

NO. 45464-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

LEESHAWN REDIC,

Appellant.

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

The Honorable Edmund Murphy, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO
MATTERS IN THE RECORD WHICH MIGHT ARGUABLY
SUPPORT REVIEW

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I. IDENTITY OF MOVING PARTY

Nielsen, Broman & Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i) and 18.3(a).

III. FACTS RELEVANT TO MOTION

By order filed October 15, 2013, the Pierce County Superior Court authorized appointment of appellate counsel, and on October 29, 2013, this Court appointed Nielsen, Broman & Koch to represent appellant in his appeal.

In reviewing the case for issues to raise on appeal, appellate counsel did the following:

(a) read and reviewed the verbatim report of proceedings;

(b) read and reviewed all of the clerk's papers and exhibits;

(c) researched all pertinent legal issues and conferred with the attorney that represented Mr. Redic in the Superior Court concerning legal and factual bases for appellate review;

(d) wrote to appellant, including a letter dated February 18, 2014, explaining the Anders procedure and appellant's right to file a pro se supplemental brief.

IV. GROUND FOR RELIEF

RAP 15.2(i) and 18.3(a) allow an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, review denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Redic to proceed pro se. Counsel submits the following brief to satisfy his obligations under Anders, Theobald, Pollard, RAP 15.2(i), and RAP 18.3(a).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. Following remand from the Court of Appeals, the sentencing court erred when it found Redic's 2000 Nevada conviction comparable to a Washington felony when calculating Redic's offender score.

2. Following remand, the sentencing court also erred when it refused to find that Redic's 1997 juvenile convictions involved the "same criminal conduct" and treated them as separate offenses when calculating his offender score.

Issues Pertaining to Potential Assignments of Error

1. Did the sentencing court err when – based on Redic's stipulation to his offender score at the time of his plea, this Court's decision in Redic's PRP, and its own analysis of the merits of Redic's claim – it found his 2000 Nevada conviction comparable to a Washington felony?

2. Did the sentencing court err when – based on these same considerations – it found that Redic's 1997 juvenile offenses did not involve the "same criminal conduct"?

B. STATEMENT OF THE CASE

In May of 2003, Redic pled guilty to Murder in the Second Degree. CP 5. As part of that plea, Redic stipulated to his criminal history and offender score. The stipulation included a 2000 felony drug conviction from Nevada and two 1997 Washington juvenile convictions (Unlawful Possession of a Firearm and Unlawful Possession of a Controlled Substance), which were scored as separate offenses. CP 33-34. With an offender score of 5, and a

60-month firearm enhancement, his standard range was 235 to 335 months. CP 25, 34. The sentencing court imposed 335 months. CP 27.

In July 2011, Redic filed a Personal Restraint Petition in which he made three arguments: (1) his criminal history included two 1996 juvenile convictions that washed out prior to his 2003 sentencing; (2) the State failed to prove his 2000 Nevada conviction was comparable to a Washington felony offense; and (3) his 1997 juvenile offenses were “same criminal conduct” and should have been counted as a single crime rather than two crimes. CP 61-62.

Redic’s PRP was granted in part. The State conceded, and this Court found, that Redic’s 1996 juvenile convictions had indeed washed out prior to his sentencing for murder. CP 62. This Court rejected Redic’s other two claims, however. Regarding the Nevada¹ conviction, this Court found that he had waived any challenge by stipulating to comparability as part of his plea. CP 62 (citing In re Personal Restraint of Connick, 144 Wn.2d 442, 464, 28 P.3d 729 (2001)). Regarding the 1997 juvenile offenses, this Court

found that they did not satisfy the test for “same criminal conduct” because the firearm offense and drug offense involved different intents. CP 62.

Separate from his PRP, Redic also filed a motion in Pierce County Superior Court challenging a 1999 Washington conviction for Unlawful Possession of a Firearm based on an invalid waiver of juvenile court jurisdiction. CP 92-93. The Superior Court granted the motion and entered an order that the conviction should not count in Redic’s offender score in any other case. CP 93, 103.

Redic was resentenced on the murder conviction in September 2013. Based on this Court striking the two 1996 juvenile convictions in the PRP and the Superior Court striking the 1999 conviction, Redic’s offender score was reduced by 2 points (.5 for each 1996 juvenile offense and 1 point for the 1999 adult offense) to a score of 3, resulting in a standard range (including the 60-month firearm enhancement) of 214 to 314 months. CP 93-94, 186.

In a pro se filing, Redic asked the sentencing judge to conduct a comparability analysis and find his 2000 Nevada

¹ This Court’s decision in Redic’s PRP mistakenly refers to his Nevada conviction as a Florida conviction. CP 61-62. Redic has

conviction not comparable to a Washington felony. CP 148-152, 157-162. He also asked the judge to find that his 1997 juvenile convictions for Unlawful Possession of a Firearm and Unlawful Possession of a Controlled Substance involved the “same criminal conduct.” CP 148-149, 152-156, 163-182.

The sentencing judge reviewing relevant documents from the Nevada and Washington cases and listened to the arguments of Redic, his attorney, and the prosecutor. RP 20-27; exhibit 1; CP 157-182. The court noted that Redic had stipulated to the use of all three crimes as criminal history in his 2003 plea. RP 27-28. It also noted this Court’s decision in Redic’s PRP declining to grant relief on these claims. RP 28-29. Nonetheless, the judge considered Redic’s claims on the merits, finding the Nevada conviction comparable to a Washington felony and rejecting the “same criminal conduct” argument based on different objective intents for the 1997 offenses. RP 29-31.

Based on a score of 3, the court imposed 254 months, and Redic timely filed his Notice of Appeal. RP 31, 48; CP 188, 199-212.

no Florida conviction and this Court obviously meant Nevada.

C. POTENTIAL ARGUMENTS

1. REDIC'S NEVADA CONVICTION IS NOT COMPARABLE TO A WASHINGTON FELONY AND SHOULD NOT COUNT IN HIS OFFENDER SCORE.

Under the Sentencing Reform Act, "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. . . ." RCW 9.94A.525(3). Under this provision:

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.

State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (citations omitted). A defendant's stipulation to his offender score and standard range may waive any subsequent comparability challenge. Connick, 144 Wn.2d at 463-464.

On appeal, Redic could argue that both this Court and the sentencing court erred in finding that he had stipulated to use of the Nevada conviction and thereby waived any challenge to its use.

Redic could also argue that the documents from the Nevada case indicate his conviction is not comparable to any Washington felony.

2. REDIC'S 1997 JUVENILE CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" AND SHOULD NOT HAVE BEEN COUNTED SEPARATELY IN CALCULATING HIS OFFENDER SCORE.

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct" means crimes that involve the same intent, were committed at the same time and place, and involved the same victim. Id.

The issue is reviewed for an abuse of discretion or misapplication of the law, and the defendant bears the burden to show two crimes involve the same criminal conduct. State v. Graciano, 176 Wn.2d 531, 535-539, 295 P.3d 219 (2013). The issue can be waived by stipulation to the offender score prior to sentencing. In re Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (citing State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000)).

On appeal, Redic could argue the stipulation to his offender score as part of his guilty plea did not waive his current argument that his 1997 juvenile offenses involved the same criminal conduct. He also could argue that this Court and the sentencing court have erred, on the merits, in finding that his crimes involved separate intents.

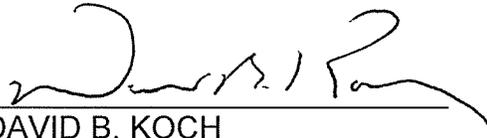
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record and to permit Redic to proceed pro se.

DATED this 18th day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'David B. Koch', written over a horizontal line.

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Attorneys for Appellant

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DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 45464-5-II
)	
LEESHAWN REDIC,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LEESHAWN REDIC
DOC NO. 798922
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY 2014.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

February 18, 2014 - 2:31 PM

Transmittal Letter

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Court of Appeals Case Number: 45464-5

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