

No. 44659-6

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN EDWARD TURNER,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Mr. Turner committed the crime of possession of a stolen motor vehicle.

2. The State did not prove beyond a reasonable doubt that Mr. Turner committed the crime of possession of motor vehicle theft tools.

3. The State did not prove Mr. Turner's criminal history for purposes of calculating the offender score.

4. The trial court erred in calculating the offender score.

5. The trial court's finding that Mr. Turner had the ability to pay the ordered financial obligations is not supported by the record. Judgment and Sentence Finding of Fact 2.5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the crime of possession of a stolen motor vehicle, the State must prove beyond a reasonable doubt (1) the accused possessed a stolen motor vehicle and (2) knew the vehicle was stolen. Did the State fail to prove Mr. Turner possessed the vehicle where he merely placed personal belongings in the vehicle? Did the State fail to prove he knew the vehicle was stolen where there was no evidence of Mr. Turner's guilty knowledge?

2. To prove the crime of possession of motor vehicle theft tools, the State must prove the accused possessed a motor vehicle theft tool under circumstances evincing an intent to use the tool in the commission of motor vehicle theft. Did the State fail to prove the elements of the crime where the State did not prove Mr. Turner possessed the screwdriver or intended to use it to steal a car?

3. The State bears the burden to prove an offender's criminal history for purposes of calculating the offender score. The State may not rely on bare allegations unsupported by evidence. Did the State fail to prove Mr. Turner's criminal history where it merely listed his alleged prior convictions and presented no evidence to prove the allegations?

4. The trial court did not inquire as to Mr. Turner's financial condition or his present or future ability to pay his legal financial obligations but entered a written finding that Mr. Turner had the present or future ability to pay them. Must the trial court's factual finding be stricken in the absence of any supporting evidence in the record?

C. STATEMENT OF THE CASE

On November 18, 2012, Rindel Caba called police and said his car was stolen. RP 17, 23. He had been visiting someone in Tacoma when he noticed his car was missing. RP 29. The car was taken sometime between 3 and 11 a.m. that day. RP 29-30. The car was a white, two-door 1991 Honda Civic. RP 20.

Almost a month later, on the afternoon of December 13, Lakewood Police Lieutenant Chris Lawler was in a marked police car driving northbound on Lincoln in Lakewood. RP 32, 36. He saw a car approaching, going southbound through an intersection. RP 38, 57. Lieutenant Lawler's attention was drawn to the car because it drove through the intersection without stopping, which was unusual. RP 57. The woman sitting in the passenger seat looked at him and appeared to be surprised. RP 38. Lieutenant Lawler could not see who was sitting in the driver's seat. RP 40.

Although there was nothing remarkable about the car, Lieutenant Lawler ran the license plate number on the computer in his police car. RP 38-39, 41. He learned the car had been reported stolen. RP 40. It was Mr. Caba's stolen Honda. RP 25, 38-39.

When Lieutenant Lawler looked up again, the car was gone. RP 40. He turned down the street and headed in the direction the car had been going. RP 42. A few minutes later, he saw the car stopped in the parking lot of an apartment complex. RP 42. He pulled into the parking lot. RP 46. The Honda was still running and the same woman he had seen was still sitting in the passenger seat. RP 45-46. No one else was in the car. RP 52. Lieutenant Lawler could not recall if the driver side door was open or closed. RP 46.

Soon after Lieutenant Lawler entered the parking lot, he saw Mr. Turner emerge from a breezeway that led to some of the apartment units and walk toward the car. RP 47, 52. Mr. Turner was carrying a backpack and some alcohol bottles; he reached through the driver's side door of the Honda and placed the items behind the driver seat. RP 46. Because the car was a hatchback and someone was already sitting in the front passenger seat, this was the only way he could place items in the back seat of the car. RP 46, 55. Mr. Turner had his head down and did not seem to notice the officer. RP 48. It appeared to the officer that Mr. Turner "was preparing to get into the driver seat almost like he was going to raise his leg to get in there." RP 47. Mr. Turner never got into the car, however.

Lieutenant Lawler got out of his car, drew his gun, and shouted at Mr. Turner to show his hands. RP 47. Another man was walking a short distance behind Mr. Turner. RP 49-50. When that man saw the officer pointing his gun in his direction, he turned around 180 degrees and walked back into the breezeway. RP 50, 56. That man was never contacted by police and Lieutenant Lawler did not know if he had anything to do with the car. RP 56, 59-60.

Backup arrived and the officers arrested Mr. Turner. RP 50. Lieutenant Lawler looked inside the Honda and saw that it was still running and the steering column was severely damaged, exposing the mechanism underneath. RP 51. Lieutenant Lawler saw a flat-blade screwdriver lying on the passenger seat floor; he speculated that someone might have used the screwdriver to manipulate the mechanism under the steering wheel to start the car. RP 51. Police did not collect the screwdriver, or the backpack and bottles. RP 26, 29, 51.

The car was returned to Mr. Caba. RP 25. It had a dent on the hood; the steering column cover was broken off; the ignition assembly switch and the heater climate control switch were damaged; and there were scratches by the radio and on the steering column cover. RP 26-27. The car did not have this damage at the time it was taken from Mr.

Caba. RP 26. There were also a bag of men's clothing and a screwdriver inside, which did not belong to Mr. Caba. RP 26, 29.

Mr. Turner was charged with one count of unlawful possession of a stolen vehicle, RCW 9A.56.068 and RCW 9A.56.140; and one count of making or possessing motor vehicle theft tools, RCW 9A.56.063. CP 1-2.

After the State rested its case, the defense moved to dismiss the charges, arguing the State did not prove beyond a reasonable doubt that Mr. Turner possessed the car or the screwdriver or knew the car was stolen. RP 62. The court denied the motion. RP 65.

The jury found Mr. Turner guilty of both counts as charged. CP 23-24. After the verdict, counsel moved for judgment notwithstanding the verdict, arguing again that the State did not prove the elements of the crimes. RP 105. The court denied the motion. RP 106.

Further facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. **The State did not prove the elements of possession of a stolen motor vehicle or possession of motor vehicle theft tools**

It is a fundamental principle of criminal procedure that an accused is presumed innocent of a criminal charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Vasquez, __ Wn.2d __, 2013 WL 3864265, at *2 (No. 87282-1, July 25, 2013); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court presumes the truth of the

State's evidence and all reasonable inferences that can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

- a. The State did not prove Mr. Turner possessed the car or knew it was stolen.

To prove the crime of unlawful possession of a stolen motor vehicle, the State was required to prove that Mr. Turner (1) knowingly possessed a stolen motor vehicle; (2) acted with knowledge that the motor vehicle had been stolen; and (3) withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto. CP 12; RCW 9A.56.068; RCW 9A.56.140.

Possession may be actual or constructive. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009); CP 16. “Actual possession” means that the car was in the personal custody of the defendant. Id. “Constructive possession” means that the car was not in actual, physical possession, but the defendant had dominion and control over it. Id. “Dominion and control means that the object may be reduced to actual possession immediately.” Id. (quoting State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)).

Dominion and control and hence constructive possession is determined by the totality of the circumstances. State v. Summers, 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986). Exclusive control of the stolen property is not necessary to establish constructive possession, but mere proximity to the property or one's presence at the place where it is found, without proof of dominion and control over the property or the premises, is not sufficient proof of possession. Id. at 765; State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

Here, the State proved only that Mr. Turner was in proximity to the stolen car, not that he had actual or constructive "possession" of it. Lieutenant Lawler never saw Mr. Turner driving the car and never saw Mr. Turner inside the car at all. RP 40.

Lieutenant Lawler saw Mr. Turner place some items into the backseat of the car, but this does not prove he had "possession" of the car. Mr. Turner was required to reach through the driver's door to place the items in the backseat because the car was a hatchback and someone was already sitting in the front passenger seat. RP 46, 55. Mr. Turner's actions of placing the items in the backseat suggest he might have been preparing to ride as a passenger in the car. But merely riding as a passenger in a stolen car is not sufficient to show the person

has possession of it. State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987).

Another gentleman was walking closely behind Mr. Turner as he approached the car. RP 49-50. When that man saw Lieutenant Lawler, he quickly turned around and walked back in the other direction. RP 50, 56. That man was just as likely the driver of the car as Mr. Turner.

In addition, the State did not prove Mr. Turner knew the car was stolen. There is no proof that Mr. Turner himself stole the car. Lieutenant Lawler spotted the car almost one month after it was reported stolen. RP 32, 36. Although the steering column was damaged and the underlying mechanism was exposed, there is no evidence that Mr. Turner noticed the damage or knew anything about it.

In sum, the State did not prove the elements of possession of a stolen motor vehicle beyond a reasonable doubt.

- b. The State did not prove Mr. Turner possessed the screwdriver or intended to use it to steal a car.

To prove the crime of possession of a motor vehicle theft tool, the State was required to prove that: (1) Mr. Turner made, mended, or caused to be made, used, or possessed a motor vehicle theft tool that

was adapted, designed, or commonly used for the commission of motor vehicle related theft; and (2) that he did so under circumstances evincing an intent to use or employ the tool or allow the tool to be used or employed, or did so knowing the tool was intended to be used, in the commission of a motor vehicle theft. CP 17; RCW 9A.56.063. A “motor vehicle theft tool”

includes, but is not limited to the following: Slim jim, false master key, master purpose key, altered or shaved key, trial or jigglers key, slide hammer, lock puller, picklock, bit, nipper, or any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft.

CP 18; RCW 9A.56.063(2).

In closing argument, the deputy prosecutor argued the “motor vehicle theft tool” was the screwdriver found on the passenger floor of the car. RP 83-84. According to the prosecutor, Mr. Turner possessed the tool because it was in the car and the car was in his possession. RP 83. The State’s theory was that Mr. Turner used the screwdriver to start the car every time he drove it. RP 84.

For the reasons given above, the State did not prove Mr. Turner possessed the screwdriver found inside the car because it did not prove he possessed the car.

Even if the evidence is sufficient to show Mr. Turner possessed the screwdriver, it is not sufficient to show he possessed it with the intent to use the tool “in the commission of a motor vehicle theft.” CP 17; RCW 9A.56.063. As noted, the theft of Mr. Caba’s car occurred almost one month before Lieutenant Lawler encountered Mr. Turner in the parking lot of the apartment complex. RP 32, 36. There is no evidence that Mr. Turner stole the car or used the screwdriver with an intent to steal the car.

Also, the State presented no evidence to show that Mr. Turner possessed the screwdriver with the intent to steal any other car in the future. The State may not prove such intent through mere possession of the tool. See Vasquez, 2013 WL 3864265, at *3 (“For . . . crimes where possession and intent are elements of the crime, Washington courts do not permit inferences based on naked possession.”). Although intent is usually proved through circumstantial evidence, “intent may not be inferred from evidence that is patently equivocal.” Id. (internal quotation marks and citation omitted). Here, the evidence of intent to steal was not only equivocal, it was completely lacking. The State presented absolutely no evidence that Mr. Turner possessed the screwdriver with an intent to use it to steal a car. RCW 9A.56.063.

In sum, the State did not prove the crime of possession of a motor vehicle theft tool because it did not prove Mr. Turner possessed the screwdriver and, even if the evidence is sufficient to prove possession, it is plainly not sufficient to show he possessed the screwdriver with the intent to steal a car.

2. The State did not prove Mr. Turner's criminal history for the purpose of calculating the offender score

In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

Constitutional due process¹ requires the State to prove the existence of prior convictions by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2). The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine

¹ The Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

whether the prior convictions should be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Despite its general reluctance to address issues not preserved in the trial court, the Washington Supreme Court “allow[s] belated challenges to criminal history relied upon by a sentencing court.” State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing Ford, 137 Wn.2d at 477-78). The purpose is to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Mendoza, 165 Wn.2d at 920.

The Supreme Court has consistently held the Sentencing Reform Act (SRA) must be interpreted in accordance with principles of due process. State v. Hunley, 175 Wn.2d 901, 913-15, 287 P.3d 584 (2012); Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 482. For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. “It is the obligation of the State, not the defendant, to assure that the record before the sentencing

court supports the criminal history determination.” Mendoza, 165 Wn.2d at 926 (citing Ford, 137 Wn.2d at 480). The SRA expressly places this burden on the State because it is “inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” Ford, 137 Wn.2d at 480 (citation omitted). Where the State fails to meet its burden of proof, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

That is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. Mendoza, 165 Wn.2d at 920; RCW 9.94A.530(2). But the mere failure to object to the prosecutor’s assertions of criminal history does not constitute such an acknowledgement. Mendoza, 165 Wn.2d at 928. Instead, the Supreme Court has “emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing.” Id. (emphasis in Mendoza).

In Hunley, at sentencing, the State presented a written statement of the prosecuting attorney, summarizing its understanding of Hunley’s

criminal history. 175 Wn.2d at 905. It was an unsworn document listing Hunley's alleged prior convictions but was not accompanied by any documentation of the alleged offenses. Id. Hunley neither disputed nor affirmatively agreed with the prosecutor summary. Id. The trial court calculated the offender score based on the prosecutor summary and Hunley did not challenge the offender score or the sentence in the trial court. Id.

The Supreme Court reversed the sentence. Id. at 915-16. Hunley's alleged prior convictions were established solely on the prosecutor's summary assertion of the offenses. Id. Because the prosecutor did not present any evidence documenting the alleged convictions, and Hunley never affirmatively acknowledged the prosecutor's assertions regarding his criminal history, the resulting sentence violated constitutional due process. Id. at 913-15. Hunley was entitled to be resentenced following a hearing at which the State was required to prove the prior convictions unless affirmatively acknowledged by Hunley. Id. at 915-16.

This case is indistinguishable from Hunley. As in Hunley, to satisfy its burden to prove Mr. Turner's criminal history, the State presented only a summary list of his alleged prior convictions. CP 44-

46. The State presented no evidence documenting the alleged convictions, and Mr. Turner never affirmatively acknowledged the prosecutor's assertions regarding his criminal history. The prosecutor attempted to persuade Mr. Turner to "stipulate" to the prior offenses but Mr. Turner and his attorney flatly refused. RP 113; CP 46.

Therefore, Mr. Turner's sentence violated constitutional due process. Hunley, 175 Wn.2d at 913-15. Mr. Turner is entitled to be resentenced following a hearing at which the State is required to prove the prior convictions unless affirmatively acknowledged by Mr. Turner. Id. at 915-16.

3. **The record does not support the court's finding that Mr. Turner had the ability to pay court costs**

At sentencing, the State asked the court to impose \$1,500 in court costs, as recoupment for the cost of court-appointed counsel. RP 114. Defense counsel objected, stating that Mr. Turner was indigent. RP 114. Without inquiring into Mr. Turner's present or future ability to pay the costs, or his actual financial condition, the court imposed \$1,000 in costs for court-appointed counsel. RP 117. In total, the court imposed the following costs, which became part of Mr. Turner's judgment and sentence: \$1,000 fee for court-appointed counsel; \$200

filing fee; \$500 crime victim penalty assessment; and \$100 DNA database fee.² RP 117; CP 30. The judgment and sentence included the following boilerplate finding:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 29. The court's finding, and the imposition of non-mandatory costs, must be stricken because the record does not support the finding that Mr. Turner had the ability to pay them.

Courts are authorized by statute to order convicted defendants to pay costs. RCW 10.01.160(1). Costs are limited to "expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). But a court may not order an offender to pay costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). In determining the amount of costs to impose, "the court shall take account of the financial resources of the defendant and the nature and burden that payment of costs will impose." *Id.*

² The \$500 crime victim fee and the \$100 DNA fee are mandatory fees that may be imposed at sentencing without a determination of the defendant's ability to pay them. RCW 43.43.7541; RCW 7.68.035. Thus, those fees are not at issue in this appeal.

It is constitutionally permissible to order a convicted defendant to pay the costs of court-appointed counsel only if: (1) repayment is not mandatory; (2) the defendant has the present or future ability to pay; (3) the financial resources of the defendant are taken into account; and (4) repayment is not ordered if it appears there is no likelihood that the defendant's indigency will end. State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

When ordering discretionary costs, the court need not enter a formal finding that the defendant has the ability to pay. Id. at 916. But if the court *does* enter such a finding, it must be supported by evidence. State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 521 (2013).

In Calvin, after the defendant was convicted of third degree assault and resisting arrest, the court imposed a total of \$1,300 in mandatory and discretionary costs. 302 P.3d at 521. The court also entered the following boilerplate finding on the judgment and sentence, identical to the finding entered by the court in Mr. Turner's case:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Id.

Despite the trial court's finding, the record did not show that Calvin had the present or future ability to pay the costs, or that the court actually took his financial resources or ability to pay into account. Id. at 521-22. The only evidence of past employment was Calvin's testimony at trial that he used to be a carpenter. Id. The only evidence of his financial resources was his testimony that he lived in a mobile home that did not have running water. Id. At sentencing, the court made no inquiry into Calvin's resources or employability. Id. Thus, the record did not support the court's finding that Calvin had the ability to pay, or that the court took his financial resources into account. Id. at 522. The Court of Appeals therefore remanded for the trial court to strike the finding and the imposition of court costs. Id.

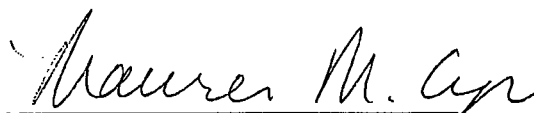
Calvin requires this Court impose the same remedy in Mr. Turner's case. The trial court made a boilerplate finding that Mr. Turner had the ability to pay the costs imposed and that the court took his financial resources into account. CP 29. But there is no evidence in the record to support the court's finding. Mr. Turner did not testify at trial and there is no information about his financial resources. At sentencing, after defense counsel asserted that Mr. Turner was indigent,

the court asked no questions about his financial circumstances and made no inquiry into his employability. RP 114-17. Therefore, the record does not support the court's finding that Mr. Turner had the ability to pay, or that the court took his financial resources into account. This Court must remand the case for the trial court to strike the finding and the imposition of court costs. Calvin, 302 P.3d at 522.

E. CONCLUSION

The State did not prove the elements of possession of a stolen motor vehicle or possession of motor vehicle theft tools beyond a reasonable doubt. The convictions must be reversed and the charges dismissed. In the alternative, Mr. Turner is entitled to be resentenced at a hearing at which the State is required to prove his prior convictions. Also, the court's finding that Mr. Turner had the ability to pay court costs, and the imposition of costs, must be stricken.

Respectfully submitted this 31st day of July, 2013.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant