

041038

041038

NO. 64163-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

RENWICK RANDUN,

Appellant.

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2010 MAR 31 PM 1:36

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG  
THE HONORABLE MICHAEL HAYDEN  
THE HONORABLE JULIE SPECTOR

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

SUZANNE LOVE  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
1. RANDUN HAS NOT MADE THE REQUISITE SHOWING THAT HIS OUT-OF-STATE CONVICTION WAS IMPROPERLY SCORED.....	2
2. THE APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE .....	10
a. There Has Been No Showing Of Deficiency.....	11
b. Randun Was Not Prejudiced As A Result Of Deficient Representation.....	12
D. <u>CONCLUSION</u> .....	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

North Carolina v. Alford, 400 U.S. 25,  
91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 1

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 10, 12

Washington State:

In re Personal Restraint of Connick,  
144 Wn.2d 442, 28 P.3d 729 (2001)..... 9

State v. Crawford, 159 Wn.2d 86,  
147 P.3d 1288 (2006)..... 12

State v. Garcia, 57 Wn. App. 927,  
791 P.2d 244, review denied,  
115 Wn.2d 1010 (1990) ..... 10

State v. Hickman, 116 Wn. App. 902,  
68 P.3d 1156 (2003)..... 4

State v. Lucero, 152 Wn. App. 287,  
217 P.3d 369 (2009)..... 8

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995)..... 10, 11

State v. McNeal, 145 Wn.2d 352,  
37 P.3d 280 (2002)..... 11

State v. Mendoza, 165 Wn.2d 913,  
205 P.3d 113 (2009)..... 6, 8

State v. Ortega, 120 Wn. App. 165,  
84 P.3d 935 (2004), remanded,  
154 Wn.2d 1031, 119 P.3d 852 (2005)..... 2

<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	4, 5
<u>State v. Sardinia</u> , 42 Wn. App. 533, 713 P.2d 122 (1986).....	11
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	11

Statutes

Washington State:

RCW 9.94A.530.....	7
RCW 9A.56.030 .....	1
RCW 9A.56.150 .....	1
RCW 9A.60.020 .....	1

**A. ISSUES PRESENTED**

1. When a defendant agrees to his offender score and to the inclusion in the offender score of a Florida theft conviction, does he waive a subsequent challenge to the offender score?

2. Where a defendant has not demonstrated that his offender score was improperly calculated, is he entitled to relief?

3. Absent a showing that an out-of-state conviction was improperly scored, can a defendant show that his counsel was ineffective?

**B. STATEMENT OF THE CASE**

The State charged the appellant, Renwick Randun, with one count of Theft in the Third Degree, one count of Possessing Stolen Property in the First Degree and one count of Forgery. CP 1-2; RCW 9A.56.030(1)(b); RCW 9A.56.150; RCW 9A.60.020(1)(b). Randun entered an Alford plea on August 7, 2009. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). CP 8-19.

The Honorable Michael Hayden presided over Randun's sentencing hearing on August 14, 2009. CP 32-35. Randun was sentenced to nine months on each count, to run concurrent to each other, with credit for

134 days served. The remaining time to be served commenced immediately. CP 35.

This timely appeal followed. CP 41.

**C. ARGUMENT**

1. RANDUN HAS NOT MADE THE REQUISITE SHOWING THAT HIS OUT-OF-STATE CONVICTION WAS IMPROPERLY SCORED

A trial court's calculation of an offender score is reviewed de novo. State v. Ortega, 120 Wn. App. 165, 174, 84 P.3d 935 (2004), remanded, 154 Wn.2d 1031, 119 P.3d 852 (2005).

At the time of the plea, Randun signed a Felony Plea Agreement form. CP 26. While that form includes an option whereby a defendant may dispute the prosecutor's statement of his criminal history, Randun did not elect to dispute any of his previous convictions on the Felony Plea Agreement form. Furthermore, during the plea colloquy, Randun was informed that his standard range had been calculated based on his criminal history, and that unless he had attached a different criminal history, then he agreed that the prosecuting attorney's statement of his criminal history was

correct and complete. 3RP 7-8.<sup>1</sup> In response to this, Randun stated, “you said that, if I understand correctly, that my criminal history in other states is all included to what I’m being charged.” 3RP 8. Randun was informed that some of his out-of-state criminal history would score, and after speaking briefly with his attorney, Randun indicated that he understood. 3RP 8.

At the sentencing hearing, Randun was silent as to the comparability of prior out-of-state convictions. Randun’s counsel agreed that Randun’s offender score, for each count, was two. 4RP 5. Furthermore, Randun’s counsel specifically noted that the conviction out of Florida counted. 4RP 9. To make sure there was not any confusion, Randun’s counsel made changes to the Appendix B, crossing out a conviction that should not count, and filling in the information for the conviction that should be properly counted. 4RP 9-10; CP 37.

Randun now, for the first time, challenges the comparability of the theft conviction out of Florida. Never, at any point at the time of the plea or during the sentencing hearing, did Randun suggest that his prior Florida theft conviction was not comparable to a Washington offense. The Florida

---

<sup>1</sup> The State designates the verbatim report of the proceedings as follows:

- “1RP” = July 24, 2009;
- “2RP” = August 3, 2009;
- “3RP” = August 7, 2009;
- “4RP” = August 14, 2009.

theft conviction was clearly included as part of the basis for Randun's offender score. CP 37 (Appendix B).

Criminal statutes in other states are, for the most part, not identical to those in Washington. However an out-of-state criminal conviction can be sufficiently comparable to a criminal statute in Washington such that it can be appropriate to incorporate an out-of-state conviction in the offender score. Before a sentencing court can make a ruling as to the comparability of an out-of-state statute, it must first make a factual determination. State v. Hickman, 116 Wn. App. 902, 68 P.3d 1156 (2003). However, when a defendant affirmatively agrees with the State's classification of an out-of-state conviction, i.e., when there is no factual dispute, a court need not make a comparability determination. Id. Because the doctrine of waiver applies where the alleged error involves a factual dispute, a defendant who stipulates that his out-of-state conviction is equivalent to a Washington offense has waived a later challenge to the use of that conviction in calculating his offender score. Id. at 907.

This situation is controlled by State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004), a case that involved consolidated appeals. In defendant Hunter's case, the prosecutor had initially asserted that the offender score was 5, based on a number of Oregon convictions. Hunter objected that two prior convictions were not comparable. At a subsequent

sentencing hearing, the State conceded that it could not prove comparability as to one conviction so it urged the court to sentence Hunter on a score of 4. "In reply, Hunter's counsel conceded that Hunter's second challenged Oregon drug conviction was properly included in his offender score." Ross, 152 Wn.2d at 226. The trial court sentenced based on a score of 4 and Hunter appealed, attempting to renew his challenge to the other Oregon conviction. The Supreme Court rejected his appeal.

Quoting language from the Court of Appeals opinion, the Court held:

Nothing . . . supports the proposition that the sentencing court must undertake a comparability determination despite the defendant's affirmative agreement with the State's classification.

Ross, at 230-31. The Court in Ross also held:

However, we noted that [w]hile waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, *waiver can be found* where the alleged error involves an agreement to *facts*, later disputed, or where the alleged error involves a matter of trial court discretion.

Id. at 231 (italics in original -- quotation marks and citations omitted). In rejecting Hunter's constitutional arguments, the Court observed that

*a defendant's acknowledgement of the existence and comparability of his or her prior out-of-state convictions allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing.* There we rejected the State's argument that a defendant acknowledges facts and information at sentencing when he or she fails to object to the State's proffered offender score

calculation based in part on a defendant's prior out-of-state convictions, but held that *a defendant's affirmative acknowledgment of the existence and comparability of out-of-state convictions will render further proof unnecessary.*

Id. at 233 (italics added -- internal quotes and citations omitted).

Randun's present challenge to his sentence turns on the *factual* comparability of his Florida conviction. Randun clearly knows what he did to merit a conviction for grand theft 3 in Florida in 2000, and he received a packet of certified documents from the State. Notwithstanding this information – or, perhaps, *because* of this information – Randun "affirmatively agreed" to the State's classification of the prior Florida theft. His decision to not challenge the facts underlying that conviction is a waiver of that challenge.

None of the certified documents pertaining to Randun's Florida conviction were filed with the court. This is similar to the recent Mendoza case (involving the cases of two defendants consolidated for appeal). 165 Wn.2d 913, 205 P.3d 113 (2009). As to defendant Mendoza, the State asserted a specified offender score and criminal history but "[n]o documentation was included verifying the convictions." Id. at 918.

Mendoza neither objected to nor affirmatively agreed with the State's assertions. Id. Similarly, as to defendant Henderson, the State asserted an offender score based on an alleged criminal history but

"provided no documentation establishing the prior convictions." Id.  
at 919.

The Court began by noting its "general reluctance to address issues not preserved in the trial court..." Id. at 919-20. It reviewed the rules requiring the State to prove criminal history at sentencing and then observed:

This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. The issue in these cases centers on what is required for an acknowledgment to occur.

Id. at 920.

To answer this question, the Court first analyzed whether silence in the face of the State's presentence brief constituted acknowledgement, pursuant to RCW 9.94A.530(2), of information in a "presentence report." The Court concluded that the State's brief was not a presentence report within the meaning of the statute, so there was no statutory waiver. Id. at 920-25.

The Court then considered whether silence in the face of the State's assertions about criminal history was a waiver. After reviewing a number of its prior cases, the Court concluded that silence was not enough, and that "an *affirmative* acknowledgement by the defendant of *facts and information* introduced for the purposes of sentencing" was required to

find waiver. *Id.* at 928 (italics in original). The court emphasized that "[b]are assertions as to criminal history" are not sufficient. *Id.* at 929.

Moreover, a defendant's affirmative acknowledgement that his prior out-of-state convictions are properly included in his offender score satisfies the requirements of the Sentencing Reform Act as to comparability with Washington crimes. *See State v. Lucero*, 152 Wn. App. 287, 217 P.3d 369 (2009). Lucero had California convictions that were included in the State's offender score calculations. *Lucero*, 152 Wn. App. at 290-91. Although the convictions were not legally comparable, it was not clear from the record whether they were factually comparable. *Id.* at 6. However, since Lucero failed to object to including those convictions in his offender score, the Court of Appeals held that he had waived the challenge. *Id.* at 293-94.

Lucero's agreement to his offender score was no more clear or "affirmative" than Randun's agreement. And, like the Court in *Mendoza*,<sup>2</sup> the court in *Lucero* observed:

...[W]e note that the position Lucero urges . . . is contrary to the most basic principles of judicial economy. It encourages defendants and their counsel to remain quiet, doing and saying nothing at the trial court level where the facts should properly be determined so they may later raise the issue on appeal. We do not think the appellate courts

---

<sup>2</sup> The Court noted its "general reluctance to address issues not preserved in the trial court..." *Mendoza*, at 919-20.

should condone or encourage such dilatory tactics. If there is an argument to be made, it should be raised in the trial court in the first instance. Failure to do so, combined with an acknowledgment of the State's offender score calculation, is and should be a waiver of the right to appeal the issue.

Accordingly, we hold there was an affirmative acknowledgement of comparability and no remand is necessary.

Id. at 9. Similarly, Randun waived the challenge of the comparability of his Florida theft conviction.

An incorrect calculation of an offender score constitutes a fundamental defect in sentencing which requires relief. In re Personal Restraint of Connick, 144 Wn.2d 442, 28 P.3d 729 (2001). In the Connick case, however, the Court ruled that Connick had not established that he was sentenced on the basis of an incorrectly calculated offender score, and therefore had not demonstrated that he was entitled to relief. Id.

Similarly, in this case there is nothing before the court to establish that the sentencing court improperly calculated Randun's offender score. Randun should not be allowed to benefit from remaining silent at sentencing, waiting to attack the comparability of the Florida conviction on appeal. Randun asks the court to entertain the possibility that his Florida Grand Theft 3 conviction did not stem from the theft of property

valued at \$300 or more. Br. App. at 7. Instead, Randun argues that it's possible he may have committed the offense by taking a fire extinguisher or a stop sign. Br. App. at 7. Randun, however, has personal knowledge of exactly what he did in order to commit Grand Theft 3, and yet has failed to make any showing that his sentence was the result of an improperly scored out-of-state conviction. As a result, Randun has not demonstrated that he is entitled to any relief.

2. THE APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that trial counsel's representation was deficient; and (2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990). Randun has satisfied neither prong here.

a. There Has Been No Showing Of Deficiency.

There is a strong presumption of adequate assistance of counsel. State v. Sardinia, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). If the attorney's conduct "can be characterized as legitimate trial strategy or tactics," the conduct cannot be the basis of an ineffective assistance claim. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." McFarland, 127 Wn.2d at 335.

A defendant claiming ineffective assistance must first show that his counsel's representation was deficient by falling below an objective standard of reasonableness, after considering all of the circumstances. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (citing State v. McFarland, 127 Wn.2d at 335).

Randun cannot rebut the presumption that his trial counsel was effective. Randun's counsel had clearly reviewed the out-of-state conviction materials carefully. There is nothing in record to demonstrate that the actions Randun took to accomplish the felony theft in Florida

would not also be a felony theft in Washington. Furthermore, there is nothing to demonstrate that Randun's attorney failed to pursue a viable argument. Thus, Randun does not satisfy the first prong to show that his trial counsel provided deficient performance, and his claim fails.

b. Randun Was Not Prejudiced As A Result Of Deficient Representation.

“Even deficient performance by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 691-93). “A defendant must *affirmatively prove prejudice*, not simply show that ‘the errors had some conceivable effect on the outcome.’” Crawford, 159 Wn.2d at 99 (quoting Strickland, 466 U.S. at 693) (emphasis in original). As a result, Randun must show that there is a reasonable probability, but for his counsel’s failure to argue the comparability of the Florida theft conviction, that the result of the proceeding would have been different. Crawford, 159 Wn.2d at 99. Randun has not made the requisite showing.

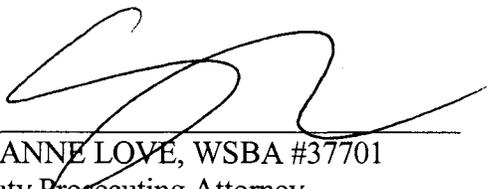
**D. CONCLUSION**

For all the foregoing reasons, the State asks this Court to deny  
Randun's request that this case should not be remanded for re-sentencing.

DATED this 31 day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
SUZANNE LOVE, WSBA #37701  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, 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. RENWICK RANDUN, Cause No. 64163-8-1, 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.

Betty K. Huddleston  
Name  
Done in Seattle, Washington

3/31/10  
Date

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 MAR 31 PM 4:36