69906-7

69906-7

NO. 69906-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RODNEY LOUIS GARROTT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Was Garrott's right to due process infringed when the court included his subsequently committed and subsequently discovered convictions in his offender score upon resentencing after his collateral attack?

B. STATEMENT OF THE CASE

The procedural history of the two cases that are the subject of this appeal is convoluted due to the number of felony charges amassed by Garrott between 2003 and 2005.[1]

Garrott was charged in 2003 with Residential Burglary under cause number 03-1-07859-6 SEA. CP 115. Also, in August of 2003, Garrott was charged in an unrelated case with two counts of Residential Burglary under cause number 03-1-08069-8 SEA. CP 1-2. Then, in November of 2003, Garrott was charged with second-degree Possessing Stolen Property in a third unrelated case filed as cause number 03-1-09848-1 SEA. CP 295.

[1] A visual representation, which may be useful to the court, is included as Appendix A. The shaded boxes represent the two cause numbers that are the subject of this appeal.

Garrott chose to go to trial on 03-1-07859-6 SEA, and on December 18, 2003, he was convicted by a jury of Residential Burglary and first-degree Trafficking in Stolen Property. CP 115. He was sentenced on April 23, 2004. CP 115-21.

On May 18, 2004, Garrott pled guilty to the charges under cause numbers 03-1-08069-8 SEA and 03-1-09848-1 SEA. CP 23, 316. He was sentenced on May 28, 2004. CP 23-30, 316-22. Because Garrott had already been convicted following the trial in 03-1-07859-6 SEA, two points for those felony convictions were properly included in his offender scores at the May 28, 2004, sentencing hearing.[2]

Garrott appealed his jury conviction under cause number 03-1-07859-6 SEA. CP 90-91. He did not appeal the May 28, 2004, sentences that resulted from guilty pleas (hereinafter referred to as the "2004 convictions"). The 2004 convictions are the subject of this direct appeal.

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[2] The original judgment and sentences erroneously refer to these convictions by the cause number 03-1-04147-1 SEA, but it is clear from the sentencing date (April 23, 2004) and crimes (residential burglary and trafficking) that they are the convictions in 03-1-07859-6 SEA. The 03-1-04147-1 case number relates to yet another, earlier 2003 conviction of Garrott's. See CP 29, 321.

In early 2005, while the appeal on the trial case was pending, Garrott was released from prison on all of the 2003 cause numbers and began the community custody portion of his sentences. CP 91, 133. Garrott promptly reoffended, and was charged with new felony offenses under two King County cause numbers: 05-1-10944-7 KNT (Residential Burglary) and 05-1-07082-6 SEA (Residential Burglary). CP 91.

While the new 2005 charges were pending, Garrott's jury convictions under cause number 03-1-07859-6 SEA were reversed on appeal. CP 91. On July 28, 2005, just two weeks after the mandate issued on the reversed case, Garrott pled guilty to one count of Residential Burglary under the mandated cause number. CP 91, 136. In exchange for his plea, the first degree Trafficking in Stolen Property charge was dismissed. CP 91, 137. That same day, Garrott also pled guilty to Residential Burglary under one of the new 2005 cause numbers, 05-1-07082-6 SEA. CP 91, 144. He was sentenced for both cases on February 3, 2006. CP 91, 136-51.

Later, on March 15, 2006, Garrott was convicted of Residential Burglary following a jury trial on the remaining 2005 cause number, 05-1-10944-7 KNT. CP 153. He was sentenced on April 7, 2006. CP 153-61.

In August of 2011, Garrott filed a personal restraint petition in the Washington Supreme Court arguing that because his 2003 trial case had been reversed on appeal in 2005, his judgments and sentences on the 2004 cases, which included two points for the reversed case, were facially invalid. The State conceded that Garrott's offender scores, although correct when the sentences were imposed, later became inaccurate based on the reversal of the trial case. The State agreed that State v. Klump[3] and State v. King[4] provided authority for Garrott's argument that his 2004 sentences were "facially invalid." CP 91-92, 163-64.

However, the State pointed out that Garrott had subsequently been re-convicted of Residential Burglary under the reversed trial case, as well as two additional felonies under the new 2005 cause numbers. CP 92, 164. The State noted that if Garrott was resentenced on the 2004 cases, his offender scores would be

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[3] 80 Wn. App. 391, 909 P.2d 317 (1996).

[4] 135 Wn. App. 662, 674, 145 P.3d 1224 (2006).

calculated as of the date of the resentencing, and would likely be higher. Id. The Supreme Court Commissioner questioned whether Garrott appreciated "the peril underlying his request for resentencing" and asked Garrott to clarify his desires in a supplemental memorandum. CP 164. After receiving Garrott's supplemental memorandum, the Commissioner transferred the petition to a department of the Supreme Court, who remanded the 2004 cases for resentencing. CP 92, 165.

Garrott elected to represent himself on remand. RP 22-31. He moved for dismissal of the 2004 cases, arguing that when the unrelated trial case was reversed in 2005, that decision automatically "invalidated" the sentences in the 2004 cases, and the State had an obligation to resentence him at that time.[5] CP 167-68, 400-01; RP 61-64. On February 1, 2013, the trial court denied Garrott's motion to dismiss, and resentenced him within the standard range. CP 186-93, 419-26; RP 67. When calculating Garrott's standard ranges for resentencing, the court included in his offender scores Garrott's 2005 convictions, as well as four additional prior felony convictions from Illinois, the existence of which the State had discovered following his arrest on the 2005

[5] Garrott did not designate his written motion as clerk's papers in this appeal.

charges. CP 187, 192, 420, 425; RP 67. Garrott now appeals and argues that none of his subsequent convictions and subsequently discovered convictions should have been included in his offender scores upon resentencing. CP 291-92, 431-32.

C. ARGUMENT

Citing "fundamental fairness," Garrott contends that after his 2003 trial case was reversed on appeal in 2005, the State had an affirmative obligation to move to reopen two unrelated 2004 final judgment and sentences, and ask that he be resentenced without including any of his subsequent convictions or subsequently-discovered offenses in his offender score. Garrott cites to no persuasive authority for this position. Indeed, the State had no ability or obligation to reopen cases in which Garrott had a legitimate expectation of finality. Garrott's sentences must be affirmed.

THE SENTENCING COURT PROPERLY INCLUDED GARROTT'S SUBSEQUENT AND SUBSEQUENTLY DISCOVERED CONVICTIONS IN HIS OFFENDER SCORES UPON RESENTENCING.

A properly calculated offender score includes "all other current and prior convictions[.]" RCW 9.94A.589(1)(a). A prior

conviction is one that "exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). Thus, if a defendant is resentenced, crimes of which he was convicted after his original sentencing are "prior convictions" that must be included in his offender score. See State v. Shilling, 77 Wn. App. 166, 175, 889 P.2d 948, rev. denied, 127 Wn.2d 1006, 898 P.2d 308 (1995) ("The offender score includes ***all*** prior convictions . . . existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology."); State v. Collicot, 118 Wn.2d 649, 827 P.2d 263 (1992) (subsequent convictions appropriately used to calculate the defendant's offender score upon resentencing); State v. Clark, 125 Wn. App. 515, 94 P.3d 335 (2004) (sentencing court properly included in defendant's offender score subsequent convictions that occurred during pendency of appeal).

Indeed, in 2008, the legislature amended the Sentencing Reform Act ("SRA") to further "ensure that sentences imposed accurately reflect the offender's actual, complete criminal history,

whether imposed at sentencing or upon resentencing." Laws of 2008, ch. 231, § 1 (emphasis added). The stated impetus for the legislature's action was several decisions of the Washington Supreme Court which had limited a sentencing court's ability to consider certain prior convictions when calculating a defendant's offender score upon resentencing.[6] Laws of 2008, ch. 231, § 1. Included in the adopted changes was:

> 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 included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

Laws of 2008, ch. 231, § 3 (currently codified as RCW 9.94A.525(22)) (emphasis added).

Additionally, the legislature specified, "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

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[6] The legislature cited to In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002), State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) and State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999).

history not previously presented." Laws of 2008, ch. 231, § 4 (currently codified as RCW 9.94A.530(2)) (emphasis added).

Garrott's resentencing hearing in 2013 occurred as a result of his 2011 collateral attack. Therefore, the resentencing court was statutorily required to consider all of his prior criminal convictions, including those that he committed after his original sentencing in 2004, and those additional Illinois convictions that the State discovered after his original sentencing hearing in 2004.

Garrott does not acknowledge this statutory mandate.[7] Rather, he simply declares that it was "patently unfair, and violative of due process and fundamental fairness" for the court to have included his subsequent convictions in his offender scores.[8] Brf. of App. at 6. However, Garrott's argument begins and ends with the mistaken assertion that the State had the ability and obligation to move to reopen his final 2004 sentences following the reversal of an entirely unrelated case in 2005.

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[7] Although he does not mention or discuss the requirements of the SRA, Garrott argues that this Court should follow State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), instead of Collicot, supra. However, in approving the inclusion of subsequent convictions in the offender score at a resentencing hearing, the court in Collicot distinguished the facts of Whitaker, stating, "We are not here concerned with probation and revocation." Collicot, 118 Wn.2d at 665. Garrott's situation is legally indistinguishable from Collicot.

[8] In fact, this Court has determined that due process was not violated when subsequent convictions were included in the offender score upon resentencing. State v. Bryan, 145 Wn. App. 353, 363-64, 185 P.3d 1320 (2008).

Garrott cites to no authority in support of his pronouncement that the State was required to move "for resentencing in 2006." Brf. of App. at 6. This court need not consider a claim where no argument is made beyond an assertion of the conclusion itself. State v. Martin, 41 Wn. App. 133, 141, 703 P.2d 309 (1985) (citing Hockley v. Hargitt, 82 Wn.2d 337, 345, 510 P.2d 1123 (1973)). In any event, due process does not require that when a conviction is reversed on appeal, the State comb through the defendant's unrelated final judgments and sentences to determine whether the reversal affects those other cases, and then move to reopen them.

In fact, the State would have been prohibited from attempting to resentence Garrott. By the time the trial case was reversed in 2005, the State had discovered four additional felony convictions from Illinois belonging to Garrott. CP 142, 150. And, just two weeks after the mandate issued in the reversed trial case, Garrott pled guilty to the reversed case, as well as to a new felony offense. CP 91, 136. Therefore, after the trial reversal in 2005, Garrott's offender scores and standard ranges in the 2004 matters would have been substantially higher than originally reflected on the final judgments and sentences.

The double jeopardy clause prevents the State from increasing a sentence (even if it is erroneous) if the defendant has a legitimate expectation of finality in it. State v. Hardesty, 129 Wn.2d 303, 310-11, 915 P.2d 1080 (1996). If the defendant is not on notice that his sentence might be modified, and if he has substantially served it, he has a legitimate expectation of finality. Id. at 312. The State did not appeal, challenge, or otherwise place Garrott on notice that it would seek to alter his 2004 sentences—sentences that Garrott did not appeal and had substantially served. If the State had moved to reopen the 2004 cases and resentence Garrott over a year later when his unrelated trial case was reversed, double jeopardy would have precluded a resentencing.

Belying Garrott's claim of "unfairness" is the reality that the only reason he is now serving more time on the 2004 cases is because he collaterally attacked them in 2011, after having been convicted of additional crimes in the interim. The State had no ability, much less obligation, to unilaterally move to reopen and resentence Garrott in matters that were final. Garrott was given the opportunity in 2012 to withdraw his personal restraint petition and let a sleeping dog lie. He chose to awaken it, and his appeal should be rejected.

D. CONCLUSION

For all of the above-stated reasons, the State respectfully requests this Court to affirm the judgments and sentences.

DATED this 22nd day of October, 2013.

Respectfully submitted,

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APPENDIX A

2003	2004	2005	2006	2011	2013
03-1-07859-6 Res. Burg. Trafficking 1 Convicted Jury Dec. 18, 2003 APPEALED	03-1-08069-8 03-1-09848-1 Res. Burg PSP 1 Pled Guilty May 18, 2004 Sentenced May 28, 2004 NO APPEAL	Released January 2005 Reoffended Early 2005 05-1-07082-6 05-1-10744-7 Remanded July 2005 03-1-07859-6 Pled Guilty July 28, 2005 03-1-07859-6 05-1-07082-6	Sentenced Feb. 3, 2006 03-1-07859-6 05-1-07082-6 Convicted Jury Mar. 15, 2006 05-1-10744-7 Sentenced April 7, 2006 05-1-10744-7	03-1-08069-8 03-1-09848-1 Collateral Attack Filed August 2011 Remanded for Resentencing Sept. 2012	03-1-08069-8 03-1-09848-1 Resentenced Feb. 2, 2013 THIS APPEAL

*Shaded boxes represent the two cause numbers that are the subject of this appeal.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. RODNEY LOUIS GARROTT, Cause No. 69906-7 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 22 day of October, 2013

Name
Done in Seattle, Washington