

65176-5

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NO. 65176-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAVON PITCHFORD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

SUPPLEMENTAL BRIEF OF RESPONDENT

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COURT OF APPEALS
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A. SUPPLEMENTAL ISSUE PRESENTED.

A defendant waives his objection to calculation of his offender score by agreeing to the calculation at sentencing. Here, Pitchford agreed in both his written materials and oral presentation that the State had correctly calculated his offender score. Did Pitchford thereby waive his claim that the State failed to establish his offender score?

B. SUPPLEMENTAL STATEMENT OF THE CASE.

At sentencing, both the State and the defense submitted presentence reports to the trial court. The State's presentence report detailed Pitchford's criminal history and the State's offender score calculation. CP 120-23. The statement of criminal history reflects one adult felony conviction (counting one point), and five juvenile felony adjudications (counting ½ point each), resulting in an offender score of three. CP 122-23. Based on an offender score of three, Pitchford's standard range was 120 to 160 months for the underlying crime plus 60 months for the firearm enhancement for a total standard range of 180 to 220 months. CP 121. The defense presentence report **agreed that Pitchford's total standard range**

was 180 to 220 months. CP 49. At sentencing, the following exchange occurred:

Ms. Woo: The State's calculation of the defendant's offender score is a three. I'd ask if counsel agrees with the State's calculation.

Mr. Felker: We do.

RP 4/2/10 91 (emphasis added).

C. ARGUMENT.

PITCHFORD WAIVED HIS CLAIM THAT HIS OFFENDER SCORE WAS INCORRECTLY CALCULATED.

Pitchford argues for the first time in his supplemental brief that his offender score was improperly calculated. However, the record reflects that Pitchford affirmatively acknowledged the accuracy of the State's understanding of his criminal history and the State's calculation of his offender score. He therefore waived any claim that his offender score was incorrectly calculated, because he cannot show that any legal error was made in calculating his offender score.

In State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004), our Supreme Court held that a defendant waives the right to object to the inclusion of a prior conviction when the defendant affirmatively acknowledges that the conviction was properly included in his or

her offender score. Further, a defendant's affirmative acknowledgment of the existence of convictions renders further proof unnecessary. Id. at 233. The State is thereby relieved of its burden of proving the existence of a defendant's convictions. Such acknowledgement satisfies the requirements of the SRA and due process. Id. at 230.

In this case, defense counsel expressly acknowledged that the State had correctly calculated Pitchford's offender score, both in the defense sentencing materials and at the sentencing hearing. Based on well-established case law and the SRA, Pitchford affirmatively acknowledged his offender score and waived any objection to the calculation of his offender score.

An exception to the waiver rule applies where the defendant can establish a legal error in his sentence. As the state supreme court explained in In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002), "while waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion."

Notably, Pitchford makes no argument that there was any legal error that occurred in the calculation of his offender score. He makes no argument that his adult felony conviction and his five juvenile felony adjudications could not have been included in his offender score as a matter of law. He simply argues that the State failed to prove them. But his affirmative acknowledgement relieved the State of any further burden of proof.

As argued in the Brief of Respondent, although the judgment and sentence reflects the proper offender score, it lists only the adult conviction in Appendix B. CP 59. Appendix B should include the five prior juvenile adjudications that the parties agreed were included in the offender score as well. As the State pointed out in the Brief of Respondent, this case should be remanded for an order correcting Appendix B to properly reflect Pitchford's criminal history, which was agreed to by all parties at sentencing.¹

¹ Even if this Court could somehow conclude that Pitchford did not affirmatively acknowledge that his offender score was correctly calculated and included the convictions set forth in the State's sentencing materials, the matter would require resentencing, and the State would be free to offer proof of all of his prior convictions at resentencing. RCW 9.94A.530(2) provides, in part, "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

D. CONCLUSION.

Pitchford's conviction should be affirmed and the matter remanded solely for the purpose of correcting Appendix B of the Judgment and Sentence to reflect Pitchford's complete criminal history.

DATED this 6th day of October, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. PITCHFORD, Cause No. 65176-5-I, 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.

U Brame
Name
Done in Seattle, Washington

10/7/11
Date