

FILED
Sep 16, 2015
Court of Appeals
Division I
State of Washington

NO. 72332-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICKY LEE LEWIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HELEN HALPERT

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
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TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Goodwin, 146 Wn.2d 861,
50 P.3d 618 (2002)..... 4, 5

State v. Ford, 137 Wn.2d 472,
973 P.2d 472 (1999)..... 4, 6

State v. Moen, 129 Wn.2d 535,
919 P.2d 69 (1996)..... 4

State v. Mutch, 171 Wn.2d 646,
254 P.3d 803 (2011)..... 4

State v. Nitsch, 100 Wn. App. 512,
997 P.2d 1000 (2000)..... 6, 7

State v. Ross, 152 Wn.2d 220,
95 P.3d 1225 (2004)..... 6

State v. Wiley, 124 Wn.2d 679,
880 P.2d 983 (1994)..... 4

Statutes

Washington State:

RCW 9.94A.030 1

RCW 9.94A.525 1, 5

Other Jurisdictions:

Georgia Code § 16-8-2 5

Other Authorities

Sentencing Reform Act 1, 4, 5, 6

A. ISSUE PRESENTED

Did Lewis, by agreeing to the correctness of the State's understanding of his criminal history, his offender score, and his standard sentence range, waive any challenge to the factual predicate for his sentence?

B. STATEMENT OF THE CASE

The State alleged that Ricky Lee Lewis assaulted B.A.P. and unlawfully restrained her by striking her when she refused to engage in sexual intercourse and held her down to keep her from leaving his trailer. Lewis also restrained another woman, C.M.S. from leaving his trailer by striking her and forcibly engaging in sexual intercourse. CP 4-6. Lewis was charged by amended information in King County Superior Court with assault in the second degree and two counts of unlawful imprisonment against victims B.A.P. and C.M.S. CP 65-66.

Lewis pled guilty to the amended charges in exchange for the State's agreement to dismiss another filed felony case and the promise not to file additional charges related to yet another case involving a different victim. CP 67-80; RP 12. There was no dispute as to Lewis' criminal history, his offender score, or the

standard range. The “Statement of Defendant on Plea of Guilty” provides that the “...statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney’s statement is correct and complete.” CP 69.

The sentencing court – relying on the scoring forms, appendix B and the felony plea agreement – calculated Lewis’s offender score to be a “9” as to count I and an “8” as to counts II and III. CP 86-91. The State and Lewis jointly recommended a sentence of 84 months. CP 91. The trial court followed that recommendation. CP 94-102.

C. ARGUMENT

LEWIS CANNOT RAISE A FACTUAL CHALLENGE TO HIS OFFENDER SCORE FOR THE FIRST TIME ON APPEAL.

Lewis argues that the trial court miscalculated his offender score by attributing a “point” to an out-of-state prior conviction committed when he was 17 years-old. Based on that fact alone he asserts that the conviction was a “juvenile offense” and should not have been given a whole “point” in calculating his offender score. Br. of App. at 5. He has waived this fact-based claim. Moreover,

he provides neither documentation nor legal reasoning based on Georgia law to support his assertion that the prior conviction was a “juvenile” offense.

Under the SRA, a sentencing court is required to determine a defendant’s offender score based on his or her prior convictions and the level of seriousness of the current offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). A trial court’s calculation of the offender score is reviewed de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An illegal or erroneous sentence can be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 472 (1999), *citing* State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996). However, a defendant waives an alleged sentencing error that involves an *agreement to facts*, later disputed. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

Lewis’s present challenge is to the factual predicate for his offender score; it is not a challenge to the way the score was *calculated*. When scoring a “violent offense,” a prior adult nonviolent felony conviction is scored as a “point” and a juvenile

nonviolent felony offense is scored as a "1/2" point.¹ According to his "Appendix B," Mr. Lewis received three years "confinement" in Georgia for "theft by taking – auto theft."² CP 89. Whether Lewis's conviction occurred in adult or juvenile court is a question of fact that was not established in the trial court because Lewis agreed that the prosecutor's understanding of his criminal history was correct. By agreeing that the State's recitation of his prior criminal history was correct, and by agreeing to the offender score and standard range, Lewis agreed that the Georgia conviction was obtained in adult court.

"Legal error" like that found in In re Pers. Restraint of Goodwin and its progeny did not occur in this case. In In re Pers. Restraint of Goodwin, "legal error" occurred when the defendant's

¹ RCW 9.94A.525(8) states: "If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

² It seems highly probable that Lewis's factual concession in the trial court was appropriate. "Theft by Taking" is defined under Georgia Code § 16-8-2. Under Georgia Code § 16-8-12, a person convicted of violating this section shall be punished as a misdemeanor except when an enumerated set of circumstances are applicable; including the type of property, its value and whether a subsequent offense has occurred. If the property taken was at least \$5,000.00 in value but less than \$25,000 in value, imprisonment for not less than one year nor more than ten years would be imposed. Mr. Lewis' sentence falls within this range. Lewis has provided no authority suggesting he could have served three years of confinement under a juvenile adjudication for this offense in Georgia.

“washed out” prior juvenile convictions were erroneously included in the defendant’s offender score. There was no dispute that the prior convictions existed, that they were handed down in juvenile court, and that they were obtained during a relevant time period. As a matter of law, because the prior convictions should not have been included in an offender score, the sentence was in excess of the court’s statutory authority. Id. at 621, 874.

Similarly, in State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999), the defendant did not dispute the existence of his prior out-of-state convictions at sentencing, but he did challenge their inclusion in his offender score calculation, claiming that as a result of those convictions he had been civilly committed. Id. at 475. The State, however, orally asserted that the prior convictions were comparable to Washington law but did offer any court records, documentation or comparable Washington statutes. Id. at 476. Despite holding that Mr. Ford did not waive his challenge to the sentence, and that the State was under a burden to prove by a preponderance of the evidence the comparability of offenses, the court recognized that a sentencing court may rely upon unchallenged facts and information under the SRA. Id. at 482.

This holding is analogous to a comparability challenge after an affirmative acknowledgment by a defendant that prior out-of-state or federal convictions are comparable. See State v. Ross, 152 Wn.2d 220, 232, 95 P.3d 1225 (2004); State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000). In Nitsch, the defendant claimed for the first time on appeal that the trial court should have found two prior convictions to be of the same criminal conduct. Id. at 518. However, because Nitsch affirmatively acknowledged his offender score in his pre-sentence report in addition to the “plea agreement,” waiver was found. Id. at 522.

Much like Nitsch, Lewis’ assertion requires a review of the underlying factual context of his prior out-of-state conviction. Id. at 524, 525. Mr. Lewis explicitly and affirmatively acknowledged the comparability and legal classification of his prior conviction as an adult felony offense. His repeated acknowledgment and agreement to the accuracy and completeness of the scoring forms, criminal history (Appendix B), offender score and comparability, relied upon by the parties and trial court establishes waiver as to his factual dispute.


D. CONCLUSION

The trial court properly determined Lewis's offender score based on agreed facts and circumstances surrounding the his prior criminal history, including his prior out-of-state conviction. Mr. Lewis affirmatively acknowledged the existence and circumstances of his prior conviction as an adult felony offense. Because Mr. Lewis' claim arises out of a factual dispute, no "legal error" occurred, so this claim may not be raised for the first time on appeal. The sentence did not exceed the court's authority.

DATED this 15th day of September, 2015.

Respectfully submitted,

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By 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Maureen Cyr, the attorney for the appellant, at Maureen@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Ricky Lee Lewis, Cause No. 72332-4, 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 15 day of September, 2015.


Name:
Done in Seattle, Washington