

64034-8

64034-8

NO. 64034-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LEANDRE GAINES,

Appellant.

2010 MAY 17 11:58 AM

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Is the defendant's challenge to his offender score moot where he has completed his term of confinement?

2. Did the State meet its statutory duty to establish criminal history where defendant affirmatively acknowledged that the offender score calculation, based on the prosecutor's criminal history summary and certified court documents provided by the State, was correct?

3. Is Gaines' 1996 Thurston County juvenile adjudication valid on its face for purposes of establishing its existence under the Sentencing Reform Act where there is no constitutional error that can be determined from the face of the document?

4. Should the defendant's claim of ineffective assistance of counsel be rejected where he cannot show that he was prejudiced by counsel's decision to acknowledge his criminal history.

B. STATEMENT OF THE CASE.

Leandre Gaines was charged by information with assault in the second degree and possession of cocaine. CP 1-2. A jury trial was held before the Honorable Mary Yu. RP 6/8/09 2. The State dismissed the assault charge and the jury failed to reach a verdict

as to the possession charge. RP 6/8/09 2. A second jury trial was held before the Honorable James Cayce. RP 6/8/09 2. The jury found Gaines guilty of possession of cocaine on June 10, 2009. CP 33. The court sentenced Gaines to a low-end sentence of 12 months plus one day, based on an offender score calculation of eight. CP 34, 36. The offender score included four prior adult felony convictions and seven prior juvenile felony adjudications. CP 39. These convictions were detailed in the Presentence Statement of the King County Prosecuting Attorney filed with the court. CP 51-53. The defense filed no presentence statement. The State also presented certified copies of the disposition order or sentencing order from the three Thurston County juvenile adjudications. CP 66-71.

At the sentencing hearing held on July 22, 2009, defense counsel represented to the court that there was "no dispute as to the standard range." RP 7/22/09 2. When asked if the defense had any objection to the offender score calculation or the certified documents that the State was presenting, defense counsel stated, "No objection. It was calculated originally and we know what it is." RP 7/22/09 3.

C. ARGUMENT.

1. THE ISSUE AS TO THE OFFENDER SCORE IS MOOT.

Gaines argues for the first time on appeal that his offender score was miscalculated. This issue is moot. Gaines was sentenced to 12 months of confinement on July 22, 2009. He was released from prison on February 17, 2010. Appendix A. Because he has completed his term of confinement, this Court cannot provide effective relief.

A case is moot when the court can no longer provide effective relief. State v. Abd-Rahmaan, 120 Wn. App. 284, 288, 84 P.3d 944 (2004), reversed on other grounds, 154 Wn.2d 280, 111 P.3d 1157 (2005). See also State v. Ross, 152 Wn.2d 220, 228-29, 95 P.3d 1225 (2004) (finding defendant's challenge to his offender score moot). An appellate court will reach the merits of a moot appeal only if the case presents a matter of continuing and substantial public interest. Id. Three factors should be considered in making this determination: (1) whether the issue presented is public in nature, (2) whether an "authoritative determination is desirable to provide future guidance to public officers," and

(3) whether the issue presented is likely to recur. Id. (quoting Hart v. Dept. of Soc. Health Services, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)).

In the present case, these factors do not favor reaching the merits. Issues involving sentencing are public in nature. Id. However, this case does not present any issue that requires an authoritative determination. The legal standards that govern the proof required to establish criminal history, and the effect of affirmative acknowledgment by the defense, have already been established in caselaw and by statute. See State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009); RCW 9.94A.530. This case does not present an issue of continuing and substantial public interest. It should be dismissed as moot.

2. THE STATE MET ITS STATUTORY BURDEN OF PROVING CRIMINAL HISTORY BECAUSE THE HISTORY WAS AFFIRMATIVELY ACKNOWLEDGED BY THE DEFENSE.

Gaines contends that his offender score was miscalculated because the State failed to prove all of his prior convictions. This claim was waived when defense counsel relieved the State of its burden of proving all the convictions when she affirmatively

acknowledged that the offender score calculation was correct.

Moreover, under the amendment RCW 9.94A.530, failure to object is deemed to be affirmative acknowledgment.

At sentencing, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. Mendoza, 165 Wn.2d at 920. The best evidence of a prior conviction is a certified copy of the judgment. Id. However, if a defendant affirmatively acknowledges his criminal history, the State is relieved of its obligation to produce evidence. Id. In Mendoza, the state supreme court held that the failure to object to the State's assertion of criminal history was not affirmative acknowledgment under the prior statute. Id. at 928-29. An agreement with the ultimate sentencing recommendation alone also fell short of affirmative acknowledgment in the court's view. Id. In Mendoza, defense counsel was not asked and made no statement as to the accuracy of the criminal history compiled by the prosecuting attorney. Id. at 918-19. Counsel simply made a sentencing recommendation. Id. The court held that the record did not support the State's claim that the defendant had affirmatively acknowledged the criminal history, and the State had failed to provide any documents to prove that history.

The present case differs substantially from Mendoza. First, the State provided certified court documents to prove the juvenile adjudications. CP 67-71. The defense, in contrast, did not even file a defense presentence report, although one is required by LCrR 7.1(a).¹ Upon explicit inquiry by the court, defense counsel affirmatively acknowledged that the defense had no dispute with the offender score and the resulting standard range. RP 7/22/09 2-3. When the State presented the documents proving the prior juvenile adjudications, defense counsel affirmatively acknowledged that the defense had no objection to the Court making a finding by a preponderance of the evidence that the defendant's offender score was 8. RP 7/22/09 3. Pursuant to Mendoza, the defendant affirmatively acknowledged that the state's calculation of his offender score and the resulting standard range was correct. He therefore relieved the State of its duty of proving that criminal history. He cannot now claim on appeal that the State failed to meet its burden.

¹ LCrR 7.1(a) provides: "Unless otherwise directed by the court, in all cases where a person is to be sentenced for commission of a felony, the prosecuting attorney and the defendant's attorney shall, not less than three days before the sentencing date, serve a copy of his/her presentence report upon the opposing party and the original to the sentencing judge."

Moreover, RCW 9.94A.530(2), as amended in 2008, applies to this case. RCW 9.94A.530(2) reads, in part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentence, or proven pursuant to RCW 9.94A.537. *Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to the criminal history presented at the time of sentencing.*

(Emphasis added). The amendment was effective June 12, 2008. Laws of 2008, Ch. 231, sec. 1-4. The sentencing hearing in this case occurred on July 22, 2009. The amended version of RCW 9.94A.530(2) applied. Even if Gaines had not affirmatively acknowledged his criminal history as contemplated by Mendoza, his failure to object constituted affirmative acknowledgment as statutorily defined by RCW 9.94A.530(2).²

Finally, even if the State had failed to meet its burden of proving Gaines' criminal history, the proper remedy would be remand with an opportunity for the State to present additional

² Gaines does not argue that the application of the amended statute to his sentencing hearing violates the ex post facto clauses of the federal and state constitutions. The application of new procedures enacted in the Sentencing Reform Act to crimes committed before the procedure was enacted does not offend the ex post facto clause. State v. Pillatos, 159 Wn.2d 459, 476, 150 P.3d 1130 (2007).

evidence. Remand for an additional evidentiary hearing is appropriate where the defendant failed to object to the State's evidence of a prior conviction. RCW 9.94A.530(2); In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 877, 123 P.3d 456 (2005).

3. THE 1996 THURSTON COUNTY CONVICTION IS NOT INVALID ON ITS FACE.

Gaines contends that one of the three Thurston County juvenile adjudications that the State proved with certified court documents is invalid on its face because the sentencing order does not include the name of the crime. This claim must be rejected because the omission is at most a technical matter that does not render the conviction unconstitutional on its face.

Under the Sentencing Reform Act, the State does not have the burden of proving the constitutional validity of a prior conviction. State v. Ammons, 105 Wn.2d 175, 187, 718 P.2d 796 (1986). However, a prior conviction that is constitutionally invalid on its face may not be included in a defendant's offender score. Id. at 187-88. A conviction is constitutionally invalid on its face if it evidences an infirmity of constitutional magnitude without further elaboration. Id.

at 188. Facial invalidity includes those documents signed as part of a plea agreement as well as the judgment and sentence itself. Id. at 189. The documents of the plea can inform the inquiry as to whether the judgment and sentence is constitutionally invalid on its face. In re Personal Restraint of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). To be facially invalid, a judgment must have a more substantial defect than a technical misstatement that had no actual effect on the rights of the defendant. In re Personal Restraint of McKiernan, 165 Wn.2d 777, 203 P.3d 375 (2009).

Gaines argues that the 1996 Thurston County JRA Sentencing Order is incomplete because it does not list the name of the offense. The Prosecutor's Understanding of Defendant's Criminal History, based on WASIS/NCIC (Washington State Patrol Identification and Criminal History Section³/National Crime Information Center⁴) printouts, shows that the conviction was for custodial assault. CP 63. Pursuant to RCW 9.94A.500(1), the criminal history summary is prima facie evidence of the conviction. The omission of the name of crime from the sentencing order is, as in McKiernan, a technical omission that had no actual effect of the

³ See www.watch.wsp.wa.gov.

⁴ See www.fbi.gov/hq/cjisd/ncic.htm.

rights of the defendant. The criminal history summary and the sentencing order considered together establish the conviction. There is no constitutional error apparent on the face of the sentence order. It is not constitutionally invalid on its face. It was properly included in the defendant's criminal history.

Moreover, even assuming this adjudication was invalid on its face, and should have been excluded from Gaines' criminal history, his offender score would be no different. Gaines had four prior adult felony convictions that counted one point each, plus two violent or serious violent juvenile felony adjudications (attempted rape in the second degree and rape in the second degree), that counted one point each, and five other juvenile adjudications that counted one-half point each, for a total of eight and one-half points. CP 51-53. The offender score is rounded down to the nearest whole number. RCW 9.94A.525. Even without inclusion of the 1996 Thurston County custodial assault juvenile adjudication, which counted one-half point, Gaines' offender score would still be eight. No resentencing would be necessary.

4. GAINES HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.

Gaines argues that counsel was ineffective in failing to object to the State's calculation of his standard range. This claim must be rejected. Gaines has failed to show that his offender score was miscalculated, or that any prior convictions were incorrectly included in his offender score. He cannot show that counsel's performance was deficient or prejudicial without showing the offender score was, in fact, miscalculated in some way.

The defendant has the burden of establishing ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In judging the performance of trial counsel, courts must

engage in a strong presumption of competence. Strickland, 466 U.S. at 689. If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

Gaines argues that counsel was ineffective in failing to object to the 1996 Thurston County JRA Sentencing Order. However, Gaines cannot establish deficient performance or prejudice without showing that the 1996 Thurston County adjudication should not have been included in his offender score. If counsel had objected to the sentencing order, the sentencing hearing would have been continued in order for the State to gather additional documents, or the half point would have been deducted from the offender score, resulting in the same score of eight. Either way, Gaines cannot establish a reasonable probability that his score would have been different.

Likewise, Gaines claims that counsel was ineffective in failing to argue that his two 2002 VUCSA convictions sentenced on the same date under the same cause number were same criminal conduct. However, he cannot establish deficient performance or prejudice without establishing that the two convictions were the same criminal conduct. He cannot do so on the record in this case. The presumption of competence should include a presumption that

defense counsel reviewed the judgment and sentence, which is readily available to counsel and the court on Electronic Court Records, and determined that the two crimes did not constitute the same criminal conduct because they did not involve the same criminal intent or were not committed at the same time and place. RCW 9.94A.589(1)(a). Similarly, it should be presumed that counsel also reviewed the court documents from the 1994 rape and attempted rape convictions, which are also readily available on Electronic Court Records, and determined that the two crimes did not constitute the same criminal conduct because they did not involve the same victim or were not committed at the same time and place. Without some showing that these convictions would have been deemed the same criminal conduct by the court, Gaines cannot establish ineffective assistance of counsel. The appropriate means to establish that these convictions constituted the same criminal conduct with facts outside the record is a personal restraint petition. State v. McFarland, 127 Wn.2d at 335.

Gaines' reliance on State v. Thieffault, 160 Wn.2d 409, 158 P.3d 580 (2007), is misplaced. In Thieffault, the state supreme court found defense counsel's performance deficient when counsel failed to object to the sentencing court's inclusion of a prior

conviction from Montana that was not legally comparable. Id. at 417. The court held counsel's failure to hold the State to its burden of proving comparability was prejudicial. Id. at 414-16. Thiefault is inapposite because none of Gaines' prior convictions were from out of state. There is no question of comparability. While Thiefault established on appeal that the Montana conviction was not legally comparable, Gaines has failed to establish any problems with his prior Washington convictions. His arguments that they might not have counted are based on pure speculation because there are no facts in the record from which this Court could conclude that they would not have counted. See State v. Birch, 151 Wn. App. 504, 520, 213 P.3d 63 (2009), review denied, 168 Wn.2d 1004 (2010) (ineffective assistance not established where no showing that out-of-state conviction not comparable). Counsel cannot be found deficient for failing to object to the existence of prior convictions that were properly counted. Gaines has failed to establish ineffective assistance of counsel.

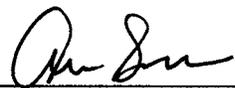
D. CONCLUSION.

Gaines' sentence should be affirmed.

DATED this 17th day of May, 2010.

Respectfully submitted,

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APPENDIX A



FORS

SUPERVISED: Gaines, Leandre



Home
Search For An Offender

DOC Number:	SID Number:	Current Status:	Current Location:
836316	WA20366068	SUPERVISED	Sex Offender Unit (Special Assault Unit)

Offender

General Information
Confidential Offender Information
Conviction Information (Law Enforcement Only)
Board, Court and DOC Imposed Conditions
Offender Movement History
DOC Sex / Kidnap Offender Registration Information

DOC Sex / Kidnap Offender Registration Information

Offender Residence Address

[REDACTED]

[REDACTED]

Registration Information

Registration Date:
2/12/2010

Release Information

Release Date:	Release County:	Release Employer Name:	Release Employer City:
2/17/10	King		

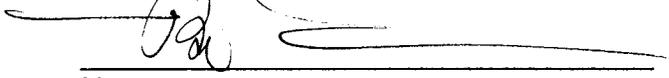
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GAINES, Cause No. 64034-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/17/10
Date