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No. 53214-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GAYLON THIEFAULT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON
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A. SUMMARY OF SUPPLEMENTAL BRIEF

In his supplemental opening brief, Mr. Thieffault argued as follows:

1. That Mr. Thieffault's trial counsel provided deficient attorney performance at the September 30, 2003, new sentencing hearing, by waiving challenge to the trial court's inclusion of two prior foreign convictions as Washington strike offenses;

2. That this deficient performance prejudiced Mr. Thieffault where the prior sentencing documentation was inadequate to show comparability of the defendant's conduct to Washington strike crimes, without looking to matters in the sentencing record that had ever been proved beyond a reasonable doubt or admitted by the defendant; and

3. That the trial court's own finding of comparability of the foreign offenses was erroneous, requiring reversal of the defendant's sentence to Life Without Possibility of Parole, even in the presence of express waiver by counsel on the record.

B. REPLY ARGUMENT

The State of Washington argues that Mr. Thieffault's defense counsel at his first sentencing hearing implicitly agreed that the State's classification of his prior Montana attempted robbery and

federal sexual assault, as “three-strike” offenses, was correct, and that this issue was foreclosed at his second sentencing hearing following reversal of his incorrectly imposed “two-strikes” sentence. Brief of Respondent, at 4-5.

However, Mr. Thieffault’s second sentencing hearing was a new sentencing hearing, and all sentencing challenges could be and should have been raised.¹ Thus an unreasonable failure by Mr. Thieffault’s second counsel to challenge the prior convictions as “three-strike” offenses may be ineffective if the requirements of ineffective assistance of counsel are met.

The State also argues that Mr. Thieffault’s counsel did not object to the pre-sentencing memorandum at the second sentencing and that Mr. Thieffault “agreed to the pre-sentence report previously used.” Brief of Respondent, at pp. 5-6. However, the real facts doctrine does not provide that the defendant

¹Mr. Thieffault was sentenced to a term of incarceration for Life Without Possibility of Parole, pursuant to the Persistent Offender Accountability Act (“Three Strikes”), following his current conviction for attempted second degree rape and the trial court’s conclusion under Washington’s Three Strikes law that the defendant was also guilty of two prior “most serious offenses” in the form of (1) a prior Montana conviction for attempted robbery and (2) a prior federal conviction for aggravated sexual assault. CP 17-28. The defendant’s sentencing on September 30, 2003 was a new sentencing hearing, following remand from a decision of the Court of Appeals which had reversed the defendant’s original “two-strikes” sentence imposed August 10, 2001. Supp. CP ____, Sub # 98.

acknowledges the viability of legal arguments made in the State's sentencing briefing. See RCW 9.94A.530.

The State also argues that the elements of the Montana and federal offenses at issue in the present case are comparable to the stated Washington strike crimes. Brief of Respondent, at pp. 7-12. In particular, the State contends that the Washington requirement of robbery that the defendant have the intent to commit theft is comparable to robbery in Montana, which requires that the defendant be in the course of committing a theft when he commits the other elements of the crime of robbery, and that Montana's theft definition includes intent to deprive the owner of property. Brief of Respondent, at 8-10. However, the definitions of theft in Montana, set out in the State's brief, plainly show that theft is defined in several circumstances as requiring mens rea elements of a lesser order than intent to deprive.

In addition, the State contends without any elaboration or argument, that the two State's definitions of "attempt" are "comparable" despite the facially and significantly different language used in the respective statutes. Brief of Respondent, at p. 11. But the language of the Montana attempt definition, requiring only "an act toward" the commission of the offense, is patently

broader in scope and inclusion than Washington's requirement of a "substantial step."

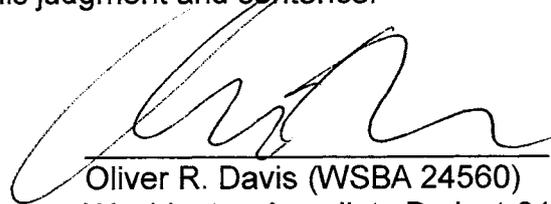
Finally, the trial court in this case at sentencing considered, just as the State v. Bunting trial court refused to consider, for purposes of comparability, facts contained in documents that were not referenced in or incorporated into the defendant's plea of guilty or judgment.² Without the documents referred to by the State in its responsive brief, there are no facts adequate to establish that the defendant's Montana conduct was comparable to a Washington attempted robbery, and since the Montana statute for attempted robbery is broader than Washington's, no sentencing court could find Mr. Thieffault committed a Washington "three-strikes" offense without looking to facts neither proved or admitted by the defendant in the plea or judgment. Regardless of what Mr. Thieffault's trial

²Although the State's motion to file the information, dated December 21, 1983, was included as a copied attachment to the sentencing memorandum, no copy of the December 22 information was attached, and neither judgment incorporates or references the motion to file the information or any other document so as to admit its facts, or references the absent information. Supp. CP ___, Sub # 71 (State's Sentencing Brief, Appendices A); see State v. Bunting, 115 Wn.App. 135, 140-41, 61 P.3d 375 (2003). In Bunting, a criminal defendant's prior offense was proffered in the form of his plea of guilty to armed robbery in Illinois under a statute broader than Washington's. State v. Bunting, 115 Wn.App. at 135. The Court ruled it would be improper to rely on the facts alleged in the Illinois complaint and the "official statement of facts" [similar to the affidavit of probable cause] to establish the element of specific intent to deprive that was necessary to make the offense comparable to armed robbery in Washington, because the allegations in the complaint and "official statement" had not been proven or conceded by the defendant. State v. Bunting, 115 Wn.App. at 143.

counsel did, did not, or failed to object to at sentencing, a judgment or plea without supporting facts referenced therein proves only that the defendant Mr. Thieffault committed that crime in the foreign jurisdiction.

C. CONCLUSION

Based on the foregoing supplemental brief, and on appellant's previous briefing, Mr. Thieffault respectfully requests that this Court reverse his judgment and ~~sent~~ sentence.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
V.)	COA NO. 53214-6-1
)	
GAYLON THIEFAULT,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 30TH DAY OF SEPTEMBER, 2004, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2004.

X _____ 

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