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NO. 57691-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

84982-0

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. MR. WEAVER WAS DENIED HIS RIGHT TO COUNSEL AND TO PRESENT A DEFENSE, CONTRARY TO THE PROSECUTION'S MISREPRESENT OF THE FACTS OF THIS CASE

Defense counsel David Gehrke vociferously and repeatedly informed the court that he was unprepared for trial and had relied on his conversation with the trial prosecutor about Mr. Weaver's impending heart surgery that the trial would not begin on the previously scheduled dates. 2/14/05RP 7. He offered additional specifics as to his lack of preparation in a written memorandum he filed with Judge Armstrong after Judge Kessler denied his initial request for more time without an inquiry or even the opportunity to explain his lack of preparation. 2/14/05RP 7; CP 32-33 (Defense Trial Memorandum).

For example, he stated that both the DNA evidence and the conflicting evidence required additional preparation, and he needed to discuss the case "in more detail" with Mr. Weaver as well as hire a DNA expert. 2/14/05RP 8. He had not personally interviewed the complainant. Id.; see Lord v. Wood, 184 F.3d 1083, 1093 (9<sup>th</sup> Cir. 1999) (attorney incompetent based on failure to personally interview witness prior to deciding trial strategy); State v. Visitacion,

55 Wn.App. 166, 173, 776 P.2d 986 (1989) (interviewing witness is essential for effective assistance of counsel). While the prosecutor says he could freely rely upon work done by prior attorneys, Mr. Weaver had strenuously objected to the work of other attorneys and thus Mr. Gehrke was correct to feel obligated to conduct some independent investigation. CP 37 (Mr. Weaver's complaint as to attorney's reliance upon inadequate work by prior attorney).

Judge Armstrong asserted numerous times that she lacked authority to continue the case. 2/14/05RP 9 ("I'll have to" deny any request for a continuance because so instructed by Judge Kessler); Id. at 12 ("I don't have authority to give a continuance."); Id. at 13 ("I've been instructed" to refer any requests for recess to Judge Kessler).

Moreover, Mr. Gehrke later informed the court of a different development: he believed he was the victim of a fraud perpetrated by Mr. Weaver, who was paying him with fraudulent bonds. 2/16/05RP 71-75 ("I suspect he's deliberately trying to defraud me."). While Mr. Weaver denied the bonds were fake, Mr. Gehrke had conducted his own investigation and was convinced as to their illegitimacy. Id. at 71-73. The bonds were worthless because they were phony, not, as the prosecution implies, for some more

innocuous reason. Id. Not only was Mr. Gehrke unhappy about not being paid the \$7,500 he was owed, and concerned about his ability to meet his necessary expenses, he suspected his client was lying to him about substantive trial matters as well and thus could not present his client's theories about the case to the court. Id. at 74 ("I can't deal with being deliberately set up with phony paper."); Id. at 75 ("I can't be the advocate I need to be for my client.").

Furthermore, during trial Mr. Gehrke learned, either for the first time or having forgotten he was earlier informed, that Mr. Weaver was infertile and thus could not have impregnated the complainant. 2/17/05RP 159; 2/22/05RP 322. A doctor concluded Mr. Weaver was presently infertile but additional documents were needed to show his infertility at the time of the offense. 2/22/05RP 319; 326. The court refused to permit Mr. Weaver to present this information at trial or receive the additional time he needed to locate information that would support his claim. Id. at 325-27.

The prosecutor misrepresents these legal errors. Mr. Gehrke was not complaining about not being paid, he was informing the court that he had a personal interest in Mr. Weaver being discredited and convicted, because Mr. Weaver had paid him

with forged financial documents and he believed he was the victim of a crime Mr. Weaver committed.

Mr. Weaver did not express his delight with Mr. Gehrke's performance, rather he told the court he wanted an attorney who would do a better job than Mr. Gehrke was doing or who would at least return his phone calls. Id. at 82. He said, "I don't want [Mr.Gehrke] here . . . ." Id. at 80. The hearing concluded with defense counsel saying about Mr. Weaver's use of fraudulent financial documents, "It sounds like fraud to me." Id. at 82. The attorney-client relationship was irreparably harmed by Mr. Gehrke's accusations that Mr. Weaver was involved in forgery or theft against him.

Prior to trial, Mr. Gehrke's lack of preparation was not manufactured, but a documented complaint joined in by Mr. Weaver. CP 34-37 (letter written before trial complaining of at least 19 issues attorney failed to investigate). Mr. Weaver's right to a prepared counsel trumps the State's interest in a speedy proceeding, notwithstanding any statute that encourages speedy trials. See Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) ("Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce

constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less.”)

Mr. Weaver's right to an attorney also embraces the right to a lawyer who is not torn by a personal interest in seeing the defendant convicted. As a victim of a fraud, Mr. Gehrke gave no assurances he could fairly or zealously represent Mr. Weaver.

Finally, his right to counsel includes the right to a prepared attorney, who is afforded the opportunity to present a defense. Mr. Weaver presented the court with information that he was infertile and thus could not have impregnated the complainant. The court denied Mr. Weaver the opportunity to present this defense. Even if this evidence should have been gathered earlier, Mr. Weaver had long complained of his attorney's inaccessibility and lack of communication. CP 34-37 (letter to attorney filed before trial complaining of lack of communication and preparation by attorney).

The prejudicial effect of the attorney-client conflict is made plain by Mr. Gehrke's belated investigation of Mr. Weaver's infertility and failure to even introduce any such information at trial. Mr. Gehrke could have at least cast doubt upon the critical DNA

evidence and credibility issues of the complaining witness had he offered evidence that Mr. Weaver is presently incapable of impregnating anyone. The jury would surely have been affected by this important evidence, even if the defense could not absolutely establish Mr. Weaver's infertility at the time of the offense.

For the reasons presented in Mr. Weaver's opening brief and the facts as further described above, the court impermissibly forced Mr. Weaver to proceed to trial with an attorney who claimed he was unprepared, believed his client was a liar, and who never indicated he was able to zealously represent Mr. Weaver. The admittedly unprepared attorney failed to investigate critical defense issues, such as evidence of infertility. The court's denial of Mr. Weaver's right to counsel and to present a defense require reversal as these errors have not been proven harmless beyond a reasonable doubt.

2. THE STATE DID NOT MEET ITS BURDEN OF PROVING MR. WEAVER'S OFFENDER SCORE

a. The court must properly calculate an offender score. The Washington Supreme Court has repeatedly explained that the prosecution must prove, at the original sentencing hearing,

the classification, comparability, and validity of a prior out-of-state conviction unless agreed or waived. In re the Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002); In re the Pers. Restraint of Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

In Cadwallader, the prosecution asked for an additional opportunity to prove an intervening felony conviction from Kansas when the defendant had not claimed at the initial sentencing hearing that an earlier conviction washed out. 155 Wn.2d at 872. The Cadwallader Court rejected the prosecution's request for an additional evidentiary hearing, ruling:

Regardless of whether it appeared necessary to present the [intervening] Kansas conviction at the time of sentencing, it was the State's burden to present criminal history, not Cadwallader's.

155 Wn.2d at 876. The prosecution in Cadwallader claimed it was not on notice that it needed to prove the Kansas conviction or that wash out issues needed to be litigated. Id. Even though the prosecution in Cadwallader could not have been expected to guess that wash out would be an issue either under the case law or by virtue of a defense objection, the Cadwallader Court refused to

waive the requirement that the prosecution prove sentencing issues at the time of sentencing.

Cadwallader is consistent with the mandatory language in RCW 9.94A.525(2), which provides in relevant part that

Class B prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(Emphasis added.) The court may not include an offense in the offender score unless the court determines the offender has not spent ten crime-free years in the community.

b. The court did not find Mr. Weaver's prior offenses did not wash out. The Judgment and Sentence is the final order in a criminal case. See Tembruell v. Seattle, 64 Wn.2d 503, 509-10, 392 P.2d 453 (1964). It denotes the court's formal declaration as to the legal consequences of the conviction. Id. at 510; see also State v. Johnson, 113 Wn.App. 482, 488, 53 P.3d 155 (2002) (relying on language in Judgment and Sentence as determinative of offenses of conviction).

Here, the Judgment and Sentence states that it lists all pertinent criminal history used in calculating the offender score. It reads, "The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525)." CP 81.

Yet it lists only the two second-degree burglaries. Id. If a misdemeanor intervened to prevent a felony from being excluded from the criminal history, the court did not use any such misdemeanor offense according to the terms of the Judgment and Sentence. Thus, according to the plain language of the Judgment and Sentence, the court did not rely on any other criminal history in calculating Mr. Weaver's offender score. CP 81.

c. Mr. Weaver did not acknowledge the prior misdemeanors. The prosecution asserts that Mr. Weaver implicitly acknowledged intervening misdemeanors because the State filed a document that listed misdemeanor convictions and Mr. Weaver raised no objection. Resp. Brf. at 26-27. The prosecution misrepresents both the facts and the law on this point.

In State v. Grayson, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005), the case on which the prosecution relies, the court stated that acknowledged facts include all facts presented or considered during sentencing that are not objected to by the parties. In

Grayson, the sentencing court relied on information outside the record as to the efficacy of the DOSA program and its funding. The defense did not object to the court's reliance on its outside knowledge. Yet the Supreme Court reversed the sentence, finding that the court abused its discretion by making a sentencing determination based on evidence that was not part of the record, even though no one objected.

In the case at bar, the prosecution filed two pleadings regarding sentencing, one focusing on the exceptional sentence request. CP 60-67. A second pleading included a one page document titled, "Appendix B to Plea Agreement Prosecutor's Understanding of Defendant's Criminal History." CP 190. This document included a list of felony and misdemeanor offenses on which the State now claims Mr. Weaver implicitly agreed by failing to object to this document. Yet given the title of the document, which on its face limits its applicability to plea bargaining purposes, Mr. Weaver would not be expected to presume that this document was intended to govern his sentence in the absence of a guilty plea.

Moreover, there is no evidence that the court considered this document at sentencing. At the sentencing hearing, the prosecutor

focused strictly on the memorandum regarding the exceptional sentence. 4/8/05RP 371 (“I presume the Court has had an opportunity to review the State’s sentencing memorandum regarding the requested exceptional sentence.”). The prosecutor argued only about the reasons why Mr. Weaver should receive an exceptional sentence. Id. at 372, 374-77. As to his criminal history, the prosecutor merely stated, “He had a very active criminal life when he was younger, and that is why he had two points for his burglaries that he was previously convicted for.” Id. at 376. He did not refer to any more recent criminal history.

Defense counsel did not present a written sentencing memorandum. He argued, “Mr. Weaver did have some criminal history in his younger days. He grew out of that and became a successful husband and father and business man.” 4/8/05RP 378. The court did not orally address Mr. Weaver’s criminal history. Id. at 380-383.

Based on the information presented or considered at sentencing, and the court’s sentencing findings, the court did not calculate Mr. Weaver’s offender score based on a finding as to the existence of any misdemeanor offenses. The SRA squarely places the burden of properly calculating the offender score on the court

and the burden of proof on the prosecution. The single document referring to plea bargaining does not demonstrate that Mr. Weaver acknowledged his criminal history when he did not enter into any plea agreement. The prosecution failed to meet its burden of proof at sentencing and remand for further factual evidence is not permitted.

3. THE EXCEPTIONAL SENTENCE IS PERMITTED  
PURSUANT TO RCW 9.94A.712

Although this matter was not discussed during sentencing, the appellate prosecutor correctly observes that RCW 9.94A.712 governs Mr. Weaver's sentence. RCW 9.94A.712 was effective beginning September 1, 2001, and thus embraces the instant accusations from 2002. The Supreme Court's recent decision in State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006), provides that the State is not required to provide a jury trial for facts used to increase the minimum term of a sentence imposed under RCW 9.94A.712. Because the exceptional sentence imposed in the case at bar is essentially a minimum term, Clarke holds that the State was not required to comply with the dictates of the Sixth Amendment right to trial by jury.

B. CONCLUSION.

For the foregoing reasons and those presented in  
Appellant's Opening Brief, Oliver Weaver asks this Court to reverse  
his convictions and sentence.

DATED this 2<sup>nd</sup> day of April 2007.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 57691-7-1
	)	
v.	)	
	)	
OLIVER WEAVER,	)	
	)	
Appellant.	)	

**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 3<sup>RD</sup> DAY OF APRIL, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| <input checked="" type="checkbox"/> OLIVER WEAVER<br>268865<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520                    | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF APRIL, 2007.

x \_\_\_\_\_ *me*

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