

FILED
Nov 14, 2014
Court of Appeals
Division III
State of Washington

No.
COA No. 31895-8-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

91045-6

STATE OF WASHINGTON,

Respondent,

v.

KORY L. ZIELKE,

Petitioner.

FILED
NOV 25 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
OF

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

The Honorable Kathleen M. O'Connor

PETITION FOR REVIEW

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WASHINGTON APPELLATE PROJECT
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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED..... 4

 1. THE TRIAL COURT HAD AN INDEPENDENT
 OBLIGATION TO DETERMINE WHETHER
 MR. ZIELKE’S PRIOR CONVICTIONS
 SENTENCED ON THE SAME DATES
 CONSTITUTED THE SAME CRIMINAL
 CONDUCT 4

 2. MR. ZIELKE DID NOT AFFIRMATIVELY
 ACKNOWLEDGE HIS IDAHO PRIOR
 CONVICTION WAS COMPARABLE TO A
 WASHINGTON FELONY CONVICTION 7

F. CONCLUSION 11

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005)..... 7

In re Personal Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007)..... 6

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 4, 10

State v. Johnson, 150 Wn.App. 663, 208 P.3d 1265 (2009) 8

State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)..... 8

State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000 *review denied*, 141 Wn.2d 1030 (2000)..... 6

State v. Reinhart, 77 Wn.App. 454, 891 P.2d 735, *review denied*, 127 Wn.2d 1014 (1995)..... 5

State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004) 4, 7, 8, 9

State v. Weiland, 66 Wn.App. 29, 831 P.2d 749 (1992)..... 10

State v. Williams, 176 Wn.App. 138, 307 P.3d 819 (2013), *review granted*, 180 Wn.2d 1001 (2014) 5

STATUTES

RCW 9.94A.525 5, 6, 8

RCW 9.94A.589 5

RULES

RAP 13.4 1

A. IDENTITY OF PETITIONER

Kory Zielke asks this Court to accept review of the Court of Appeals order terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the Court of Appeals Commissioner's ruling in *State v. Kory Lee Zielke*, No. 31895-8-III (July 25, 2014). A copy of the Commissioner's Ruling is in the Appendix at pages A-1 to A-6.

Mr. Zielke moved to modify the Commissioner's Ruling, which was denied by the Court of Appeals on October 16, 2014. A copy of the Court's order is in the Appendix at B-1.

C. ISSUES PRESENTED FOR REVIEW

1. Where evidence establishes a defendant's prior convictions were sentenced on the same date, the trial court has an independent duty to determine whether those prior convictions constituted the same criminal conduct. Mr. Zielke had two groups of prior convictions that had been sentenced on the same dates. The trial court failed to determine whether these prior convictions were based on the same criminal conduct. Is an issue of substantial public interest presented

entitling Mr. Zielke to reversal of his sentence and remand for the trial court to make this independent finding?

2. Prior out-of-state convictions may be included in the offender score if they are found to be comparable to Washington offenses. The court must determine whether the offenses are legally comparable by examining the elements, and if not legally comparable, whether they are factually comparable by looking at the facts underlying the foreign conviction that have been admitted to, stipulated to, or proven beyond a reasonable doubt. The court here accepted Mr. Zielke's admission he had a prior Idaho forgery conviction without determining whether the prior foreign conviction was comparable to a Washington offense. In addition, the State failed to provide any additional evidence to establish comparability. Is an issue of substantial public interest presented where the trial court erred in including the Idaho prior conviction thus requiring reversal of Mr. Zielke's sentence?

D. STATEMENT OF THE CASE

Kory Zielke was charged with attempting to elude a police officer and possession of a stolen vehicle. CP 7. Following a jury trial, Mr. Zielke was convicted as charged. CP 39-40.

Mr. Zielke's criminal history consisted of ten prior felony convictions. CP 55. At the sentencing hearing, Mr. Zielke admitted an additional forgery conviction from Idaho. CP 45; RP 211-16. Among these prior convictions were three forgery convictions from Spokane County that were all sentenced on the same date: November 14, 2011. CP 45, 55. In addition, Mr. Zielke had residential burglary and malicious mischief convictions from Spokane County which were also sentenced on the same date: March 1, 2006. CP 45, 55. Mr. Zielke did not request that the trial court find these groups of prior convictions to be the same criminal conduct. Nor did the trial court engage in a same criminal conduct analysis for these two groups of prior convictions. The trial court calculated Mr. Zielke's offender score as a "12" on the possession of a stolen vehicle count and an "11" on the attempting to elude conviction and sentenced him accordingly. CP 46-47.

On appeal, Mr. Zielke submitted the trial court failed to engage in its independent obligation to determine whether the prior convictions sentenced at the same time were the same criminal conduct, and failed to determine whether his self-confessed Idaho prior conviction was comparable to a Washington felony offense. The Commissioner affirmed Mr. Zielke's sentence, ruling that Mr. Zielke affirmatively

acknowledged his Idaho forgery conviction was comparable to a Washington felony, and the trial court was not obligated to determine whether his out-of-state prior convictions were the same criminal conduct. Ruling at 4-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THE TRIAL COURT HAD AN INDEPENDENT OBLIGATION TO DETERMINE WHETHER MR. ZIELKE'S PRIOR CONVICTIONS SENTENCED ON THE SAME DATES CONSTITUTED THE SAME CRIMINAL CONDUCT

To properly calculate a defendant's offender score, the Sentencing Reform Act (SRA) requires that sentencing courts determine a defendant's criminal history based on his prior convictions. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

A current sentencing court must calculate an offender score based on an offender's "other current and prior convictions." RCW 9.94A.589(1)(a); *State v. Williams*, 176 Wn.App. 138, 141, 307 P.3d

819 (2013), *review granted*, 180 Wn.2d 1001 (2014). If a prior sentencing court found that multiple offenses encompassed the same criminal conduct, the current sentencing court must count those prior convictions as one offense. RCW 9.94A.525(5)(a)(i); *Williams*, 176 Wn.App. at 141. If the prior sentencing court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current sentencing court must *independently* evaluate whether those prior convictions encompass the same criminal conduct and, if they do, must count them as one offense. RCW 9.94A.525(5)(a)(i) (“The current sentencing court *shall* determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589 (1)(a)”) (emphasis added). “[T]he language of [RCW 9.94A.525(5)(a)] appears clear and unambiguous in mandating that the current sentencing court determine whether to count prior offenses, served concurrently, as separate offenses.” *State v. Reinhart*, 77 Wn.App. 454, 459, 891 P.2d 735, *review denied*, 127 Wn.2d 1014 (1995).

The Commissioner conflated the test required for *current* multiple offenses with the test required for *prior* offenses. Ruling at 4-5. The cases relied on by the Commissioner, *In re Personal Restraint of Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007), and *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000 *review denied*, 141 Wn.2d 1030 (2000), involved matters where the trial court was being asked to find *current* convictions as the same criminal conduct. Ruling at 4. But, as argued, Mr. Zielke submits the test for *prior* convictions requires the trial court to determine whether they are the same criminal conduct, regardless of whether the defendant requests. RCW 9.94A.525(5)(a)(i).

Here, despite the fact that the two groups of *prior* convictions were sentenced on the same dates, the trial court made no finding regarding whether the offenses were the same criminal conduct as required by RCW 9.94A. 525(5)(a)(i). The court had an *independent duty* to conduct this analysis and it failed to do so. This Court should grant review and reverse Mr. Zielke's sentence and remanded to the trial court to make the same criminal conduct determination.

2. MR. ZIELKE DID NOT AFFIRMATIVELY
ACKNOWLEDGE HIS IDAHO PRIOR
CONVICTION WAS COMPARABLE TO A
WASHINGTON FELONY CONVICTION

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525 (3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. Generally, when engaging in the comparability analysis, the sentencing court must compare the elements of the prior out-of-state offense with the elements of the potentially comparable current Washington offenses. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the crimes are comparable, a sentencing court must treat the defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it is then necessary to determine from the out-of-state record whether the out-of-state court found each fact necessary to liability for the Washington crime (factual comparability). *State v.*

Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). “If a factual analysis is necessary, the court considers only facts admitted or stipulated by the defendant, or proved beyond a reasonable doubt.”
State v. Johnson, 150 Wn.App. 663, 676, 208 P.3d 1265 (2009).

The Commissioner ruled that Mr. Zielke’s admission that he had a prior Idaho forgery convictions constituted an admission that it was comparable. That ruling is simply incorrect, since the two are distinctly different and require different analysis.

The Commissioner relied on the decision in *Ross* in ruling Mr. Ziekle acknowledged his prior conviction was comparable. Ruling at 5-6. But the Commissioner failed to acknowledge the distinction between acknowledging the prior convictions were comparable, and acknowledging the existence of the prior conviction. In *Ross*, the defendant affirmatively acknowledged the foreign convictions were comparable to a Washington felony offense. *See Ross*, 152 Wn.2d at 230 (“Here, both Hunter and Legrone *affirmatively acknowledged at sentencing that their prior out-of-state and/or federal convictions were comparable to Washington State crimes* and thus, were properly included in their offender score.”) (emphasis added).

Here, Mr. Zielke never agreed that the Idaho prior conviction was comparable; he merely admitted to the *existence* of the prior conviction. *See* CP 45; RP 211-16. Mr. Zielke never admitted the prior conviction was comparable to a Washington felony offense as the defendant is *Ross* did.

THE COURT: Okay. Why don't we put a note because Mr. Zielke disclosed it. It is not going to make any difference in your offender score from the standpoint –

THE DEFENDANT: I'm just trying to be honest.

THE COURT: That's the point, I want to put it in here so people know you disclosed it. So it was a forgery?

THE DEFENDANT: Yes, ma'am.

THE COURT: Was it in Kootenai County?

THE DEFENDANT: Yes, ma'am.

THE COURT: So we'll just say forgery, Kootenai County. And you were sentenced some time in 2013, this year.

THE DEFENDANT: I was sentenced December 14th.

THE COURT: Of 2012.

THE DEFENDANT: Yes.

THE COURT: Okay, so we'll just put 12-12 and I will note "per defendant." All right, so that covers criminal history. You may be seated. I will hear from Mr. Janda as to recommendations.

RP 215-16.

The court here accepted Mr. Zielke's admission that he had this Idaho prior conviction without more. The State provided nothing in support of this prior conviction, and the court did not engage in any analysis regarding the comparability of this Idaho prior conviction. The court merely included it in Mr. Zielke's offender score. CP 45.

An out-of-state conviction may not be used to increase the defendant's offender score unless the State proves it is equivalent to a felony in Washington. *State v. Weiland*, 66 Wn.App. 29, 31-32, 831 P.2d 749 (1992). If the State fails to establish a sufficient record, then the sentencing court lacks the necessary evidence to determine if the out-of-state convictions should be included in the offender score. *Ford*, 137 Wn.2d at 480-81. An erroneous sentence must be reversed and remanded for resentencing. *Id.* at 485.

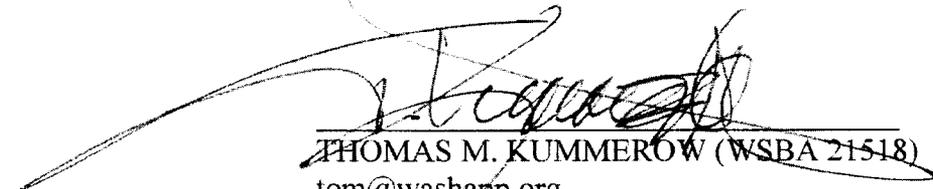
Here, Mr. Zielke's sentence is illegal as it contains an out-of-state prior conviction where there was no court finding the foreign conviction was comparable to a Washington offense. This Court should grant, reverse Mr. Zielke's sentence, and remand for resentencing.

F. CONCLUSION

For the reasons stated, Mr. Zielke asks this Court to grant review of the Commissioner's ruling and reverse his convictions.

DATED this 14th day of November 2014.

Respectfully submitted,



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APPENDIX A

The Court of Appeals
of the
State of Washington
Division III

JUL 25 2014

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 KORY LEE ZIELKE,)
)
 Appellant.)

COMMISSIONER'S RULING
NO. 31895-8-III

Kory L. Zielke appeals the sentence imposed as a result of his Spokane County Superior Court convictions of attempting to elude a police officer and possession of a stolen vehicle. He contends that the court erred by failing to determine whether: (1) his prior convictions, which were sentenced on the same date, constituted the same criminal conduct; and (2) his self-confessed prior Idaho conviction for forgery was comparable to a Washington felony. This Court's motion on the merits is granted.

Mr. Zielke was charged and convicted by jury of attempting to elude a police officer and possession of a stolen vehicle. His criminal history consisted of ten prior felony convictions, and he admitted that he had an additional Idaho forgery conviction.

No. 31895-8-III

The court accepted this admission without any discussion. Three Spokane County forgery convictions were among his prior convictions and he was sentenced on all of them on the same date, November 14, 2011. He also received sentences on the same date, March 1, 2006, for a residential burglary conviction and a malicious mischief conviction. He did not ask that these priors be considered the "same criminal conduct" and the trial court did not engage in a "same criminal conduct" analysis. The trial court determined that Mr. Zielke's offender score was "12" for the possession of a stolen vehicle and "11" for the attempting to elude conviction. He appeals.

First, Mr. Zielke contends that the court erred by failing to determine whether his prior convictions sentenced on the same dates constituted the same criminal conduct and computing his offender score accordingly.

RCW 9.94A.525 provides in pertinent part:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations . . .

No. 31895-8-III

Crimes constitute the "same criminal conduct" when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990) (affirming the petitioner's sentence where the "same criminal conduct" determination involved "neither a clear abuse of discretion nor a misapplication of the law"); *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (the appellate court reviews the trial court's determination of what constitutes the "same criminal conduct" for abuse of discretion or misapplication of the law). Under this standard, when the record supports only one conclusion on whether crimes constitute the "same criminal conduct," a sentencing court abuses its discretion in arriving at a contrary result. See *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). But where the record adequately supports either conclusion, the matter lies in the court's discretion. Whether the record "supports" a particular conclusion, of course, may depend on who carries the burden of proof. *State v. Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013).

Because the existence of a prior convictions favors the State by increasing the offender score, the State has the burden of proving the defendant's criminal history. *Graciano*, 176 Wn.2d 539. However, since a finding of "same criminal conduct" favors the defendant by lowering the offender score, the defendant has the burden of

establishing the crimes constitute the same criminal conduct. *Id.* The *Graciano* Court stated at 176 Wn.2d 539-40: "Same criminal conduct does not have a constitutional dimension and the legislature undoubtedly could have placed the burden of proof on the State, but it did not." "The scheme—and the burden—could not be more straightforward: each of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim." *Graciano*, 176 Wn. 2d at 540.

In the case of *In re Personal Restraint Petition of Shale*, 160 Wn.2d 489, 158 P.3d 588 (2007), Mr. Shale contended that the trial court erred by failing to treat some of his crimes as the "same criminal conduct" for offender score purposes. The State responded that without contesting the issue at the trial level and alerting the trial court to make a discretionary call, Mr. Shale waived his right to raise the issue on appeal. In deciding the case, the Supreme Court pointed out that it had held previously in *In re Pers. Restraint of Goodwin*, 146 Wn. 2d 861, 873-74, 50 P.3d 618 (2002) that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based upon a miscalculated offender score (miscalculated upward), and that a defendant cannot agree to punishment in excess of that which the legislature has established, but that may be waived if the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. *Shale*, 160 Wn.2d at 494. The Court, citing to *State v. Nitsch*, 100 Wn. App. 512, 520-23, 997 P.2d (2000), also pointed out that the "same criminal conduct" inquiry involves

both factual determinations and the exercise of discretion. *Shale*, 160 Wn.2d at 495. The *Shale* Court then held that the defendant's failure to ask the trial court to make a discretionary call of any factual dispute regarding the issue of "same criminal conduct" constituted a waiver and thus the defendant could not raise the issue on appeal. *Shale*, 160 Wn.2d at 496.

Here, Mr. Zielke failed to request the trial court to make a discretionary call on any factual dispute regarding whether some of his prior convictions constituted the same criminal conduct and thus he waived the issue and cannot now raise it on appeal.

Second, Mr. Zielke contends that the trial court erred by failing to determine whether his Idaho prior conviction for forgery was comparable to a Washington felony.

However, Mr. Zielke's contention is not well-taken. In *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004) the Court held that although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state convictions, a defendant's affirmative acknowledgment that his prior out-of-state convictions are properly included in his offender score satisfies SRA requirements. See also *State v. Wilson*, 170 Wn.2d 682, 690, 244 P.3d 950 (2010) (when a defendant affirmatively acknowledges a foreign conviction in his criminal history, the trial court needs no further proof).

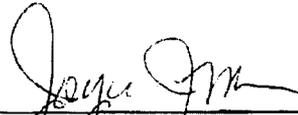
Here, the State did not know about Mr. Zielke's prior Idaho forgery conviction until Mr. Zielke himself voluntarily informed the court of the existence of the Idaho conviction and discussed it with the court. Thus the trial court did not err by failing to

No. 31895-8-III

conduct a comparability analysis between the Idaho forgery and the Washington forgery statutes. But, even if the trial court did err by including the Idaho conviction in the offender score, the error is harmless as the length of Mr. Zielke's sentence would remain the same with or without inclusion of the Idaho conviction in his offender score.

The motion on the merits is granted. The decision of the trial court is affirmed.

July 25 , 2014.



Joyce J. McCown
COMMISSIONER

APPENDIX B

FILED
OCT. 16, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,)	No. 31895-8-III
)	
Respondent,)	ORDER DENYING
)	MOTION TO MODIFY
v.)	COMMISSIONER'S RULING
)	
KORY LEE ZIELKE,)	
)	
Appellant.)	

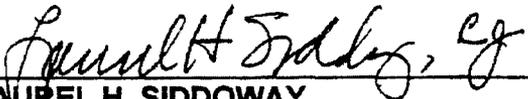
THE COURT has considered appellant's motion to modify the Commissioner's Ruling of July 25, 2014, and having considered the records and files herein is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify the Commissioner's Ruling is hereby denied.

DATED: October 16, 2014

PANEL: Jj. Brown, Fearing, Lawrence-Berrey

FOR THE COURT:



LAUREL H. SIDDOWAY
CHIEF JUDGE

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	S.C. NO. _____
)	
v.)	COA NO. 31895-8-III
)	
KORY ZIELKE,)	
)	
PETITIONER.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SPOKANE, WA 99260		

<input checked="" type="checkbox"/> KORY ZIELKE	(X)	U.S. MAIL
892152	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF NOVEMBER, 2014.

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WASHINGTON APPELLATE PROJECT

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Nov 14, 2014

Court of Appeals

Division III

State of Washington

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Court of Appeals Case Number: 31895-8

Party Represented: PETITIONER

Is This a Personal Restraint Petition? Yes No

Trial Court County: _____ - Superior Court # _____

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