

No. 65176-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAVON PITCHFORD,

SEP 12 2011

Appellant.

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

FILED
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STATE OF WASHINGTON
DIVISION ONE
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APPELLANT'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

4. The trial court erred by finding Mr. Pitchford had a prior conviction the State failed to prove.

5. The trial court erred by sentencing Mr. Pitchford based upon an incorrect offender score and incorrect standard range.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

4. Principles of due process impose on the State the burden of proving criminal history by a preponderance of the evidence.

The State did not offer any proof of Mr. Pitchford's prior convictions to establish the offender score and standard range used to sentence Mr. Pitchford. Must Mr. Pitchford's sentence be vacated and remanded for a new sentencing hearing? (Assignments of Error 4-5)

5. The Sentencing Reform Act of 1985 (SRA) requires the sentencing court to determine a defendant's criminal history, offender score, and standard sentence range. The sentencing court determined that Mr. Pitchford had one prior nonviolent felony conviction, but that conviction does not support the court's determination that Mr. Pitchford's offender score was 3. Based upon the incorrect offender score, the court set Mr. Pitchford's

minimum term under the incorrect standard range. Must Mr. Pitchford's sentence be vacated because the sentence exceeded that authorized by the SRA? (Assignment of Error 5)

C. STATEMENT OF THE CASE

Mr. Pitchford was convicted by a jury of rape in the first degree with a firearm enhancement. CP 44-45, 52. At sentencing, the State asserted that Mr. Pitchford's offender score was 3, and defense counsel agreed. 4RP 91.¹ In support of this assertion, the State provided a list entitled "Appendix to Plea Agreement [sic], Prosecutor's Understanding of Defendant's Criminal History (Sentencing Reform Act)." 2SuppCP 122-23 (Presentence Statement of King County Prosecuting Attorney, sub. no. 80, 3/30/10).

The sentencing court determined Mr. Pitchford's criminal history consisted of one 2007 adult conviction for a "CONTROLLED SUBSTANCE VIOLATION." CP 59. The court then used an offender score of 3 to determine the standard sentence range for setting Mr. Pitchford's minimum term. CP 53. The court found the standard range was 120 to 160 months confinement plus an

¹ 4RP refers to the volume of the verbatim report of proceedings that includes February 4, 5, 8, 19 and April 4, 2010

additional 60 months based upon the firearm enhancement. CP

53. The court imposed a 210 month minimum term sentence. CP

56.

D. ARGUMENT

5. MR. PITCHFORD'S JUDGMENT AND SENTENCE
MUST BE VACATED BECAUSE THE STATE DID
NOT PROVE HIS CRIMINAL HISTORY BY A
PREPONDERANCE OF THE EVIDENCE AS
REQUIRED BY DUE PROCESS

The State had the burden of proving Mr. Pitchford's criminal history at sentencing. The State provided the sentencing court with a list of crimes it asserted were Mr. Pitchford's prior convictions, but did not provide any further proof such as a certified copy of any prior judgments. See State v. Rivers, 130 Wn.App. 689, 701, 128 P.3d 608 (2005), rev. denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007) (court "could think of no explanation" for prosecutor's failure to provide court with certified copy of prior judgment and sentence from same county at sentencing hearing). While the statute permits the court to determine the defendant's offender score based upon crimes acknowledged the defendant, Mr. Pitchford's trial attorney did not agree that the State had correctly listed Mr. Pitchford's criminal history. The State thus

failed to meet its burden of proving Mr. Pitchford had the criminal history listed on the Judgment and Sentence.

When sentencing a defendant for felony offenses, the court must comply with the Sentencing Reform Act of 1985 (SRA).² RCW 9.94A.505; In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). The SRA creates a grid of standard sentencing ranges based upon the offender's "offender score" and the "seriousness level" of the current offense. RCW 9.94A.505(1); RCW 9.94A.530(1); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The court normally imposes a sentence within the standard sentence range, which constitutes the Legislature's determination of an appropriate sentence for the crime given the defendant's criminal history, absent substantial and compelling mitigating or aggravating circumstances. RCW 9.94A.505(2)(a)(1); RCW 9.94A.535. In this case, the standard range was used to determine Mr. Pitchford's minimum term. RCW 9.94A.507(1)(a)(i), (3); CP 59.

A sentencing court acts without statutory authority when it imposes a sentence based upon the incorrect offender score or

² The sentencing court must comply with the sentencing statutes in effect at the time the defendant committed the offense. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Here, the offense occurred on October 23, 2008. CP 30, 52.

miscalculated standard range. In re Personal Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). Mr. Pitchford may challenge his erroneous sentence for the first time on appeal. Ford, 137 Wn.2d at 477-78. This Court reviews the sentencing court's determination of a defendant's offender score de novo. Rivers, 130 Wn.App. at 699.

“Our Supreme Court has consistently held that the State bears the constitutional burden of proving prior convictions by a preponderance of the evidence.” State v. Hunley, 161 Wn.App. 919, 927, 253 P.3d 448 (2011) (citing Ford, 137 Wn.2d at 479-480). The burden is 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 (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). For this reason, the record before the sentencing court must support the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); see RCW 9.94A.500(1) (2008) (requiring information relied upon by trial court in determining criminal history be part of the record). “This reflects fundamental principles of due process, which require that a sentencing court base its decision on

information bearing ‘some minimal indicium of reliability beyond mere allegation.’” Id. (quoting Ford, 137 Wn.2d at 481) (emphasis in original, citation deleted).

A sentencing court may rely upon the defendant’s stipulation or acknowledgment of prior convictions without requiring the State to present further proof. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 873, 123 P.3d 456 (2005). But “[t]he defendant’s silence is not constitutionally sufficient to meet this burden.” Hunley, 161 Wn.App. at 928. Further, where a defendant does not enter into a plea agreement with the State, he has no obligation to disclose prior convictions. Cadwallader, 155 Wn.2d at 875.

Mr. Pitchford’s lawyer agreed that his offender score was 3 and recommended a minimum term within the resulting standard range. CP 49; 4RP 91, 96. Defense counsel, however, did not agree that Mr. Pitchford’s criminal history included the adult felony found by the court or any of the other crimes listed in the State’s presentence report. CP 49-51; 4RP 91, 95-97. Mr. Pitchford thus did not “affirmatively acknowledge” any prior offenses. State v. Weaver, 171 Wn.2d 256, 258, 251 P.3d 876 (2011) (defense counsel who “acknowledged without elaboration that Weaver had a criminal history” did not affirmatively acknowledge client’s criminal

history); State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010) (defendant did not waive argument that prior convictions “washed out” because he agreed to State’s determination of offender score and standard range); Mendoza, 165 Wn.2d at 928 (failure to object to prosecutor’s assertion of criminal history does not constitute affirmative acknowledgment by defendant).

The State provided only a list of what it asserted were Mr. Pitchford’s prior convictions. 2SuppCP 122-23. A list does not provide the proof by a preponderance of the evidence required by due process. Mendoza, 165 Wn.2d at 929 (“bare assertions” as to criminal history do not provide the facts and information required by sentencing court). Applying Ford and its progeny, the Hunley Court invalidated 2008 amendments to RCW 9.94A.500 and .530, which provided “[a] criminal history summary relating to the defendant from the prosecuting authority ... shall be prima facie evidence of the existence and validity of the convictions listed therein” and the failure to object to such summary constituted acknowledgment of criminal history. Hunley, 161 Wn.App. at 928-29.

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions 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.

Id. at 928 (quoting Ford, 137 Wn.2d at 482) (emphasis in Hunley).

In Hunley the prosecutor submitted an unsworn document, presumably similar to the prosecutor's statement of criminal history in this case, that simply listed what the prosecutor believed were Hunley's prior convictions. Hunley, 161 Wn.App. 924. The Court found the prosecutor's statement was "exactly the type of 'bare assertion' rejected in Ford." Id. at 929. Similarly the prosecutor's list of Mr. Pitchford's purported prior convictions did not prove by a preponderance of the evidence that Mr. Pitchford committed a controlled substance offense in 2007. This Court must reverse Mr. Pitchford's conviction and remand for a resentencing hearing at which the State would have the opportunity to prove the criminal history. Id. at 929-30.

4. MR. PITCHFORD'S JUDGMENT AND SENTENCE
MUST BE VACATED BECAUSE THE CRIMINAL
HISTORY DETERMINED BY THE COURT DOES
NOT SUPPORT THE OFFENDER SCORE AND
STANDARD SENTENCE RANGE AND THE
SENTENCE THUS EXCEEDS THE COURT'S
SENTENCING AUTHORITY

The sentencing court determined Mr. Pitchford's criminal history consisted of one prior felony, apparently for a violation of the

Uniform Controlled Substances Act. CP 59. The court, however, sentenced Mr. Pitchford based upon an offender score of 3 and a resulting standard range of 180 to 220 months. CP 53, 56. With only one prior felony conviction, however, Mr. Pitchford's offender score was actually 1 and his standard sentence range was only 153 to 183 months. This Court must vacate Mr. Pitchford's sentence.³

As mentioned above, the SRA creates a grid of standard sentencing ranges based upon the offender's offender score and the seriousness level of the current offense. RCW 9.94A.505(1); RCW 9.94A.530(1); Ford, 137 Wn.2d at 479. The first step in the sentencing process is to determine the defendant's criminal history; the State has the burden of proof. Mendoza, 165 Wn.2d at 920. "If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). Here the court found one prior conviction for a "controlled substance violation." CP 59.

³ The State attempted to raise this issue in the Brief of Respondent, pointing out the judgment is invalid on its face and asking that the case be remanded to correct Appendix B to reflect additional criminal history. Brief of Respondent at 23-24 (citing In re Personal Restraint of Thompson, 141 Wn.2d 712 (2000)). As the State did not file a cross-appeal, however, it cannot raise a separate issue for consideration on appeal.

The court then uses the criminal history to determine the defendant's offender score. RCW 9.94A.525. Mr. Pitchford was sentenced for rape in the first degree, which is classified as a serious violent offense. RCW 9.94A.030(41)(vii) (2008). In determining the offender score for first degree rape, a prior nonviolent adult felony counts as 1 point in determining the offender score for this crime.⁴ RCW 9.94A.525(9), (17). Violations of the Uniform Controlled Substances Act are not violent or serious violent offenses. RCW 9.94A.030(41), (50) (2008).⁵ Thus, the prior conviction found by the trial court counts only as 1 point. The trial court therefore incorrectly calculated Mr. Pitchford's offender score.

The incorrect offender score translated into an incorrect standard sentence range. The trial court determined Mr. Pitchford's standard range was 120 to 160 months, plus 60 months for the firearm enhancement. CP 53. In fact, the correct standard range was 123 to 164 months, plus the additional 60 months. RCW 9.94A.510 (Table 1) RCW 9.94A.515 (seriousness level for rape in the first degree is XII); RCW 9.94A.533(3)(a) (additional 5 years

⁴ For the court's convenience, copies of the offender scoring form for rape in the first degree and the deadly weapon enhancement scoring from the 2008 Adult Sentencing Manual are attached as an appendix. Sentencing Guidelines Commission, *Adult Sentencing Manual 2008* at III-8, III-174.

⁵ These definitions are now found at RCW 9.94A.030(45), (54).

must be added when jury finds offender armed with a firearm while committing class A felony). Thus, by setting Mr. Pitchford's minimum term at 150 months plus 60 months for the firearm enhancement, the court exceeded its authority under the SRA. Mr. Pitchford's sentence must therefore be vacated. Ford, 137 Wn.2d at 485; State v. Healy, 157 Wn.App. 502, 516, 237 P.3d 360 (2010).

E. CONCLUSION

The sentencing court erred (1) by relying upon a prior conviction that the State did not prove by a preponderance of the evidence, and (2) by sentencing Mr. Pitchford based upon a standard range not supported by its own determination of his criminal history. This Court should reverse Mr. Pitchford's sentence and remand for a new sentencing hearing.

DATED this 12th day of September 2011.

Respectfully submitted:



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APPENDIX

**Sentencing Guidelines Commission,
Adult Sentencing Manual 2008**

**Offender Scoring Form for Rape in the First Degree
General Deadly Weapon Enhancement – Form A**

RAPE FIRST DEGREE
(RCW 9A.44.040)
CLASS A - SERIOUS VIOLENT SEX

I. OFFENDER SCORING (RCW 9.94A.525(17))

ADULT HISTORY:

Enter number of sex offense convictions _____ x 3 = _____
 Enter number of other serious violent felony convictions _____ x 3 = _____
 Enter number of other violent felony convictions _____ x 2 = _____
 Enter number of other nonviolent felony convictions _____ x 1 = _____

JUVENILE HISTORY:

Enter number of sex offense dispositions _____ x 3 = _____
 Enter number of other serious violent felony dispositions _____ x 3 = _____
 Enter number of other violent felony dispositions _____ x 2 = _____
 Enter number of other nonviolent felony dispositions _____ x ½ = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other sex offense convictions _____ x 3 = _____
 Enter number of other violent felony convictions _____ x 2 = _____
 Enter number of other nonviolent felony convictions _____ x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the **Offender Score**
(Round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL XII)	93 - 123 months	102 - 136 months	111 - 147 months	120 - 160 months	129 - 171 months	138 - 184 months	162 - 216 months	178 - 236 months	209 - 277 months	240 - 318 months

- B. If the offender is not a persistent offender and the current offense was committed on or after September 1, 2001, then the offender is subject to the sentencing requirements under RCW 9.94A.712(1)(a)(i) including community custody under the supervision of the Dept. of Corrections and the authority of the Indeterminate Sentence Review Board for any period of time the person is released from total confinement before the expiration of the maximum sentence. See provisions under RCW 9.94A.712(5).
- C. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- D. Statutory **minimum** sentence of 60 months for Rape in the First Degree, is established under RCW 9.94A.540(1)(c) and imposed under the rules in RCW 9.94A.712(3)(c).
- E. If a finding that; (1) the victim was under the age of fifteen at the time of the offense (RCW 9.94A.837) or (2) found to be developmentally disabled, mentally disordered or a frail elder or vulnerable adult at the time of the offense (RCW 9.94A.838), then, the minimum term shall be either the maximum of the standard sentence range for the offense or **twenty-five years**, whichever is greater (RCW 9.94A.712(3)(c)(ii)).
- *Statutory maximum is a term of life imprisonment in a state correctional institution (RCW 9A.20.021(1))*

Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission.

GENERAL DEADLY WEAPON ENHANCEMENT- FORM A

Firearm or Other Deadly Weapon Enhancements*¹

For offenses committed after July 23, 1995

Use of this form: Only for offenses committed after July 23, 1995 that have a firearm or other deadly weapon finding.

CLASS A FELONY DEADLY WEAPON ENHANCEMENTS:

<u>First Deadly Weapon/Firearm Offense**:</u>		<u>Subsequent*** Deadly Weapon/Firearm Offense:</u>	
Firearm	5 years	Firearm	10 years
Other Deadly Weapon	2 years	Other Deadly Weapon	4 years

CLASS B FELONY DEADLY WEAPON ENHANCEMENTS:

<u>First Deadly Weapon/Firearm Offense**:</u>		<u>Subsequent*** Deadly Weapon/Firearm Offense:</u>	
Firearm	3 years	Firearm	6 years
Other Deadly Weapon	1 year	Other Deadly Weapon	2 years

CLASS C FELONY DEADLY WEAPON ENHANCEMENTS:

<u>First Deadly Weapon/Firearm Offense**:</u>		<u>Subsequent*** Deadly Weapon/Firearm Offense:</u>	
Firearm	18 months	Firearm	3 years
Other Deadly Weapon	6 months	Other Deadly Weapon	1 year

* Excluded offenses: Possession of a Machine Gun, Possessing a Stolen Firearm, Drive-by Shooting, Theft of a Firearm, Unlawful Possession of a Firearm 1 and 2, Use of a Machine Gun in a felony, or any offense committed on or before July 23, 1995 with a deadly weapon finding.

** This enhancement is limited to offenses committed after July 23, 1995.

*** To be sentenced as a subsequent deadly weapon finding, the offense in history with a deadly weapon finding must also have been committed after July 23, 1995.

STANDARD RANGE CALCULATION

CURRENT OFFENSE BEING SCORED	SERIOUSNESS LEVEL	OFFENDER SCORE	BASE STANDARD SENTENCE RANGE		
				TO	
			LOW		HIGH
	DEADLY WEAPON ENHANCEMENT				
		STANDARD RANGE		TO	
			LOW		HIGH

NOTE: The "base standard sentence range" is the appropriate standard sentence without the deadly weapon enhancement.

¹For anticipatory offenses with a deadly weapon finding, add the enhancement after reducing the standard sentence range by 25%.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
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 v.)
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 JAVON PITCHFORD,)
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 Appellant.)

NO. 65176-5-I

SEP 12 2011

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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