

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 77753-5

Title of Case: State v. Thieffault

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Oral Argument Date: 09/21/2006

SOURCE OF APPEAL

Appeal from Snohomish Superior Court

01-1-00167-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

)

Respondent,) No. 77753-5

)
v.) En Banc
)
GAYLON LEE THIEFAULT,)
) Filed May 17, 2007
Petitioner.)
)

OWENS, J. -- Petitioner Gaylon Lee Thiefault is an inmate sentenced to life with no possibility of parole or early release under Washington's Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981, chapter 9.94A RCW. Thiefault contends that his sentencing counsel was ineffective by failing to object to the superior court's comparability analysis regarding a prior Montana conviction. We hold that the trial court's comparability analysis was erroneous. We further hold that the failure of Thiefault's counsel to object to the erroneous comparability analysis constitutes ineffective assistance of counsel for purposes of the

sixth amendment to the United States Constitution. Accordingly, we vacate

State v. Thiefault

No. 77753-5

Thiefault's sentence and remand for resentencing.

2

State v. Thiefault

No. 77753-5

Facts

Following a jury trial and conviction for indecent liberties by forcible compulsion and attempted second degree rape, the Snohomish County Superior Court sentenced Thiefault to life in prison with no possibility of parole under the POAA.

The court found that Thiefault was a persistent offender with three prior convictions, including two foreign offenses -- an attempted robbery conviction from Montana and a

previous federal aggravated sexual assault conviction. The superior court conducted a comparability analysis of the out-of-state convictions to their Washington counterparts. The court found that the Montana and federal convictions were legally comparable to their Washington counterparts and thus sentenced Thieffault to life in prison with no possibility of parole. Verbatim Report of Proceedings (VRP) at 27 ("It is clear to this court that the Montana attempted robbery does fit within the second degree [attempted] robbery elements as defined in the statutes.").

Thieffault appealed, arguing in part that his conviction for indecent liberties and attempted second degree rape violated double jeopardy and that his federal sexual assault conviction could not be considered under the POAA's two-strike law. The Court of Appeals agreed and granted Thieffault's appeal on those issues. *State v. Thieffault*, noted at 116 Wn. App. 1059, 2003 Wash. App. LEXIS 718, at *11. The

court reversed Thieffault's indecent liberties conviction and remanded for resentencing.

3

State v. Thieffault

No. 77753-5

Id.

A different attorney represented Thieffault during resentencing and did not object to the comparability of the prior offenses; "I'm not . . . raising that argument because my understanding is that's already been determined." VRP at 39. The superior court incorporated its comparability findings from the previous sentencing, found that Thieffault constituted a persistent offender under the POAA's three-strikes law, and sentenced him to life with no possibility of parole.

Thieffault again appealed. The Court of Appeals affirmed but remanded to correct scrivener's errors. We granted Thieffault's petition for review. State v.

Thiefault, 157 Wn.2d 1002, 136 P.3d 758 (2006).

Issue

Did Thiefault receive ineffective assistance of counsel when his attorney failed to object to the trial court's comparability analysis-1

Analysis

Standard of Review. Courts conduct de novo review of a sentencing court's decision to consider a prior conviction as a strike. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), review granted in part and remanded, 154 Wn.2d 1031 (2005). Other questions of law are likewise reviewed de novo. *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

¹ Because this issue is dispositive, we need not reach Thiefault's other arguments.

State v. Thiefault

No. 77753-5

Ineffective Assistance of Counsel. Thiefault contends that he received ineffective assistance of counsel because his attorney did not object to the superior court's comparability finding regarding the Montana conviction. We agree. To prevail on his claim of ineffective assistance of counsel, Thiefault must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); see also

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In order to ascertain whether Thiefault's counsel was deficient under Strickland's first prong, this court must conduct a comparability analysis of the Montana conviction. Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable -- that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable -- that is, whether the

State v. Thiefault

No. 77753-5

conduct underlying the foreign offense would have violated the comparable

Washington statute. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). In

making its factual comparison, the sentencing court may rely on facts in the foreign

record that are admitted, stipulated to, or proved beyond a reasonable doubt. In re

Pers. Restraint of Lavery, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); *State v.*

Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); *Ortega*, 120 Wn. App. at 171-

74. If a court concludes that a prior, foreign conviction is neither legally nor factually

comparable, it may not count the conviction as a strike under the POAA. *Lavery*, 154

Wn.2d at 258 ("We conclude that Lavery's 1991 foreign robbery conviction is neither

factually nor legally comparable to Washington's second degree robbery and therefore

not a strike under the POAA.").

In the instant case, the Court of Appeals found that Thieffault satisfied the first

prong of the Strickland test and demonstrated that his lawyer provided deficient

representation for Sixth Amendment purposes. The court held that the Montana offense was broader than its Washington counterpart, in part because the Montana statute required a lesser mens rea. The court thus concluded that the Montana conviction was not legally comparable to Washington's version. It further held that it could not determine if the offenses were factually comparable because the superior

State v. Thiefault

No. 77753-5

court's record did not include facts Thiefault admitted.² Thus, it could not determine whether the Montana offense was factually comparable to Washington's.

Nonetheless, the court held that Thiefault could not satisfy Strickland's second prong and establish with reasonable probability that his counsel's failure to object to

the comparability analysis prejudiced his case. The court reasoned that the superior court would likely have given the State the opportunity to obtain information properly establishing the facts underlying Thieffault's Montana conviction had his attorney argued that the convictions were not comparable. The court further reasoned that Thieffault did not demonstrate that there was a reasonable probability that the facts underlying the Montana conviction would not have satisfied the Washington crime. Consequently, the court held that Thieffault's counsel was not ineffective.

In his petition for review, Thieffault contends that the Court of Appeals erred by finding that he could not meet Strickland's second prong. According to Thieffault, the record demonstrates that the State previously sought to obtain all the possible documentation of his Montana conviction and did not have it at the time of

2The information the State provided to the superior court regarding the Montana conviction included a motion for leave to file information, an affidavit from a prosecutor,

and the judgment. The State did not produce the actual information or guilty plea agreement. Further, although the motion for leave to file information and the affidavit both described Thiefault's conduct, neither of the documents contained facts that Thiefault admitted, stipulated to, or that were otherwise proved beyond a reasonable doubt. See Lavery, 154 Wn.2d at 258.

7

State v. Thiefault

No. 77753-5

sentencing. He thus challenges the Court of Appeals' conclusion that the State would have been able to obtain the proper documentation if the superior court granted it a continuance. The State, on the other hand, contends that the information would likely contain the same facts as the motion for leave to file information.³

We hold that Thiefault received ineffective assistance of counsel under Strickland. The Court of Appeals correctly concluded that the Montana attempted robbery statute is broader than its Washington counterpart. The Court of Appeals also

correctly found that the motion for leave to file information, the prosecutor's affidavit,

and the judgment were insufficient to establish factual comparability. Thus,

Thiefault's attorney provided deficient representation under Strickland's first prong

when he did not object to the superior court's comparability analysis. The Court of

Appeals improperly found that such deficient representation did not prejudice

3The State also contends that Thiefault's counsel was not deficient because the law existing at the time of Thiefault's September 30, 2003, sentencing did not require a court to rely upon facts admitted by the defendant. This argument is without merit. Prior to Thiefault's 2003 sentencing, both case and statutory law required a sentencing court to find that the prior convictions were comparable. See, e.g., *Morley*, 134 Wn.2d at 606. Here, the superior court improperly determined that the Montana conviction was legally comparable with Washington's statute. Because the superior court determined that Montana and Washington had comparable elements, it did not reach the second stage of the comparability analysis and examine Thiefault's specific conduct. Thus, under the law in existence at the time of sentencing, Thiefault's counsel was deficient by not objecting to the superior court's conclusion that the convictions were legally comparable.

Moreover, case law at the time of sentencing also required a sentencing court to examine reliable evidence, such as an information. *Id.*

State v. Thiefault

No. 77753-5

Thiefault. Although the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable; in which case, the superior court could not have deemed the Montana conviction a "strike" for purposes of the POAA. We therefore vacate Thiefault's sentence and remand the case to superior court to conduct a factual comparability analysis of the Montana conviction.⁴

Thiefault contends that upon remand he has a right to a jury determination of his prior conviction. Thiefault argues that the United States Supreme Court holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),

4Remand for resentencing with the inclusion of the Montana offense is the appropriate remedy where, as in this case, the trial counsel fails to object to the State's evidence of a prior conviction. See, e.g., *State v. Ford*, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999) ("Accordingly, where, as here, the defendant fails to specifically put the court on notice as to any apparent defects, remand for an evidentiary hearing to allow the State to prove the classification of the disputed convictions is appropriate."); accord *State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997) (noting that remand without another opportunity to prove the classification of a prior offense is the appropriate remedy if the defendant objects to the State's evidence and the State then fails to satisfy its burden), *aff'd*, 137 Wn.2d 490, 973 P.2d 461 (1999). The State bears the burden of proving the existence of a prior conviction. *Ford*, 137 Wn.2d at 480-81. However, where the issue has not been fully argued before the trial court and the defendant does not object to the evidence, the State retains an opportunity to prove the classification of an offense upon remand. *Id.* at 485-86. Here, the trial court determined that Thiefault's prior conviction was legally comparable and thus did not reach the issue of factual comparability. Moreover, Thiefault did not object to the erroneous legal comparability ruling. As a result, the State did not have to establish factual comparability. In such situations, the proper remedy is remand to the trial court where the State has the opportunity to satisfy its burden of proving factual comparability.

No. 77753-5

and most recently in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.

2d 403 (2004), require a jury to determine whether a prior conviction is comparable.⁵

This court has repeatedly rejected similar arguments and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt. See, e.g., *Lavery*, 154 Wn.2d at 256-57; *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002); see also *Ortega*, 120 Wn. App. 165; accord *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (holding that the State need not prove the fact of a prior conviction to a jury).

We recently rejected this argument in *Lavery*. As in the instant case, the

defendant in Lavery was sentenced to life after the superior court found that a prior

federal robbery conviction constituted a strike under the POAA. 154 Wn.2d at 253.

Upon review, the court held that Lavery's federal robbery conviction was broader than

its Washington counterpart and therefore not legally comparable. Id. at 256. The

5 In Apprendi, the Court held that under the fourteenth amendment to the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In Blakely, the Court found that this state's sentencing procedure, which permitted judges to enhance a defendant's sentence based on information the State had not proved to a jury beyond a reasonable doubt, violated a defendant's Sixth Amendment right to a jury trial. 542 U.S. at 305.

State v. Thiefault

No. 77753-5

court thus turned to a factual comparison of the respective crimes and whether

Apprendi and its progeny applied. The Lavery court predicated its analysis on the holding that a life sentence without possibility of parole constitutes a penalty beyond the statutory maximum and thus implicates Apprendi. *Id.* It further held that Apprendi does not apply where the State seeks to prove the existence of a prior conviction but does apply when a court must look to the facts underlying a foreign offense to determine its comparability under the POAA. *Id.* at 256-57; accord *Ortega*, 120 Wn. App. at 172 ("[W]e conclude underlying facts that were not found by the trier of fact beyond a reasonable doubt may not be used to increase the penalty of a subsequent conviction beyond the statutory maximum."). It then examined the superior court's record and concluded that it was devoid of any information admitted, stipulated to, or proved beyond a reasonable doubt. *Id.* at 258. The court concluded that Lavery's federal conviction could not count as a strike under the POAA. *Id.* The

Lavery court did not hold that Apprendi required a jury determination of facts

regarding a prior conviction.

In an analogous case, the United States Supreme Court took a similar approach and limited the scope of judicial fact-finding but did not extend Apprendi to require a

jury determination of fact. In *Shepard v. United States*, 544 U.S. 13, 24, 125 S. Ct.

1254, 161 L. Ed. 2d 205 (2005), the Court held that a trial court may not look to police

State v. Thiefault

No. 77753-5

reports or complaint applications when determining whether to enhance a defendant's

sentence under the Armed Career Criminal Act of 1984 (ACCA).⁶ The Court reasoned

that a disputed fact regarding a prior conviction was "too much like the findings

subject to . . . Apprendi, to say that *Almendarez-Torres* clearly authorizes a judge to

resolve the dispute." *Id.* at 25. Thus, the Shepard Court limited the trial court's factual inquiry to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. The Court declined to extend Apprendi's holding to require a jury determination of a defendant's prior convictions under the ACCA. *Id.*

Thus, upon remand, the superior court may not use Thiefault's prior Montana conviction as a strike under the POAA, unless the State satisfies its burden of proving that the Montana conviction is factually comparable based on facts Thiefault admitted

⁶ The ACCA dictates a 15-year sentence for defendants who possess a firearm after three prior convictions for serious or violent offenses. 18 U.S.C. § 924(e)(1).

State v. Thieffault

No. 77753-5

to, stipulated to, or that were proved beyond a reasonable doubt. 7 If the superior court

is unable to determine that Thieffault's Montana attempted robbery conviction is

factually comparable to Washington's attempted robbery statute through examination

of the appropriate documents, it may not count the Montana offense as a strike under

the POAA.

Conclusion

We vacate Thieffault's sentence and remand for resentencing. We direct the superior court to conduct a factual comparability analysis to determine whether the conduct underlying Thieffault's Montana conviction constitutes attempted robbery under Washington's narrower statute. In making such a determination, the superior court may rely on only those facts that Thieffault stipulated or admitted to or those that

were proved beyond a reasonable doubt.

7 Thieffault makes a labored argument that double jeopardy precludes the superior court from considering the Montana conviction in its resentencing. Thieffault contends that his rape conviction is a lesser included offense within his life sentence with no possibility of parole. Such a finding would require a considerable extension and attenuation of the Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and the court denies Thieffault's argument. *Id.* at 605 (holding that aggravating circumstances are "the functional equivalent of an element of a greater offense" (quoting *Apprendi*, 530 U.S. at 494 n.19)). Because we deny Thieffault's argument as a basis of relief, we need not reach the State's motion to strike this issue.