No. 91351-0
Court of Appeals No. 71216-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFF HEURTELOU,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Jeff Heurtelou asks this Court to accept review of opinion of the Court of Appeals in *State v. Heurtelou*, 71216-1-I.

B. OPINION BELOW

Mr. Heurtelou contends the sentencing court violated the provisions RCW 9.94A.530(2) where the sentencing court considered facts regarding the victims and other codefendants and those facts were not proved by the State, or agreed to or acknowledged by Mr. Heurtelou. The Court of Appeals recognized that statute expressly permit a court to consider such facts, nor expressly require an objection by defendant, but nonetheless concluded Mr. Heurtelou's failure to object barred his appeal.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

RCW 9.94A.530(2) bars a court from considering at sentencing facts which have not been proved, agreed to or acknowledged by the defendant. That statute provides that a defendant acknowledges facts alleged in a presentence report if he does not object to them. That statute does not treat the failure to object to other facts, i.e., those not contained in the presentence report, as an acknowledgment.

Nonetheless the Court of Appeals expanded application to treat he failure to object to any factual allegation as an acknowledgment. Does that expansion of a trial court's sentencing authority beyond that provided in the statute conflict with this court's decisions and present significant constitutional issues by shifting the burden of proof at sentencing?

D. STATEMENT OF THE CASE

Mr. Heurtelou pleaded guilty to seven counts of first degree robbery and two counts of first degree burglary. CP 27. The charges arose from a series of incidents in which Mr. Heurtelou and others entered several apartments used by massage therapists and robbed those present of money and property. CP 4-11. As part of his plea agreement, Mr. Heurtelou agreed to recommend a sentence of not less than 273 months. CP 31.

At sentencing, the State discussed in detail the sentences imposed by different sentencing judges in the case of the other codefendants. 11/1/13 RP 4-6. The victims did not appear at nor speak at sentencing. However, at the court's invitation, the prosecutor discussed details of the victims' lives. *Id.* at 7-9.

Based upon the prosecutors' presentation, the court imposed a sentence of 297 months. CP 48

E. ARGUMENT

This Court has long recognized that "A [] court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.530(2) provides in relevant part:

> 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. . . .

The purpose of this doctrine is to protect the defendant from the trial court's "'consideration of unreliable or inaccurate information.'" *State v. Morreira*, 107 Wn. App. 450, 456-57, 27 P.3d 639 (2001) (quoting *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990)). That purpose is consistent with the requirement that the State bears the burden of presenting evidence to support the sentence imposed

regardless of whether the defendant objects. *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). The State cannot meet that burden by bare assertions unsupported by evidence. *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

Consistent with that recognition, RCW 9.94A.530(2) limits those facts a court may consider when imposing any sentence other than an exceptional sentence above the range. *Hunley* found unconstitutional the portion of the statute pertaining to criminal history, and cast serious doubt on the constitutionality of the concept of "acknowledgment" altogether, saying:

> There must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in *an unconstitutional shifting of the burden of proof to the defendant*

Hunley, 175 Wn.2d at 912 (Emphasis in original, internal quotations and citations omitted.). But even assuming the notion survives, it cannot mean more than what the statute provides.

In this case, the sentencing court invited the prosecutor to provide details of the victims' lives. The court asked the prosecutor to give her a "picture" of "what they are like." 11/1/13 RP 7. Thus, the prosecutor was allowed to detail that many of the victims were recent

immigrants and may have potentially been victims of a human trafficking ring, of which Mr. Heurtelou was not a part and of which there is no reason to believe he had knowledge. *Id.* at 7. The court also permitted the deputy prosecutor to detail the sentences imposed by another judge on Mr. Heurtelou accomplices. *Id.* at 7-8.

Mr. Heurtelou did not agree to the facts regarding his accomplices' sentences or of the victim's background. The State did not prove those facts at a trial or any hearing. Those facts are not contained in the State's presentence report, and thus Mr. Heurtelou did not acknowledge them by failing to object. In his plea agreement Mr. Heurtelou agreed the sentencing court could consider the facts set forth in the certification for determining probable cause. CP 43. But the facts considered by the sentencing court were not contained in that document. RCW 9.94A.530(2) did not permit the court to consider any of those facts in setting Mr. Heurtelou's sentence. But it is plain the court did just that.

In announcing her sentence, the judge said "surely you knew after the first few times that you were dealing with young women from another country." RP 12. "I don't know how you could not have known that these women weren't human trafficking victims." *Id* at 13. Finally,

the court said "I can't find a basis to distinguish you from [your codefendants]. *Id.*

Mr. Heurtelou did not agree to or acknowledge the facts regarding his accomplices' sentences imposed by a different judge. He did not agree to or acknowledge the facts of the victim's past and current immigration circumstances. The State did not prove those facts. Although the sentencing judge may have wished to have a clearer "picture" of the victims and their lives, RCW 9.94A.530(2) restricts the type of information the sentencing court considers, even when imposing a standard range sentence. The trial court went beyond those restrictions and exceeded its sentencing authority.

As the Court of Appeals recognized, the facts at issue were not contained in the presentence report. Opinion at 3. Thus, by the plain language of the statute the failure to object could be not be deemed an acknowledgement of those facts. But the opinion nonetheless concludes the facts were acknowledged. *Id.* By the logic of the opinion a sentencing court is free to consider any facts it wishes, despite the plain language of the statute to the contrary. The only apparent limitation is an objection by a defendant, even though the statute does not require one. The opinion removes all restraints on a sentencing court's

consideration of unproven facts. In the place of the statutory limits, the Court of Appeals instead places the burden on the defendant to object. That is precisely the sort of unconstitutional burden shifting which *Hunley* rejected.

Pursuant to RAP 13.4 this Court should accept review of this case.

F. CONCLUSION

For the reasons above, this Court should accept review in this case.

Respectfully submitted this 19th day of February, 2015.

GREGORY C. LINK – 25228
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFF HEURTELOU, Appellant.	)	No. 71216-1-I DIVISION ONE UNPUBLISHED OPINION FILED: January 26, 2015

BECKER, J. — Defendants who receive a standard-range sentence must object to unproven assertions of fact presented at sentencing to preserve error under the real facts doctrine.

Appellant Jeff Heurtelou, received a standard range sentence of 297 months after he pleaded guilty to seven counts of first-degree robbery and two counts of first-degree burglary. The charges arose from a series of incidents in Bellevue in which Heurtelou and others entered apartments used by massage therapists and robbed those who were present. As part of his plea agreement, Heurtelou agreed to recommend a sentence of not more than 273 months. The State recommended a sentence of 315 months. Both recommendations were within the standard range.

At sentencing, upon the request of the court, the prosecutor provided details about the sentence imposed on one of Heurtelou's accomplices. The

State responded that the sentence was about 25 years, somewhat less than what the State had recommended. Counsel for Heurtelou acknowledged that the sentence was 297 months:

> I have the judgment and the sentence for the other individual, your Honor. If you would like to know about it, it was 297 months.

The prosecutor next stated that she had met with many of the victims and that they supported the resolution of the case. The court asked the prosecutor about who the victims were. The prosecutor described them and indicated that they had been brought into the Bellevue area in a human trafficking scheme. Defense counsel responded that Heurtelou was unaware of the human trafficking aspect of the victims' lives;

> I think that it is fair to say that [Heurtelou] did not understand or know that these individuals were involved in human trafficking. . . .
>
> . . . .
>
> . . . I am sure that what he is hearing about these women and the other things that they have been subjected to, it is even more painful.

Heurtelou did not object to any portion of the State's presentation. The court imposed a sentence of 297 months, commenting that there appeared to be no distinction between Heurtelou's conduct and that of his accomplice. Heurtelou appeals the sentence.

Ordinarily, a sentence within the standard range may not be appealed. RCW 9.94A.585(1). Few exceptions to this rule exist. State v. Mail, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993). One exception is where the appellant challenges the procedure by which the trial judge arrived at the sentence. Mail, 121 Wn.2d at 711.

Heurtelou contends that the procedure by which the trial judge arrived at the sentence imposed in this case violated a statute providing that the 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." RCW 9.94A.530(2). This statute is recognized as the source of what is known as the "real facts" doctrine. Mail, 121 Wn.2d at 711 n.2.

The same statute also provides, "Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing." RCW 9.94A.530(2). Heurtelou contends that it was error for the court to consider the details about his accomplice's sentence and the lives of the victims because he did not agree to or acknowledge these facts.

Defense counsel clearly acknowledged the information provided about the sentence imposed upon the accomplice. It is true that he did not explicitly acknowledge the truth of the information about the victims, and that information was not stated in a presentence report. Nevertheless, under Mail, Heurtelou's failure to raise a timely and specific objection to the court's consideration of the information still constitutes an acknowledgment for purposes of RCW 9.94A.530(2). Mail, 121 Wn.2d at 711-12. Accord State v. Grayson, 154 Wn.2d 333, 338-39, 111 P.3d 1183 (2005) (acknowledged facts include all those facts presented or considered during sentencing that are not objected to by the parties.) This is because a sentencing court is obligated to consider other

information and arguments in addition to what is included in a presentence report. Former RCW 9.94A.110 (2000); Mail, 121 Wn.2d at 711.

In order to escape the prohibition against appealing a standard range sentence, an appellant like Heurtelou must show either that the trial court refused to consider information mandated by RCW 9.94A.500(1) or that he "timely and specifically objected to the consideration of certain information and that no evidentiary hearing was held." Mail, 121 Wn.2d at 713. Because Heurtelou has not made this showing, we may not review his standard range sentence.

Appeal denied.

Becker, J.

WE CONCUR:

Spearman, C.J.

Ellington, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71216-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 19, 2015

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