IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARNARD LASHELL PINSON, Appellant.	No. 37691-1-II UNPUBLISHED OPINION

Houghton, P.J. — Larnard Pinson appeals his conviction for first degree escape, arguing trial court error in calculating his offender score calculation. He also claims he received ineffective assistance of counsel and raises additional arguments pro se. We affirm the conviction but remand for resentencing, allowing both parties to submit evidence as to Pinson's prior convictions.

FACTS

On June 22, 2007, a jury found Pinson guilty of unlawful possession of a controlled substance (cocaine), RCW 69.50.401(1)(2)(a). The trial court sentenced him to five months in custody and seven months to a Pierce County supervised community program, known as Breaking the Cycle (BTC).[1] The criminal conviction at issue in the present case, first degree felony escape, stems from his failure to comply with the BTC program requirements.

[1] RCW 9.94A.680(3) authorizes such a program.

On June 26, Pierce County Sheriff Deputy Gabriel Fajardo transported Pinson from jail to the BTC program office. Fajardo and Doug Turner, a case manager for the BTC program, provided the orientation. They explained the program requirements and that noncompliance could result in a return to jail or an escape charge.[2] Pinson received and signed a detailed orientation document, outlining these requirements and consequences.

Pinson appeared as required for three days. After Friday, June 29, he did not attend again, including failing to appear on July 3 for a scheduled urinalysis test.

On July 6, Turner prepared a violation report and forwarded it to Fajardo. The report included a recommendation that the prosecutor's office issue an escape warrant because Pinson had failed to report as required and his whereabouts were unknown. Fajardo also unsuccessfully attempted to locate Pinson at the two addresses listed on his orientation form. Fajardo then prepared a report and forwarded it to the prosecutor's office. The State charged Pinson with felony escape, RCW 9A.76.110(1).

A Tacoma police officer noticed Pinson standing at an intersection early in the morning on July 14. The officer, aware of Pinson's outstanding arrest warrant, confirmed the warrant, contacted him, and arrested him. Pinson told the officer that he was not aware of such a warrant, but he admitted that he had failed to check in with the BTC program.

Pinson later moved to discharge his assigned counsel. At a motion hearing, Pinson

[2] The BTC program operates with four phases, each lasting 30 days. The first phase requires each participant to report daily before noon. The second phase requires in-person reporting three days per week and reporting by telephone the other days. The third phase requires two in-person reporting days and the other three days reporting in by telephone. The fourth phase requires participants to report one day per week and the other four days reporting in by telephone. The program requires urinalysis tests throughout the program.

asserted a conflict of interest and his attorney's failure to subpoena a particular witness as Pinson's reasons for seeking a new attorney. The trial court denied the motion but advised Pinson of his right to represent himself pro se, to find a pro bono attorney, or to hire his own.

A jury heard the matter and found Pinson guilty of first degree felony escape. At the sentencing hearing, the State presented several records relating to prior convictions, including three prior Pierce County, Washington convictions; two Lucas County, Ohio convictions; and a Chicksaw County, Mississippi conviction.

On March 26, 1990, Pinson had pleaded guilty as accessory before the fact to armed robbery in Chicksaw County, Mississippi. On January 27, 1998, he entered an *Alford*[3] plea for aggravated robbery in Lucas County, Ohio.[4] On July 27, 2004, he pleaded "no contest" to theft of an elderly person, a fifth degree felony, in Lucas County, Ohio. Clerk's Papers (CP) at 102-03. On September 15, 2006, he pleaded guilty to attempted unauthorized possession of a controlled substance (cocaine) and second degree theft in Pierce County. And on June 22, 2007, he pleaded guilty to conspiracy to commit unlawful delivery of a controlled substance in Pierce County.

Based on an offender score of 5 at sentencing, defense counsel asserted that Pinson's offender score should be 5 with a resulting standard sentencing range of 22 to 29 months. Defense counsel objected to consideration of the Ohio convictions in the offender score

[3] *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (an individual may voluntarily consent to a prison sentence even if he is unwilling to admit to participation in the crime).

[4] The State did not provide a judgment and sentence to substantiate this. The record includes only a docket printout. The State explained to the trial court that there were problems retrieving copies of the judgment.

calculation because no corresponding felony charge existed in Washington for theft from an elderly person and because the State had provided insufficient proof of the felony robbery conviction. The trial court agreed. The State conceded that the offender score would be 5 in light of the court's determination.

The trial court heard both counsel's arguments as to the appropriate sentence and then asked Pinson if he had anything to say. Among other things, Pinson said that he believed his offender score to be 4, not 5. He explained that the trial court should not consider the Mississippi conviction because he had committed it more than 10 years earlier and therefore had washed out of his offender score. He also said that the theft and attempt to possess a controlled substance convictions "ran together," making them count as 1 point. The trial court then reviewed documents Pinson provided, but they were not made part of the record.[5]

The trial court noted that it was "not sentencing Mr. Pinson based on criminal convictions that weren't proven to be part of his criminal history." Verbatim Report of Proceedings (Sentencing) (VRP) at 11. It then sentenced Pinson to 29 months' incarceration, the high end of the range. Pinson appeals.

ANALYSIS

Offender Score Calculation / Mississippi Conviction

Pinson first contends that the trial court improperly considered his prior Mississippi conviction in calculating his offender score for sentencing purposes. "We review a sentencing court's calculation of an offender score de novo." *State v. Wilson*, 113 Wn. App. 122, 136, 52

[5] We cannot discern from the record what information the documents contained.

P.3d 545 (2002). The State must prove the existence of prior convictions by a preponderance of the evidence to have them included in an offender score calculation. RCW 9.94A.500(1); *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986). The State must also prove that any prior out-of-state convictions used in this case are felonies under Washington law. RCW 9.94A.525(3).

The sentencing court may accept different forms of prior criminal conviction evidence. The sentencing court favors a certified copy of the judgment, but the State may also introduce record documents or prior proceeding transcripts to establish criminal history. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.3d 452 (1999). The State may introduce a Washington judgment and sentence that uses out-of-state convictions to calculate an offender score to establish its comparability with a Washington felony only if the defendant does not challenge the State's criminal history presentation. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). Where the defendant objects to the use of a prior Washington judgment and sentence, the State must present additional evidence of the existence and classification of out-of-state convictions. *Labarbera*, 128 Wn. App. at 349. Here, the State presented various Washington judgment and sentences and a Mississippi plea of guilty and judgment of the court.

We must first determine whether Pinson objected below. His defense counsel did not object to the inclusion of the Mississippi conviction at any time during sentencing. But Pinson raised concerns pro se when the trial court asked if he had anything to say regarding sentencing. Pinson said in relevant part:

> But then again, as far as my sentencing range, [defense counsel] explains that I have an offender score of five. Well, according to what it is in my paperwork here, I only have a four. If you don't – if the squash period of the

> robbery out of – the accessory before the fact of robbery out of the state of Mississippi, that occurred in 1989. Okay. There was a ten-year-and-seven-month period within that. That's why I don't see how I can be held accountable for that. Okay.

VRP at 10.

Our Supreme Court has addressed whether a defendant's pro se argument qualifies as an objection in a similar case. *See State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007). In *Bergstrom*, defense counsel did not object to the State's offender score calculation at sentencing, but the defendant specifically and personally disputed the score calculation at a later hearing by arguing that some of his prior offenses constituted the same criminal conduct. 162 Wn.2d at 95-96. The Court considered the pro se objection as validly raising the issue and requiring the trial court to classify the out-of-state convictions for sentencing purposes. *Bergstrom*, 162 Wn.2d at 96-97.

Here, the trial court listened to Pinson's argument. It also reviewed documents he provided. These circumstances comprise a valid objection under *Bergstrom*.

We must next decide whether Pinson's objection should have led the trial court to engage in a conviction classification. Pinson essentially argued that his Mississippi conviction should "wash out" under the Sentencing Reform Act of 1981, chapter 9.94A RCW, because it was too old. Class A felonies do not wash out, but class B and class C felonies wash out after 10 and 5 years respectively. *See* RCW 9.94A.525(2),(4). The State counters that the Mississippi conviction does not wash out because it is equivalent to a class A felony under Washington law. We hold that the trial court should have classified the conviction because a defendant's objection to convictions in the offender score calculation believed to have "washed out" compels conviction

classification. *See State v. McCorkle*, 137 Wn.2d 490, 496-97, 973 P.2d 461 (1999).

At sentencing, the trial court did not classify the Mississippi conviction and instead relied on a Mississippi plea of guilty and judgment of the court and several stipulated judgments from prior Washington convictions. Nothing in the record suggests that the trial court reviewed the applicable Washington and Mississippi statutes to classify the conviction properly.[6] The remedy is to remand for resentencing.

Because we remand for resentencing in order to classify the Mississippi conviction, we must further decide what evidence, if any, Pinson and the State may introduce on resentencing. Pinson argues that the law limits the State to the existing record on remand. We disagree.

Generally, when a defendant objected and the disputed issues were fully argued at sentencing, the State is held to the existing record and cannot present further evidence. *In the Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005). But here, no one fully argued the issues at sentencing. This situation is analogous to *Bergstrom*, where our Supreme Court remanded without restricting the State to the record in light of the unique circumstances involving a pro se objection. 162 Wn.2d at 98. We follow *Bergstrom* and do not limit either the State's or Pinson's evidence at resentencing.[7]

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[6] Additionally, as Pinson accurately points out, the judgment and sentence in the escape conviction inaccurately denotes the Mississippi conviction. This may be because the prior Washington judgments provided to the trial court by the State contain inconsistencies regarding the classification of the Mississippi conviction. For example, a stipulation on a prior criminal record in a 2006 unlawful possession of a controlled substance conviction lists the Mississippi conviction as a class B felony. Another stipulation on a prior criminal record in a 2006 theft conviction lists the Mississippi conviction as a class A felony. Both of these stipulations reference the conviction as "ARMED ROBBERY" and do not list the applicable Mississippi statute or the comparable Washington statute. Clerk's Papers at 189.

Statement of Additional Grounds[8]

Conflict of Interest

Pro se in his statement of additional grounds (SAG), Pinson claims that the trial court erred in allowing defense counsel to continue to represent him because of an alleged RPC 1.10(b) violation. Before trial, Pinson moved to discharge his third Department of Assigned Counsel (DAC) attorney. The trial court denied the motion.

RPC 1.10(b) states:

> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

To the extent that Pinson argues that DAC fits within RPC 1.10(b), he is mistaken. If he intended something different, we decline to address it, as we will not consider an appellant's statement of additional grounds if it does not inform us of the nature and occurrence of the alleged errors. RAP 10.10(c).

Ineffective Assistance of Counsel

Pinson raises several ineffective assistance of counsel claims. He argues that his attorney failed to (1) challenge the applicability of the escape statute, (2) conduct a thorough investigation,

[7] Because we remand for resentencing, we do not address Pinson's ineffective assistance of counsel claim contained in his statement of additional grounds.

[8] RAP 10.10.

and (3) present the witnesses Pinson wanted to have testify.

An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We engage in a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics and strategy form no basis for an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Pinson cites *State v. Kent*, 62 Wn. App. 458, 814 P.2d 1195 (1991), to support the claim that his attorney failed to challenge the applicability of the escape statute. The *Kent* court reversed the trial court and found escape to include the failure to return to jail from work release on time. 62 Wn. App. at 459. Contrary to Pinson's assertion, *Kent* supports his escape conviction. Pinson's counsel had no basis upon which to challenge the statute.

Pinson claims that his attorney failed to "thoroughly investigate all relevant plausible options" SAG at 4. An attorney breaches the duty to his client if he fails to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691. This includes investigating all reasonable defenses. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). The record does not contain anything for us to conclude that Pinson's defense counsel failed in this regard, and we decline to address it further.

Finally, Pinson claims that his attorney failed to present witnesses that Pinson wanted to testify about the purpose of his plea and what Turner and Fajardo said at BTC orientation

regarding the escape offense. These potential witnesses included fellow participants in the BTC program and one of his prior attorneys. A decision not to call witnesses is generally one of trial strategy. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). For failure to call witnesses to amount to ineffective assistance of counsel, that failure must have been unreasonable and must result in prejudice, or create a reasonable probability that, had the lawyer presented witnesses, the outcome of trial would differ. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993). Pinson has not shown prejudice that such testimony would have changed the trial's outcome here.

All of Pinson's ineffective assistance of counsel claims fall under trial tactics and strategy and fail to meet the first prong of the two-prong *Strickland* test.

Sufficiency of the Evidence

Finally, Pinson argues that insufficient evidence supports his escape conviction. In determining whether evidence supports a jury verdict, we view the evidence in a light most favorable to the State. *State v. McNeal*, 145 Wn.2d 352, 359-60, 37 P.3d 280 (2002). We leave to the fact finder questions of credibility and do not review them on appeal. A review of the record discloses that Fajardo and Turner testified specifically as to the requirements of the program and that Pinson's noncompliance would be escape. They also testified to Pinson's noncompliance. The jury believed them and Pinson's argument fails.

The conviction is affirmed and the case remanded for resentencing, allowing both parties to submit evidence as to Pinson's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so

ordered.

Houghton, P.J.

We concur:

Bridgewater, J.

Hunt, J.