

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 70857-1-I
)	
vs.)	
)	RESPONDENT'S
BRENDA NICHOLAS,)	CONCESSION OF ERROR ¹
)	
Appellant,)	
)	
)	
)	
)	

1. IDENTITY OF MOVING PARTY

Respondent, The STATE OF WASHINGTON, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

The State asks this Court to accept its concession that the trial court erred when it included two out-of-state convictions in the

¹ This pleading is being filed in lieu of a Brief of Respondent.

appellant's offender score without conducting a comparability analysis.

3. FACTS RELEVANT TO MOTION

The appellant, Brenda Nicholas, was charged in this case with one count of murder in the first degree with a deadly weapon enhancement for the killing of Patrick Fleming on December 8, 2011. CP 1. Under cause number 12-1-04126-8 SEA, Nicholas was also charged with 58 counts of theft for crimes she committed from September 26, 2007 through June 9, 2012. CP 245.

Trial commenced on the murder case on March 6, 2013. 1RP² 2. During pre-trial motions, the State indicated that it would seek to admit Nicholas' out-of-state convictions of "theft embezzlement" and "grand theft" from California under ER 609 if she chose to testify. 1RP 79-80. On the record, the State indicated that it had provided the defense with a copy of the judgment and sentence for those crimes. 1RP 79. Defense counsel confirmed on

² 1RP is Verbatim Report of Proceedings dated March 6, 2013; 2RP is dated March 11, 2013; 3RP is March 13, 2013; 4RP is March 14, 2013; 5RP is March 18, 19, 20, 25, 26, 27, 28, 2013; 6RP is April 4, 2013; 7RP is April 8, 2013; 8RP is August 9, 3013.

the record that he had received that paperwork. 1RP 80. On April 8, 2013, the jury returned with a verdict of guilty of murder in the first degree, and found that Nicholas was armed with a deadly weapon. CP 86-87.

On May 24, 2014, Nicholas pled guilty to two counts of theft in the first degree and one count of identity theft in the first degree, each with a vulnerable victim aggravator, under cause number 12-1-04126-8 SEA. CP 203-215. The Plea Agreement was signed by both the defendant and her counsel. Under the section entitled "Criminal History and Offender Score," the box next to the following statement was checked:

The defendant agrees to this Plea Agreement and that the attached sentencing guidelines scoring form(s) (Appendix A), offender score, and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete and that the defendant was represented by counsel or waived counsel at the time of prior conviction(s). The State makes the sentencing recommendation set forth in the State's sentence recommendation. An essential term of this agreement is the parties' understanding of the standard sentencing range(s); if the parties are mistaken as to the offender score on any count, neither party is bound by any term of this agreement.

CP 273. However, the box next to this subsequent statement on the Plea Agreement was left unchecked:

The defendant understands that one or more convictions from other jurisdictions have been included in the offender score, and agrees that these convictions have been properly included and scored according to the comparable offense definitions provided by Washington law.

Id. The attached Appendix A, the sentencing guidelines scoring forms for theft in the first degree and identity theft in the first degree, both indicated that Nicholas had three prior felony convictions and two other current offenses, giving her an offender score of five. CP 237-238. The attached Appendix B, the prosecutor's understanding of the defendant's criminal history, showed three felonies on the defendant's criminal history: 1) theft of elder/dependent adult, cause #1217645, dated 7/13/2006, out of California; 2) grand theft under the same cause number and with the same date, also out of California; and 3) murder in the first degree with a deadly weapon, the King County charge of which the defendant had just been found guilty. CP 236.

In her Statement of Defendant on Plea of Guilty, Nicholas also stated:

The prosecuting attorney's 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. If I have attached my own statement, I assert that it is correct and complete."

CP 205. Nicholas did not attach her own statement of her criminal history to the plea form. CP 203-248.

On August 9, 2013, Nicholas was sentenced in the same hearing on both the theft and the homicide charges. 8RP 2. At the hearing and in its Sentencing Memorandum, the State calculated Nicholas as having an offender score of five, based on the two California convictions and the three guilty plea convictions. 8RP 3; CP 278. Defense counsel acknowledged that the defendant had an offender score of five and asked for a low-end sentence. 8RP 25-26. The State requested a sentence at the high end of the standard range and an additional 24-month deadly weapon enhancement. CP 279. The court sentenced the defendant to the high end of 388 months and imposed 24 months to run consecutive based on the enhancement. 8RP 29-30; CP 155-163. Neither the court nor the State conducted a comparability analysis of the out-of-state convictions. 8RP 1-32. At no time during the sentencing

hearing did the defendant or defense counsel object to the State's calculation of the defendant's offender score or request that the court conduct a comparability analysis. Id.

4. GROUNDS FOR RELIEF AND ARGUMENT

Nicholas argues that the court erred by failing to undertake a comparability analysis of the defendant's California convictions. The State concedes that neither the State nor the court conducted such an analysis and that Nicholas did not explicitly waive her right to such an analysis as is required by law.

The classification of an out-of-state conviction is reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). The State is required to establish a defendant's criminal history by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); see also State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012) ("The burden to prove prior convictions at sentencing rests firmly with the State."). Due process requires that a defendant be sentenced on the basis of reliable information that is supported by the record. Ford, 137 Wn.2d at 481 (citations omitted). An action by the court not

comporting with this standard is constitutionally impermissible.

State v. Herzog, 112 Wn.2d 419, 426, 771 P.2d 739 (1989).

The requirements of both the SRA and due process are satisfied when a sentencing court relies on the defendant's affirmative acknowledgement of the existence and comparability of his prior convictions when calculating his offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). A defendant's mere failure to object to the State's understanding of his criminal history (or his agreement with the ultimate sentencing recommendation) is insufficient to constitute an acknowledgment of the existence and comparability of his prior convictions. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009); Hunley, 175 Wn.2d at 915. Further, a defendant's agreement to his offender score and standard range does not constitute such acknowledgment. State v. Lucero, 168 Wn.2d 785, 788-89, 230 P.3d 165 (2010). A defendant must affirmatively acknowledge the "*facts and information* introduced for the purposes of sentencing." Mendoza, 165 Wn.2d at 928 (emphasis in original).

Where there was no objection to the inclusion of prior convictions at the sentencing hearing and the State consequently has not had an opportunity to put on its evidence, the proper remedy is remand for resentencing to allow the State to put on such evidence. Mendoza, 165 Wn.2d at 930.

5. CONCLUSION

For the foregoing reasons, the State asks this Court to accept its concession that remand to the trial court for resentencing is necessary.

Submitted this 18th day of September, 2014.

DANIEL T. SATTERBERG
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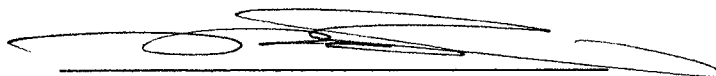
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jared Berkeley Steed, the attorney for the appellant, at steedj@nwattorney.net, containing a copy of the RESPONDENT'S CONCESSION OF ERROR, in State v. Brenda Nicholas, Cause No. 70857-1, 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 18 day of September, 2014.

A handwritten signature in black ink, appearing to be "Jared Berkeley Steed", written over a horizontal line.

Name:
Done in Seattle, Washington