois did not. The Court reiterated that when comparing the two statutes, the elements were the cornerstone of the analysis. Bunting, 115 Wn. App. at 141. Because the documentation provided for the comparability analysis did not show that Bunting conceded to all elements that would constitute a robbery in Washington, it was inadequate.

That was not the situation here, where the documents outlined the acts which constituted the robbery in Montana. The Court of Appeals found the Montana robbery statute broader than Washington's robbery statute because injury or threat to injure is not required; a person could commit the crime by committing a theft while committing any felony other than theft, such as bribery. Opinion at 17. In reading the documents provided to the court, it is clear that was not the case here; the defendant committed an attempted robbery by committing a theft of cash by attempting to put a store employee in immediate fear of bodily injury by brandishing a gun.

Even if, as the Court has found, the Motion for Leave to File Information was insufficient for a comparability analysis, the defendant has not shown that the court would not have given the

State leave to obtain other documents that were sufficient. Certainly, given the information available to the parties, it is probable that the defendant admitted to conduct which falls squarely within Washington's attempted robbery statute when he pled guilty in Montana.

B. THE DEFENDANT WAS NOT ENTITLED TO HAVE A JURY DETERMINE HIS PRIOR CRIMINAL HISTORY.

In his petition for review the defendant argues that he was entitled a jury determination regarding his prior convictions. He further argues that his attorney's concession that the prior convictions were comparable to Washington offenses was not a valid waiver of his jury right.

The Court of Appeals has most recently considered and rejected the defendant's argument that he was entitled to a jury determination of his prior convictions in State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005) and State v. Farnsworth, 133 Wn. App. 1, 130 P.3d 389 (2006). The United States Supreme Court has similarly reaffirmed its position that the judge determines prior criminal history. Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Shepard defined the information

which the judge may consider when comparing a foreign conviction to a federal offense. Shepard, 544 U.S. at 26.

The defendant also contends that he was entitled to notice of his prior convictions in the Information. This Court has held that prior convictions that result in a sentence of life imprisonment without the possibility of parole need not be pleaded in the information. State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001), cert denied, 535 U.S. 996, 122 S.Ct. 1559, 152 L.Ed.2d 482 (2002).

IV. CONCLUSION

For the forgoing reasons and the reasons set out in the State's prior briefing the State requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted on July 27, 2006.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By:



KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent