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NO. 53214-6-I

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

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STATE OF WASHINGTON

Respondent

v.

GAYLON LEE THIEFAULT,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

1. When the defendant was originally sentenced his attorney affirmatively agreed that his prior foreign convictions counted toward finding the defendant was a persistent offender. At re-sentencing after appeal his second attorney made a tactical decision to not challenge the trial court's previous determination that the defendant's foreign convictions were comparable to Washington offenses. Instead counsel focused the court's attention on a challenge to the facial validity of those convictions. Did the defendant receive effective assistance of counsel?

2. Where the trial court's original determination that the defendant's prior foreign convictions were comparable to Washington offenses was accurate, was defense counsel's representation of the defendant at re-sentencing objectively reasonable when he did not challenge that decision?

3. Was trial counsel's failure to anticipate a change in the law ineffective assistance of counsel?

4. The trial court adopted its prior comparability analysis at the defendant's re-sentencing. Does this fact excuse the defense waiver of the comparability issue?

## **II. STATEMENT OF THE CASE**

The State has set forth the facts of the defendant's case in its original response filed June 14, 2004 and are incorporated by reference. The following additional facts relate to the supplemental issue presented by the defendant.

The defendant was originally sentenced as a persistent offender on August 10, 2001. He was represented by Christine Sanders. After the sentence was reversed and remanded the defendant was re-sentenced as a persistent offender on September 30, 2003. He was represented at the second sentencing hearing by Damian Klauss. At the re-sentencing hearing Mr. Klauss acknowledged the court had already determined that the Montana conviction was comparable to a Washington conviction for attempted Robbery and for that reason decided not to argue comparability. RP 39. Ms. Sanders had agreed the foreign convictions were comparable to Washington offenses when she stated at the defendant's first sentencing that the court had no discretion in sentencing. RP 24. The defendant did not object to any portion of the pre-sentence report. The pre-sentence report stated the defendant's 1983 Robbery conviction was equivalent to First Degree Robbery in Washington. It included the Montana

robbery and Federal rape convictions in determining the defendant was a persistent offender. 4 CP \_\_\_\_ (Sub. 68).

Four and one-half months after the defendant was re-sentenced Division III of the Court of Appeals decided State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004). Nine months after the defendant was re-sentenced the United States Supreme Court decided Blakely v. Washington, \_\_\_\_ U.S. \_\_\_\_, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Each of these cases analyzed different aspects of Washington's sentencing scheme in light of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

### **III. ARGUMENT**

#### **A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

In order to establish ineffective assistance of counsel, the petitioner must show that counsel's performance was deficient, that it was not a matter of trial strategy or tactics, and that the petitioner was prejudiced. In re Tortorelli, 149 Wn.2d 82, 95-96, 66 P.3d 606, cert. denied, \_\_\_\_ U.S. \_\_\_\_, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003) (citations omitted). "The first element is met by showing that counsel's conduct fell below an objective standard of reasonableness. In this regard the court must make every effort to

eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992).

The defendant now claims his second trial attorney was ineffective because he did not challenge trial court's determination the defendant's foreign convictions were comparable to their Washington counterparts. This argument fails for three reasons. First, the decision to focus on the facial validity of the prior foreign convictions, and not argue an issue the defendant had already waived, was a valid trial tactic. Second, counsel's performance was not deficient. The elements of the defendant's foreign convictions were comparable to their Washington counterparts. Third, even if subsequent case law was developed that would have impacted a comparability analysis of the defendant's prior convictions, defense counsel's failure to anticipate that change in the law was not ineffective assistance of counsel.

**1. Counsel's Choice To Challenge The Defendant's Prior Convictions On Some Ground Other Than Comparability Was A Valid Trial Tactic.**

The defendant does not argue that his original counsel, Ms. Sanders, was ineffective at the August 10, 2001 sentencing

hearing. Rather, he now claims Mr. Klauss was ineffective at the September 30, 2003 re-sentencing when he acknowledged the trial court had already found the defendant two prior foreign convictions were comparable to Washington offenses. Supplemental Brief of Appellant at 1. Mr. Klauss faced a sentencing hearing where that issue had been foreclosed.

Ms. Sanders had already agreed two years earlier that the court could consider the two prior offenses for purposes of determining the defendant's prior "strike" offenses. First she acknowledged that the court had no discretion as to the sentence in terms of confinement. RP 24. Implicitly she was agreeing that the Montana and Federal convictions were comparable, and therefore could be considered in determining the defendant's status as a persistent offender. Second, the defense did not object to the pre-sentence investigation report. That report specifically stated the Montana robbery conviction was comparable to first degree robbery in Washington. 4 CP \_\_\_\_ (sub 68 at p. 4) It also included the federal rape conviction in its analysis that the defendant's current offense qualified as a "third strike", which required a sentence of life imprisonment. 4 CP \_\_\_\_ (sub. 68 at 6). In addition the defendant himself agreed to the pre-sentence report previously used. 4 CP

\_\_\_ (sub 68 at p. 3). The court is entitled to rely on information acknowledged by the defendant, including information not objected to in the pre-sentence investigation. RCW 9.94A.530.

Where a defendant has affirmatively acknowledged that prior out of state and federal convictions are comparable, those prior convictions are properly used to determine the defendant's sentence. State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999). A defendant may be found to have waived an alleged error when there has been an agreement to the facts, even if those facts are later disputed. State v. Ross, \_\_\_ Wn.2d \_\_\_, 93 P.3d 1225, 1230 (2004), quoting In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). In order to avoid application of the defendant's waiver in those circumstances a defendant must show an error of fact or law occurred within the four corners of the judgment and sentence. Ross, 93 P.3d at 1230. Because he could not do this, the issue had been waived. It was therefore reasonable for Mr. Klauss to concentrate his efforts on another reason to challenge the prior foreign convictions so as to preclude them being used as strike offenses. By doing so he was able to focus the court's attention on the one issue he did raise, thereby getting fair consideration of the issue. In fact, the court even took a recess to fully consider the

issue raised by Mr. Klauss. RP 40-41. Mr. Klauss' decision to acknowledge the court's prior comparability ruling and not contest it further was a valid trial strategy. It cannot be a basis for finding ineffective assistance of counsel.

## **2. The Prior Foreign Convictions Were Comparable To Washington Offenses.**

Mr. Klauss' representation was effective when he did not argue the prior foreign convictions were not comparable to Washington offenses because the court had previously correctly determined they were comparable. "To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense." Ford, 137 Wn.2d at 479. (citations omitted). Because both the Montana robbery conviction and the Federal rape conviction met this test, the court had correctly found the two prior convictions comparable to Washington

offenses at the first sentencing hearing. Mr. Klauss was not ineffective when he chose to not further challenge the court's previous determination.

**a. The Montana Attempted Robbery conviction.**

**i. The elements of Attempted Robbery in Montana are the same as the elements of Attempted Robbery in Washington.**

With respect to the substantive crime the defendant argues the Washington and Montana offenses are not the same because both offenses require intent to commit a theft, but theft is defined more broadly in Montana than in Washington. Supplemental Brief of Appellant at 9. While the definition of theft in Montana includes several specific types of theft, they are all defined in such a way that a theft there would satisfy the requirements of a theft in Washington. Therefore, the elements of theft in each state are the same.

In Washington theft is defined as:

(1) to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services; or

(2) by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services; or

(3) to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

2 CP 140-41.

In Montana one commits a theft under one of four scenarios. Each of the four scenarios requires a showing the defendant acted purposely or knowingly. They are:

(1) obtaining or exerting unauthorized control over property of another

(2) obtaining property of another by threat or deception

(3) obtaining control over stolen property knowing the property to be stolen and

(4) obtaining or exerting unauthorized control over public assistance.

In the first three circumstances require an additional showing either that the defendant

(a) had the purpose of depriving the owner of the property;

or

(b) purposely or knowingly uses, conceals, or abandons the property in a manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

The fourth method of committing a theft in Montana must be done by false statement or fraud.

2 CP 70.

The first two ways in which theft may be accomplished in Montana are virtually identical to the first two ways it may be done in Washington. The only difference between Montana's third and fourth definitions of theft and Washington's definition is that Montana requires a showing the theft involved certain types of property. The third kind of theft involves property the defendant knows to be stolen. In proving that the defendant knew the property was stolen when he obtained control over it, the prosecutor would necessarily prove the defendant "obtained or exerted unauthorized control over the property of another." Similarly the fourth type of theft involves public assistance obtained by fraud or deception. In proving those elements the prosecutor would necessarily prove the defendant acted "by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of

such property or services.” Rather than being broader than the Washington statute, Montana’s theft statute is identical to Washington’s theft statute. One would necessarily prove a theft in Washington if one proved a theft in Montana.

The defendant also argues that Montana’s attempt statute is broader than Washington’s attempt statute. In fact, both attempt statutes are the same. In Montana “a person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.” MCA 45-4-103, 2 CP 68. In Washington “a person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020, 2 CP 127. A “substantial step” is “conduct which strongly indicates a criminal purpose and which is more than mere preparation.” WPIC 100.05, 2 CP 136, State v. Gatalski, 40 Wn. App. 601, 613, 699 P.2d 804 (1985) implied overruling on other grounds recognized, State v. Baldwin, 63 Wn. App. 536, 821 P.2d 496 (1991). A defendant would take a substantial step toward the commission of an offense if he did any act toward the commission of that offense. Thus, the two statutes are the same.

The Montana robbery and attempt statutes are comparable to the Washington robbery and attempt statutes. Mr. Klaus's decision not to challenge the Montana attempted robbery conviction on that basis was reasonable.

**ii. The defendant's conduct in Montana would have been an attempted robbery in Washington.**

When the trial court first made the comparability determination it not only looked at the elements of the four statutes in issue, but also looked at the defendant's conduct as outlined in the affidavit attached to the information and the judgment. RP 28. The defendant claims the only information before the court at the time of re-sentencing was the supplemental exhibits admitted at that time, which he argues do not set forth the facts of the offense. Brief of Appellant at 14-15. His argument ignores the record at re-sentencing when the court stated "[t]he documents that were previously considered by the court again will be considered at this time, as well as I will have marked as a new exhibit the items that were handed up to me by Ms. Albert at this particular proceeding..." RP 45. Those documents included certified copies of the materials supplied in the State's sentencing memorandum. See Ex. 1A, 1B, and 1C. One of those documents entitled "Motion for Leave to File

Information” sets forth the language of the actual information filed in the case. The defendant has cited no reason the court could not consider the language of the charged statute in the motion rather than the actual information. The information language outlines the defendant’s conduct which includes an attempt to steal cash from a store employee by placing that person in fear of immediate bodily injury by entering the store wearing a stocking mask and hold a .44 magnum handgun. 2 CP 56. Those acts constitute both first and second degree robbery in Washington. RCW 9A.56.200 and .210.

**b. The Federal Rape conviction**

The federal statute defining aggravated sexual abuse is broader than Washington’s second degree rape statute. Aggravated sexual abuse occurs when the defendant knowingly causes another person to engage in a sexual act by using force against that other person. 2 CP 98. A sexual act is defined not only as penetration of the vagina or anus by either a penis or other object but also intentional touching of the genitalia under the clothing of persons less than 16 years old. 2 CP 100-101. The record of the defendant’s conviction supported the court’s conclusion that the defendant’s conduct would have been a second degree rape under Washington law. Like the attempted robbery

conviction, the defendant argues no certified judgment or documents of the conviction. Brief of Appellant at 15. Those certified documents were filed at the defendant's original sentence hearing. The court again considered them at the re-sentencing hearing. RP 45. See ex. 1A, 1B, and 1C.

The indictment stated the defendant knowingly caused A.S. to engage in a sexual act, to wit: contact between the penis and vulva, by the use of force against A.S., in that he physically restrained her and struck her with his hands. 2 CP 88. In his signed plea agreement the defendant admitted he knowingly caused another person to have sexual intercourse with him through the use of force. 2 CP 89. Under Washington law the defendant would have committed a second degree rape if he engaged in sexual intercourse with another person by forcible compulsion. 2 CP 145. Forcible compulsion is defined as physical force that overcomes resistance. 2 CP 148. By causing another person to engage in sexual intercourse by forcing her to do so the defendant would have been guilty of second degree rape in Washington. The trial court's original determination that the two crimes were comparable was correct. Consequently Mr. Klauss acted

reasonably when he did not challenge the court's original determination that the two offenses were comparable.

**3. The Defendant Was Not Prejudiced When Defense Counsel Did Not Object To The Court's Previous Comparability Analysis Even If The Record Of His Foreign Convictions Had Not Been Complete.**

As discussed, the defendant argues that the record of his foreign convictions was insufficient at his re-sentencing hearing for the court to conduct a comparability analysis. The defendant has provided no authority which states that a court may not consider documents relevant to the defendant's offender score and sentence at re-sentencing that had previously been admitted at the original sentencing after an appeal. Even if that were the case, the defendant would not have been prejudiced when his attorney did not object to the court's comparability analysis. Had counsel objected, the court would have most certainly granted a continuance in order to afford the State the opportunity to obtain the proper documents. In fact, the defendant's re-sentencing hearing had been continued once before when defense counsel raised an issue regarding one of the defendant's prior convictions. RP 37.

#### **4. Failure To Anticipate A Change In The Law Is Not Ineffective Assistance Of Counsel.**

The defendant relies on two opinions that were delivered by the court after the defendant's re-sentencing hearing to support his argument that the court could not consider any of the documents supplied to the court, other than the judgments, when comparing the foreign convictions to Washington crimes. Those cases do not support the conclusion that the defendant was deprived effective assistance of counsel at his September 30, 2003 sentencing hearing.

One case examined a trial court's application of the rule announced in Apprendi<sup>1</sup> in the context of comparing a foreign conviction where the foreign statute was broader than its Washington counterpart and the result of counting the foreign conviction would be a greater punishment than the statutory maximum for the offense. State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004). In Ortega the State argued the court should have counted a prior indecency with a child conviction from Texas as a strike and declares the defendant a persistent offender. The elements of the Texas statute were broader than Washington's first

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

degree child molestation. Evidence that would have brought the conviction within the definition of the Washington statute was not contained in the indictment or judgment. The court held that facts not found by the jury could not be used to determine whether a prior foreign conviction was comparable to a Washington crime. Ortega, 120 Wn. App. at 174.

Ortega is not authority for the defendant's argument that his trial counsel was ineffective at the re-sentencing hearing for two reasons. First, all the facts that establish the comparable elements of attempted second degree robbery and second degree rape are contained the charging documents for each offense and the plea statement in the federal rape case. In pleading guilty to those charges the defendant necessarily conceded the facts as set forth in those documents. State v. Bunting, 115 Wn. App. 135, 143, 61 P.3d 375 (2003). Second, before Ortega, the court allowed consideration of other court documents to determine whether the defendant's conduct would have violated a Washington statute without the limitation. State v. Morley, 134 Wn.2d 588, 611, 952 P.2d 167 (1998). Ortega represents a change in the law. Failure to anticipate a change in the law is not ineffective assistance of counsel. In re Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

The defendant also relies on Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531 (2004). Like Ortega, Blakely represents a change in the law. Before the court decided Blakely the trial court was charged with finding facts that constitute substantial and compelling reasons to support an exceptional sentence beyond the standard range. RCW 9.94A.535. Blakely determined that those facts must either be found by a jury or admitted by the defendant, following the reasoning in Apprendi. Blakely, 124 S.Ct. at 2537. Because Blakely is a change in the law, defense counsel cannot be ineffective for failing to anticipate it. Benn, 134 Wn.2d at 939. Blakely also does not support the defendant's position because he did admit to the facts of the underlying offenses as outlined in the information, indictment, and plea statement, when he pled guilty to them.

Finally, the defendant also cites Bunting to support his position. In Bunting the court considered whether three documents should have been considered by the trial court when comparing an Illinois statute that was broader than its Washington counterpart to determine whether the defendant's conduct would have been a crime in Washington at the time. The trial court had an "official statement of facts" that set out what the defendant did and was

submitted by the prosecutor after the defendant pled guilty, a complaint that alleged the facts of the case and an indictment charging the defendant with the crime. The court found the defendant only conceded the acts as set out in the indictment and not the official statement of facts or the complaint, because he had only pled guilty to the indictment. Bunting, 115 Wn. App. 135. Therefore the court could only consider what was in the indictment. It was not sufficient to establish the two crimes were comparable.

In the Montana attempted robbery case no complaint was filed. Instead an Information outlining the defendant's acts was filed. The defendant pled guilty to that information. Following the reasoning in Bunting the defendant conceded the facts as outlined in the information. The same is true for the federal rape conviction. The defendant's signed plea form also set out facts that were properly considered by the trial court. Because the information contained in both the Montana "Motion for Leave to File Information" and the Federal Rape indictment and plea statement established they were comparable to Washington crimes, defense counsel was not ineffective for not objecting to them.

In the alternative, if the court finds the "Motion for Leave to File Information" from the Montana conviction is not sufficient, and

a certified copy of the information charging the defendant was required, the proper remedy is to allow the State the opportunity to produce a certified copy of the information, where under the circumstances presented here the defendant admitted he had been convicted of the offense. State v. McCorkle, 137 Wn.2d 490, 499, 945 P.2d 736 (1997) affirmed 137 Wn.2d 490, 973 P.2d 461 (1999).

**B. THE TRIAL COURT'S COMPARIBILITY ANALYSIS AT THE DEFENDANT'S RE-SENTENCING DOES NOT IMPACT THE OUTCOME HERE.**

The defendant argues that the trial court conducted a "de novo" comparability analysis at the re-sentencing hearing which somehow excused his waiver of that issue on appeal. He provides no authority to support that position.

In addition, the trial court did not conduct a "de novo" comparability analysis. Rather, the trial judge said he was incorporating his previous analysis comparing the statutes in questions by reference into his decision at the re-sentencing hearing. RP 44-45. At best it can be said the trial judge was making a complete record.

Finally, the defendant has framed the issue in his supplemental brief in terms of ineffective assistance of counsel.

Had the court actually done a de novo review of the comparison between the relevant statutes, the defendant would not have suffered any prejudice by the conduct of counsel. His ineffective assistance of counsel claim would fail.

#### **IV. CONCLUSION**

Trial counsel at the re-sentencing hearing provided effective assistance of counsel. The defendant had waived the issue of comparability when he agreed the prior foreign convictions were properly included in determining he was a persistent offender at his August 2001 sentencing. Trial counsel at the September 2003 re-sentencing hearing made a tactical decision to challenge the defendant's foreign convictions on the ground of their facial validity, rather than their comparability to Washington statutes. In any event, the court properly found the foreign convictions were comparable to their Washington counterparts. Subsequent cause authority does not affect the trial court's initial determination that the relevant statutes were comparable. Further, they represent a change in the law that defense counsel was not required to

anticipate. For the forgoing reasons the State requests the court affirm the defendant's sentence.

Respectfully submitted on September 17, 2004.

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IN THE COURT OF APPEALS  
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DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

GAYLON L. THIEFAULT,

Appellant.

No. 53214-6-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17<sup>th</sup> day of September, 2004, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 17<sup>th</sup> day of September, 2004.

Kathleen Webber 16040  
KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent