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

STATE OF WASHINGTON,	)	No. 61939-0-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
GREGORY LEON THOMAS,	)	
	)	
Appellant.	)	FILED: November 9, 2009
	)	

Schindler, C.J. — Gregory Leon Thomas appeals his judgment and sentence for the third time. In 2001, a jury convicted Thomas of two counts of robbery in the second degree while armed with a firearm and one count of unlawful possession of a firearm. With an offender score of 14, the court imposed a concurrent high-end standard range sentence and mandatory consecutive firearm enhancements. In 2004, we granted Thomas's personal restraint petition on the grounds that some of the prior convictions washed out. On remand, the court rejected Thomas's argument that his 1980 and 1982 California burglary convictions should not be included in the offender score, and determined that Thomas had an offender score of eight. On appeal, we held that the 1980 and 1982 California burglary convictions were not factually comparable to a Washington crime. We also held Thomas waived the right to challenge the inclusion of his 1992 California conviction for possession of stolen

property in the offender score calculation. In this appeal, Thomas contends that his attorney provided ineffective assistance of counsel by failing to inform the court that (1) it had the discretion to consider whether the 1992 California conviction for possession of stolen property was comparable to a Washington crime, and (2) two recent statutory amendments gave Thomas the right to challenge inclusion of his 1992 California conviction in the offender score. Because Thomas cannot establish ineffective assistance of counsel, we affirm.

FACTS

In 2001, a jury found Gregory L. Thomas guilty of two counts of robbery in the second degree while armed with a firearm and one count of unlawful possession of a firearm. Based on an offender score of 14, the court imposed a high-end concurrent standard range 84-month sentence for the two robbery convictions, and two mandatory consecutive 36-month firearm sentence enhancements, for a total of 156 months.[1]

In 2004, Thomas filed a personal restraint petition arguing that because several of his prior out-of-state convictions were the equivalent of class C felonies, those convictions "washed out" for purposes of calculating his offender score. The State conceded that because "Thomas spent a 5-year crime-free period between June 13, 1987 and September 28, 1992" the offender score calculation erroneously included prior convictions that washed out.

[1] Thomas filed a direct appeal. State v. Thomas, 113 Wn. App. 755, 54 P.3d 719 (2002). Thomas argued that the sentence exceeded the statutory 10-year maximum for robbery in the second degree. This court affirmed. In 2003, our supreme court granted review and affirmed. State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003). While the appeal was pending Thomas filed the 2004 personal restraint petition.

This court accepted the State's concession and ruled that on remand for resentencing, the class C felonies that washed out should not be included in the offender score. We also noted an apparent dispute as to whether the 1980 and 1982 California burglary convictions should be included in the offender score as class B or class C felonies:

> There appears to be some dispute over whether Thomas' 1980 and 1982 out-of-state convictions for burglary should be classified as class C or B felonies under Washington law. Thomas admits that his trial counsel did not object to those convictions being included in his offender score. Where '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.' State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1979).

On remand, the State argued that Thomas's offender score was an eight based on three points for his current convictions, two points for his two prior Washington convictions of possession of stolen property in the second degree in 1997 and bail jumping in 1995, and three points for his prior California convictions of receiving stolen property in 1992 and burglary in 1980 and 1982. The State submitted certified copies of court records to establish the five prior convictions.[2] Thomas argued that the 1980 and the 1982 California burglary convictions were not comparable to the

[2] As to the 1992 California conviction of receiving stolen property, the records show Thomas was convicted by a plea of no contest on July 1, 1992 in San Luis Obispo County, California Cause No. 17608 of receiving stolen property.

> "On or about June 17, 1992, in the county of San Luis Obispo, the crime of RECEIVING STOLEN PROPERTY, in violation of PENAL CODE SECTION 496.1, a FELONY, was committed by GREGORY LEON THOMAS who did willfully and unlawfully buy, receive, conceal, sell, withhold, and aid in concealing, selling, and withholding property, to wit, a 1992 JAGUAR, which had been stolen and obtained by extortion, knowing that said property had been stolen and obtained by extortion."

Washington crime of burglary and his offender score was six. During allocution, Thomas also challenged the validity of his 1995 bail jumping conviction. The court determined that the 1980 and 1982 California burglary convictions were comparable. With an offender score of eight, the court imposed a standard range sentence plus mandatory firearm enhancements for a total of 137 months.

On appeal, Thomas challenged the court's determination that the 1980 and 1982 burglary convictions were comparable. For the first time, he also argued that his 1992 California conviction for receiving stolen property was not comparable to a Washington crime.

In State v. Thomas, 135 Wn. App. 474, 487, 144 P.3d 1178 (2006), rev. denied, 161 Wn.2d 1009, 166 P.3d 1218 (2007), this court held that the State did not carry its burden of proving that the 1980 and 1982 California burglary convictions were factually comparable to a Washington crime. However, we rejected Thomas's argument that the 1992 California conviction for receiving stolen property should not be included in his offender score because Thomas conceded below that the conviction should be included in calculating the offender score. The mandate issued on November 16, 2007.

At the sentencing hearing on remand on June 19, 2008, the State asserted that Thomas's offender score was six based on three points for the current convictions, two points for the two prior Washington convictions of possession of stolen property in the second degree and bail jumping, and one point for the 1992 California conviction of receiving stolen property. Based on this court's decision in Thomas, Thomas's

attorney agreed that his offender score was six. However, the attorney told the court that Thomas claimed the appellate court erred in deciding that the 1992 California conviction of receiving stolen property should be included in the offender score.

> The Court of Appeals[’] decision does pare this down, and, again, it was pretty much the conclusion that we all came to, including Mr. Stern [the prosecutor] that they’re saying that the burglaries don’t count, and that the possession of stolen property does. Mr. Thomas contends that the possession of stolen property also should not count in that regard, and his offender score should be a 5, and he wants to put that on the record. He believes that the Court of Appeals is in error in regards to counting the possession of stolen property out of California.

Thomas told the sentencing court that while his attorney did not object, he objected at the previous sentencing to including the 1992 California conviction in his offender score.

> [I]t was my lawyer that waived it and said I should be sentenced to six, and I contested it to the point where they had to -- I refused to sign the remand hoping that it would go on record that my contesting that fifth point would go on record, and it should have . . . he objected to the 8 points, the two burglaries, and agreed I should be sentenced to 6. And I objected, and I told him right then, no, I’m contesting all of them.

The court ruled that the decision in Thomas was binding.

> THE COURT: Yes. Court of Appeals. All right, I think I understand what crime you’re talking about, and I presume that argument was made in front of the Court of Appeals, and they decided against your position on September 18, 2006. So you’re saying the Court of Appeals is wrong?
> MR. THOMAS: I never agreed to that.
> THE COURT: Did you appeal the Court of Appeals[’] decision up to the Supreme Court?
> MR. THOMAS: I don’t understand what’s going on . . . .
> THE COURT: There was a petition for review that was filed after the Court of Appeals[’] decision, and the [S]upreme [C]ourt declined that.

The court ruled that Thomas's offender score was six and imposed a standard range sentence plus the mandatory consecutive firearm enhancements. Thomas appeals.

ANALYSIS

Thomas argues that his attorney provided ineffective assistance of counsel by failing to inform the court that (1) it had the discretion on remand to exercise independent judgment to consider whether his 1992 California conviction for receiving stolen property, was comparable to a Washington crime, and (2) recent legislative amendments gave Thomas the right to challenge the 1992 California conviction on remand.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.E.2d 674 (1984). To prevail on his claim of ineffective assistance of counsel, Thomas must show deficient performance and that the deficient performance resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish deficient performance, Thomas has the "heavy burden" of showing that his attorney "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment . . . .'" State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting, Strickland, 466 U.S. at 687). Thomas can meet this burden by establishing that his attorney's conduct failed to meet an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). There is a strong presumption that counsel's representation was effective

and competent. McNeal, 145 Wn.2d at 362. Thomas must also show that the deficient performance resulted in prejudice such that there was a reasonable probability that but for counsel's errors, the result would have been different. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

As a general rule, the law of the case doctrine prevents a court from considering the same issue decided in a previous appeal. State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

> 'Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes redeciding the same legal issues in a subsequent appeal.
> It is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.'

State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996) (quoting, Folsom v. County of Spokane, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988).

RAP 2.5(c) also limits the court's discretion to apply the law of the case doctrine.

> (c) **Law of the Case Doctrine Restricted**. The following provisions apply if the same case is again before the appellate court following a remand:
> (1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.
> (2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

Relying on State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993), Thomas contends his attorney provided ineffective assistance of counsel by failing to inform the sentencing court that it could disregard this court's decision in Thomas, and exercise independent judgment to determine whether the prior 1992 California conviction should be included in the offender score. Barberio does not support Thomas's argument.

In Barberio the defendant Barberio was convicted of one count of rape in the second degree and one count of rape in the third degree. The trial court imposed an exceptional sentence. On appeal, Barberio challenged his conviction but did not challenge the exceptional sentence. This court reversed Barberio's conviction for rape in the third degree. On remand, the State decided not to retry Barberio on the rape in the third degree charge. At resentencing, the defendant challenged the aggravating factors and imposition of an exceptional sentence. Barberio, 121 Wn.2d at 49-50. The trial court again imposed an exceptional sentence. Barberio, 121 Wn.2d at 50. On appeal, the Washington Supreme Court affirmed imposition of the exceptional sentence. The Court held that while the trial court had the discretion to address an issue that was not the subject of an earlier appeal, the trial court could decide not to exercise that discretion.

> This rule [RAP 2.5(c)(1)] does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question. ... It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. If it does so, RAP 2.5(c)(1) states that the appellate court may review such issue.

Barberio, 121 Wn.2d at 50-51.

Here, unlike in Barberio, the 1992 California conviction for receiving stolen property was the subject of a prior appeal. In the previous appeal, Thomas challenged the inclusion of his 1992 California conviction in the offender score. Thomas argued that the 1992 conviction for receiving stolen property was not comparable to a Washington crime. Thomas, 135 Wn. App. at 487. Because Thomas affirmatively acknowledged that the conviction was properly included in his offender score, we held that Thomas waived his right to challenge the comparability of the conviction for the first time on appeal.

> Below, Thomas conceded his California conviction for receiving stolen property should be included in his offender score. For the first time on appeal, Thomas contends his California conviction for receiving stolen property is not comparable and the court erroneously included it in his offender score.
>
> In State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004), the Washington Supreme Court held that although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state conviction, a defendant's affirmative acknowledgment that a prior out-of-state conviction is properly included in the offender score satisfies the requirements of the Sentencing Reform Act and requires no further proof. Ross, 152 Wn.2d at 230.
>
> Thomas asserts that Ross was erroneously decided because it relieves the State of its burden of proof without requiring a sufficient waiver of the defendant's constitutional rights. Ross is controlling precedent and clearly provides that under these circumstances, Thomas waived his right to challenge the comparability of his California conviction for receiving stolen property.

Thomas, 135 Wn. App. at 487-88.

At oral argument and in his statement of additional authority, Thomas also relies on State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007), to argue our

decision in Thomas that he waived his right to challenge the comparability of the 1992 conviction was erroneous. We disagree.

In Bergstrom, the defense attorney agreed to the State's calculation of the offender score and criminal history. But the defendant objected and argued pro se that some of his prior crimes encompassed the same criminal conduct. Bergstrom, 162 Wn.2d at 91. The sentencing court addressed and rejected Bergstrom's pro se argument. The Supreme Court held that while the sentencing court was entitled to rely on defense counsel's acknowledgement of the offender score and criminal history, because the court considered and ruled on Bergstrom's pro se argument, the court erred in failing to hold an evidentiary hearing to require the State to produce evidence in support of the offender score. Bergstrom, 162 Wn.2d at 97.

Here, unlike in Bergstrom, the record does not support Thomas's assertion that he objected at the 2004 sentencing to his 1992 California conviction for receiving stolen property in his offender score. At the sentencing hearing in 2004, the State asserted that Thomas had an offender score of eight based on the three current convictions, and five prior convictions: the 1980 and 1982 California burglary convictions, a 1992 California conviction for receiving stolen property, a 1995 Washington conviction for bail jumping, and a 1997 Washington conviction for possession of stolen property. The State submitted certified copies of documents to prove the five prior convictions. Thomas's attorney argued that because the 1980 and 1982 California burglary convictions were not comparable to a Washington crime, the offender score was a six.

Essentially what we're going to talk about this afternoon are the

> two burglary convictions from California from 1980 and 1982. And that's mainly what we're going to dispute.
>
> Mr. Stern indicated that he believes that Mr. Thomas has an offender's score of eight. And I'm going to ask the Court to consider some facts about the two burglary convictions that could lead the court to find that he has an offender score of six. . .
>
> I have had conversations with Mr. Thomas at the jail about this case and about the direction to go. One of the issues that I discovered was the prior burglary convictions. Once Mr. Thomas challenged his prior history, the State has the burden of proving the prior history. And Mr. Stern has correctly stated that the burden of proof is preponderance of the evidence.
>
> The State though also has the burden of proving that out-of-state convictions have a comparable Washington State offense, and that it would be a felony in Washington State. And I don't believe that the State has done this in this case. I don't believe that they have provided sufficient proof on the burglaries, based on the documentation that's been provided, that that is comparable to a burglary in Washington State.

After lengthy argument, the sentencing court ruled that the State carried its burden of proving that the 1980 and 1982 California burglary convictions were comparable and the offender score was eight. Based on an offender score of eight, Thomas's attorney asked the court to impose a mid-range sentence. Thomas then addressed the court. In addition to challenging inclusion of the two California burglaries, Thomas argued that his 1995 bail jumping conviction should not be included in the calculation of his offender score.

> Also, I'd like to challenge the validity of the bail jumping. He's using a point on a bail jumping that I was convicted on in 1995, when there was no—There was no case that the bail jumping arrived from. And when I did plead guilty to it some eight years later, I feel that the jurisdiction for the ball [sic] jump had ran out, you know. It didn't have any jurisdiction.
>
> I think that the Courts misunder—I think the Courts didn't have the jurisdiction to even sentence me on a bail jumping that didn't even have a case to it. And I'd like to challenge that too.
>
> I'd like to also thank the Court for being patient and hearing my stuff, my case. And I'm still agreeing with these

> burglaries—And if you look at my record, I don't have any violence. There's no violence on my record. And those burglaries, I don't—There is not a string of them.
>
> MR. LORD: Don't say anything about the burglaries.
>
> THE DEFENDANT: So other than that and the fact that, you know, I would like to file a motion to – To have on record to where I can use as a collateral attack in my upcoming appeal or whatever. I'd like to have the fact that the bail jump—I'd like to challenge the bail jumping and the prosecutor misconduct, and I'd like to file a motion towards Mr. – My ineffective council, Mr. Harris.

Based on this record, we adhere to our decision in Thomas that Thomas waived his right to challenge the comparability of his 1992 California conviction for the first time on appeal.

Thomas also argues that State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007), supports his argument that his attorney provided ineffective assistance of counsel by failing to object to the inclusion of his1992 California conviction in the offender score. In Thiefault, the trial court determined that certain out-of-state convictions were comparable to Washington crimes. Thiefault appealed on other grounds. This court reversed one of his convictions and remanded for resentencing. On remand, Thiefault's attorney did not object to the court's prior comparability analysis. Thiefault, 160 Wn.2d at 413. On appeal, Thiefault argued his attorney provided ineffective assistance by failing to object to the court's comparability determination.

The Supreme Court held that the defense attorney provided ineffective assistance of counsel by failing to object to the sentencing court's erroneous determination that a Montana conviction was comparable. Thiefault, 160 Wn.2d at 413. The Court concluded that the defense counsel's failure to object was deficient

because the record contained insufficient documentation to establish the Montana conviction was factually comparable. Thiefault, 160 Wn.2d at 416-17.

Here, unlike in Thiefault, the sentencing court on remand did not conduct a comparability analysis based on this court's decision that he waived his right to challenge the inclusion of the 1992 California conviction for receiving stolen property in the offender score. We conclude Thomas has not overcome the strong presumption that his attorney provided effective assistance of counsel by failing to object on remand after this court's decision in Thomas to the 1992 California conviction.

In the alternative, Thomas argues that his attorney provided ineffective assistance of counsel by failing to inform the sentencing court that two recent statutory amendments, RCW 9.94A.525(21) and RCW 9.94A.530(2), gave Thomas the right to challenge his 1992 California conviction.[3] Neither RCW 9.94A.525(21) nor RCW 9.94A.530(2) apply here.

RCW 9.94A.525(21) provides:

> The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

[3] See Laws of 2008, ch. 231, §§ 1-5 (effective June 12, 2008).

RCW 9.94A.530(2) provides:

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.[4]

Statutory interpretation is a question of law. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). This court's primary goal in interpreting a statute is to ascertain and give effect to legislative intent. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). If the meaning of a statute is plain on its face, we give effect to the plain meaning as an expression of legislative intent. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

Under the plain language of RCW 9.94A.525(21), "prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing . . ."[5] There is no dispute that beginning with the original sentencing hearing in 2001, Thomas's prior 1992 California conviction for receiving stolen property has been included in his criminal history and the offender score.

[4] (Emphasis added).

[5] (Emphasis added).

Consequently, RCW 9.94A.525(21) does not apply.

RCW 9.94A.530(2) unambiguously gives the State and the defendant on remand, the opportunity to present evidence about criminal history that was "not previously presented." There is no dispute that Thomas's 1992 California conviction for receiving stolen property was previously presented as part of Thomas's criminal history. The State presented proof of the 1992 California conviction for receiving stolen property at the first sentencing hearing. Thomas did not object to the inclusion of the 1992 conviction at that sentencing or the sentencing after granting his personal restraint petition. Thomas's attorney did not provide ineffective assistance on remand following our decision in Thomas by failing to inform the court that Thomas had a right under RCW 9.94A.525(21) and RCW 9.94A.530(2), to challenge the comparability of his 1992 California conviction for receiving stolen property.

Because Thomas cannot meet his burden of showing that his attorney provided deficient performance, we reject his claim of ineffective assistance of counsel, and affirm.[6]

Schindler, C.J.

WE CONCUR:

Appelwick, J.

Cox, J.

[6] Thomas also cannot establish prejudice. The record shows that the sentencing court was well aware of this court's decision in Thomas, and would have decided that Thomas waived his right to challenge the inclusion of the 1992 California conviction in his offender score.