IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN PETER CALENE, Appellant.	)))))))))	No. 67203-7-I DIVISION ONE UNPUBLISHED OPINION FILED: September 17, 2012

Schindler, J. — A jury convicted John Peter Calene of attempting to elude a police vehicle, unlawful possession of methamphetamine, and tampering with a witness. Calene contends the court violated his Sixth Amendment right to retain counsel of his choice by denying the request he made two days before trial to hire private counsel. Calene also argues the court erred in calculating his offender score. We affirm the convictions, but remand to determine the correct offender score.

FACTS

On July 19, 2009, Washington State Patrol Trooper Robert Wilson pulled over the driver of a van for multiple traffic infractions. As Trooper Wilson approached the van, the driver, later identified as John Peter Calene, drove off. During the police pursuit, Calene drove 90 to 95 miles per hour. Trooper Wilson later found a glass pipe with a

white residue during the inventory search of the van.

On July 20, 2010, the State charged Calene with attempting to elude a pursuing police vehicle in violation of RCW 46.61.024.[1] The State alleged that Calene endangered others by his actions in violation of RCW 9.94A.834. Calene did not appear for arraignment on August 20. The court issued a bench warrant for his arrest.

At the arraignment on November 12, Calene entered a plea of not guilty. The court scheduled the trial for January 3, 2011. On December 29, the court granted the State's motion to continue the trial to January 10 based on the unavailability of a witness.

On January 4, Calene filed a notice of intent to assert an alibi defense. The notice states that Calene "has an alibi that can be established through witness Victoria Smith-Pullman of Blaine, WA." On January 10, the court granted the defense motion to continue the trial to January 18 to allow defense counsel additional time to review the recorded telephone calls Calene made from jail.

On January 11, the State filed an amended information charging Calene with unlawful possession of methamphetamine, Count II, and tampering with witness Victoria Smith-Pullman, Count III. By agreement of the parties, the court continued the trial to February 22. The order setting the new trial date states the case has been reset "by agreement of the prosecutor, defense counsel and the defendant."

On February 17, defense counsel filed a motion to continue the trial date to April 25 in order to locate and interview witnesses. The prosecutor objected, stating that the

[1] The legislature amended RCW 46.61.024 in 2010 to add the words "or her" after "his" throughout the statute. Laws of 2010, ch. 8, § 9065.

recorded jail calls showed the motion "is just basically to try and continue this and continue this[and t]here isn't any mention of locating witnesses. . . . There's no one that he's mentioned as a witness that isn't around." The court continued the trial to March 28.

On March 21, Calene posted bond and was released from custody. The prosecutor agreed to the defense request to continue the trial to April 25. Based on the agreed continuance, the court entered an order scheduling the trial for Monday, April 25.

On Thursday, April 21, defense counsel filed a motion to continue the trial for "at least" 60 days "so that Mr. Calene can retain the attorney of his choice." Calene said that private counsel needed "at least a 60-day continuation."

> [Calene] has been out of custody approximately a month at this point and he does want the opportunity to hire private counsel. He has talked with Mr. Fryer. Mr. Fryer is unable to go forward on such a short notice . . . . Mr. Fryer would need at least a 60-day continuation before he would be in a position to represent Mr. Calene in a reasonable fashion.
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> So we are requesting a continuance so that Mr. Calene can retain the attorney of his choice. It's kind of the problem why this didn't happen earlier; obviously, he was in custody and his financial situation was very restricted. Now that he is out of custody, he has been able to work and his employer can assist him in retaining the necessary funds to retain Mr. Fryer.

The prosecutor objected to continuing the trial. The prosecutor told the court that the State agreed to the previous continuance based on defense counsel's representation that it would be the last continuance. The prosecutor also told the court that the attorney who contacted her the day before to discuss a continuance was not "Mr. Fryer" but a different attorney. "[Y]esterday an attorney called me, a Mr. LaRocco[,] and said that Mr. Calene was in there to try to hire him and would I agree to a continuance and I explained

to him no." The prosecutor argued the request was untimely, Calene had not retained private counsel, and his attorney was prepared for trial.

> I understand if he had gotten out and hired a lawyer right at the beginning [of his release from custody] and there was a month for that lawyer to get ready but that isn't the case here. He doesn't have a right to the attorney of his choice on the eve of trial. And here we are on the eve of trial, once again, and have been since January pretty much.
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> So there is no legal basis to continue it. There is no I-need-to-find-witnesses. [Defense counsel] filed a supplemental witness list. She said she contacted the people she needed and was ready.

The prosecutor asserted that Calene expressed no dissatisfaction with assigned counsel and his stated goal was "just to continue" the trial. The prosecutor stated:

> I listened to the in-custody jail calls where he has never indicated he was unhappy with [defense counsel], thought she was doing a good job, and his goal in this, his strategy, was just to get out and continue it as far out as he could.

The court denied the motion to continue the April 25 trial date.

The jury convicted Calene of attempting to elude a police vehicle, unlawful possession of methamphetamine, and tampering with a witness. The jury found that during the commission of the crime of attempting to elude, Calene endangered others.

At the sentencing hearing on May 5, the court granted the prosecutor's request to continue the hearing to allow the State to obtain certified copies of the out-of-state convictions from Idaho and Wyoming. At the hearing on May 24, the State conceded the Idaho convictions were not comparable.[2] The State presented certified copies of a Wyoming judgment and sentence, dated October 4, 1990, and an amended Wyoming judgment and sentence, dated September 25, 1991 for two prior Wyoming convictions.

[2] The prosecutor said the Idaho "drug tax stamp" conviction was not comparable to a Washington offense and the State was unable to obtain documentation to prove the comparability of the possession of a controlled substance conviction.

The State argued that the Wyoming convictions for receiving stolen property and conspiracy to commit larceny should each count as an additional point for purposes of calculating the offender score. The defense argued the convictions were the same criminal conduct and should only count as one point. The court rejected the defense argument.

The State asked the court to impose a concurrent 60-month sentence. Defense counsel "join[ed] the State in the request for 60 months concurrent between all counts inclusive of the enhancement, that it would be added to the eluding in this case, the one year enhancement that makes it the 34 months." The court sentenced Calene to 60 months.

ANALYSIS

Right to Retain Counsel

Calene contends the trial court violated his right to counsel by denying his request for a continuance to retain private counsel. The State argues the court did not abuse its discretion in denying the untimely motion to continue the trial to retain private counsel. We agree with the State.

The Sixth Amendment guarantees the accused the right to counsel. U.S. Const. amend. VI. The right to counsel includes " 'the right to a reasonable opportunity to select and be represented by chosen counsel.' " State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (quoting State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994)). But the right to retain counsel of choice is not unlimited. State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010). A defendant may not unduly delay the proceedings by

making an untimely request to retain new counsel. Aguirre, 168 Wn.2d at 365.

In considering a motion to continue in order to retain counsel of choice, the court "must weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice." Aguirre, 168 Wn.2d at 365. This decision is within the broad discretion of the trial court. Aguirre, 168 Wn.2d at 365.

In Price, the court identified a number of factors to consider in determining whether the trial court abused its discretion in denying a motion to continue to retain counsel.

> (1) [W]hether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Price, 126 Wn. App. at 632.

Calene made the motion to continue two court days before trial was scheduled to begin and had not yet retained private counsel to represent him. Further, Calene did not point to any identifiable prejudice as a result of denying his motion to continue the trial another 60 days in order to retain private counsel. The record shows that the court previously granted a number of continuances at the request of the defense, Calene had not expressed any dissatisfaction with his appointed attorney, and the attorney was prepared for trial. We conclude the court did not abuse its discretion in denying Calene's motion to continue the trial date in order to retain private counsel.

Offender Score

Calene argues the court erred in counting the two prior Wyoming convictions as two points. Calene asserts the Wyoming conviction for conspiracy to commit felony larceny is not comparable to a Washington felony. Calene also asserts the convictions for felony receipt of stolen property and conspiracy to commit felony larceny were the same criminal conduct and should only count as one point.

We review a sentencing court's calculation of an offender score de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). To calculate a defendant's offender score, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, requires the court to determine a defendant's criminal history based on prior convictions and the level of seriousness of the current offense. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). Where a defendant's criminal history includes out-of-state convictions, the court must classify the convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). Comparability is both a legal and factual question. State v. Wilson, 170 Wn.2d 682, 690, 244 P.3d 950 (2010).

To determine whether an out-of-state conviction is comparable to a Washington offense, a court applies a two-part test. State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). The court first compares the elements of the out-of-state crime with the relevant Washington crime. If the elements are comparable, then the out-of-state conviction is counted as an equivalent Washington conviction. State v. Thomas, 135 Wn. App. 474, 480, 144 P.3d 1178 (2006). Where the elements of the out-of-state crime are different or broader, the sentencing court examines the defendant's conduct as

evidenced by the undisputed facts in the record to determine whether the conduct would violate a comparable Washington statute. Thomas, 135 Wn. App. at 480.[3]

The amended Wyoming judgment and sentence states that on September 13, 1990, the court sentenced Calene on four counts:

> [1] Count I, felony receiving property obtained in violation of law, in violation of Wyoming Statute § 6-3-403(a)(i), which offense occurred on or about the 7th through the 18th day of August, 1989;
> [2] Count II, knowingly possessing an automobile with an altered vehicle identification number, in violation of Wyoming Statute § 31-11-103(a)(ii)(b), which offense occurred on or about the 7th through the 18th day of August, 1989;
> [3] Count III, accessory before the fact to the crime of felony larceny, in violation of Wyoming Statute § 6-1-201(a) and 6-3-402(a)(c)(i), which offense occurred on or about the 18th day of August, 1989;
> [4] Count IV, conspiracy to commit felony larceny, in violation of Wyoming Statute § 6-1-303(a) and 6-3-402(a)(c)(i), which offense occurred on the 18th day of August, 1989.

The Wyoming court ordered the concurrent sentence on Count I and Count II to be served consecutively to the concurrent sentence on Count III and Count IV.

Below, the prosecutor argued the Wyoming convictions for receiving stolen property and conspiracy to commit larceny were comparable to Washington offenses and should count as two additional points, resulting in an offender score of 11 on Count I and Count II, and an offender score of 10 on Count III.

> Currently [the Wyoming] criminal statute for receiving a larceny for a felony was a thousand dollars. . . . Our only concern should be if it ever dipped below two hundred fifty, which it didn't, because it wouldn't be comparable for our felony. So at the time Mr. Calene was convicted of a felony of receiving, possessing stolen property, the cut-off in Wyoming was five hundred or above. So that crime is comparable to Washington's law in terms of receiving stolen property.
> The second count is conspiracy to commit larceny and possessing

[3] The prosecutor conceded that the Wyoming convictions for knowingly possessing an automobile with an altered vehicle identification number and accessory before the fact to the crime of felony larceny were not comparable to Washington offenses.

> stolen property or receiving stolen property . . . . It was five hundred at the time Mr. Calene was convicted. So a conspiracy to commit larceny higher than the amount in Washington state which is two-fifty would also be comparable to the Washington state law.
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> So I would submit to the court that the law in Washington would be met in terms of a felony conviction for the two convictions out of Wyoming[,] which would make his offender score basically an eleven on Counts I and II, and a ten on Count III.

In response, defense counsel argued that the two Wyoming convictions constituted the same criminal conduct.

> The only issue that I take is one of what I believe is merger. It's my understanding that each of the crimes for which he was convicted in the state of Wyoming deal with the same course of conduct and same course of conduct in this state in this case is essentially possession of a vehicle known to be stolen. So essentially, Your Honor, while he was convicted of four separate crimes involving that same course of conduct, I would allege that under our statute, that under our offender score statute it would be counted one under the merger rules.

The court rejected the argument that the Wyoming convictions constituted the same criminal conduct. The court counted the Wyoming convictions as two points and calculated the offender score for Count I and Count II as 11, and for Count III as10. "[A]ssuming" the calculation of the offender score was correct, the defense agreed the standard range was 22 to 29 months for Count I, 12 to 24 months for Count II, 51 to 60 months for Count III, and an additional 12 months on the jury finding that Calene endangered others.

On appeal, Calene argues for the first time that the conviction for conspiracy is not comparable and the court erred by counting the Wyoming conviction for conspiracy as one point.[4] In response, the State claims Calene waived his right to challenge the

[4] Calene does not challenge the determination that his prior Wyoming conviction for felony receipt of stolen property is comparable to a Washington offense.

court's calculation of his offender score, and Calene cannot show prejudice. Nonetheless, the State concedes that Calene's Wyoming conspiracy conviction is not legally comparable to a Washington crime.

> The State concedes that the Wyoming conspiracy conviction is not legally comparable to a Washington felony because under RCW 9.94A.525(4) only felony anticipatory offenses are to be included in the offender score, and under Washington law at the time Calene committed the offense, conspiracy to commit second degree theft would have been a gross misdemeanor. RCW 9A.28.040(3)(d) (1989); RCW 9A.56.040 (1989); Wilson, 170 Wn.2d at 687-88. This does not preclude his conspiracy offense, however, from being factually comparable to a conspiracy to commit first degree theft, if the item Calene conspired to take had in fact been valued at over $1500.

We accept the State's concession as well taken and remand to determine the correct offender score. A sentencing court that erroneously calculates an offender score acts without statutory authority under the SRA. In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). An illegal or erroneous sentence may be challenged for the first time on appeal. Ford, 137 Wn.2d at 477; In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). Although a defendant can waive factual errors, a defendant does not waive legal errors based on lack of statutory authority. Wilson, 170 Wn.2d at 688-89. The court has the power and duty to correct the erroneous calculation of the offender score. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).[5] On remand, the State may present additional evidence to support its argument that the Wyoming conspiracy conviction is factually comparable to a Washington offense, and Calene is not precluded from arguing same criminal conduct. State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009).

[5] Accordingly, we reject the State's argument that the error is harmless.

Statement of Additional Grounds

In his statement of additional grounds, Calene argues insufficient evidence supports his conviction for tampering with witness Smith-Pullman.[6] Viewed in the light most favorable to the State, the evidence supports the conviction for witness tampering. The recorded jail calls made to Smith-Pullman show that Calene coached Smith-Pullman to testify that he was with her on the date of the crime.

Calene also argues his attorney provided ineffective assistance by failing to call witnesses that he identified. A strong presumption exists that trial counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The decision about whether to call a particular witness or present certain evidence is a matter of legitimate trial strategy and tactics. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). Here, the record shows that defense counsel and the investigator talked to Calene about the witnesses and made the decision not to call those witnesses to testify at trial. Calene cannot establish ineffective assistance of counsel.

Calene asserts the trial court improperly instructed the jury that they had to be unanimous to answer "no" on the special verdict form in violation of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). But in a recent case, State v. Nunez, 174 Wn.2d 707,

[6] In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A challenge to the sufficiency of the evidence admits the truth of the evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

___ P.3d ___ (2012), our supreme court overruled the nonunanimity rule set forth in Bashaw. The court concluded that the nonunanimity rule in Bashaw "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." Nunez, 174 Wn.2d at 709-10. In reaching this decision, the court noted that under the SRA, the legislature "intended complete unanimity to impose or reject an aggravator." Nunez, 174 Wn.2d at 715 (citing RCW 9.94A.537(3)). The trial court did not err in instructing the jury on the aggravating factor.

The other arguments Calene makes, that the trial court violated the rule of completeness under ER 106 by permitting the State to play a redacted version of a jail call recording, the court erred in concluding the officers lawfully seized the glass pipe and other evidence during the inventory search of the van, the prosecutor prevented him from exercising his constitutional right to compulsory process by calling Smith-Pullman to testify, and his counsel provided ineffective assistance by failing to object to the State's use of the jail call recording, are without merit.

We affirm the convictions of attempting to elude a police vehicle, unlawful possession of methamphetamine, and tampering with a witness, but remand to determine the correct offender score.

Schindler, J.

WE CONCUR:

Cox, J.

Becker, J.