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No. 66464-6-1

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

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RAYMOND HEATH,

Appellant.

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

The Honorable Regina Cahan

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by including in Heath's SRA¹ offender score his two prior Florida "withheld adjudications" for possession of cocaine.

2. The trial court erred in entering Finding of Fact 8 regarding out-of-state criminal history. CP 154.

3. The trial court erred in entering Finding of Fact 9 regarding out-of-state criminal history. CP 154.

4. The trial court erred in entering Conclusions of Law II, III, and IV regarding out-of-state criminal history. CP 155.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. For prior offenses to count in the SRA offender score, the State bears the burden of proving by a preponderance of the evidence that the defendant has suffered a qualifying prior conviction. A "conviction" is defined "an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." In Florida, Heath entered a *nolo contendere* plea and the Florida court, pursuant to Florida law, withheld an adjudication of guilt. Did the State fail to prove that Heath had suffered a "conviction" as

¹ Sentencing Reform Act of 1981.

required for his Florida offenses to count in his SRA offender score?

2. Washington does not recognize *nolo contendere* pleas.

Does the fact that Heath entered a *nolo contendere* plea preclude his prior Florida offenses from counting in his SRA offender score?

C. STATEMENT OF THE CASE

Appellant Raymond Heath was convicted by a jury of one count of assault in the second degree and one count of assault in the fourth degree based on events occurring February 19, 2010, in Seattle. CP 94, 97. Prior to sentencing, Heath notified the State that he objected to the inclusion of two prior Florida “withheld adjudications” in his SRA offender score.² CP 113-20.

In Florida in 2003, Heath had entered “*nolo contendere*” pleas to two allegations of Unlawful Possession of Cocaine. Both judgments for these offenses indicated that Heath entered a plea of *nolo contendere* to the following crime: Possession of Cocaine, and that the adjudication was withheld. Sentencing Ex. 1, 2.

Heath argued that the offenses could not be counted toward his SRA offender score because (1) Washington does not recognize *nolo contendere* pleas; (2) there was no record in the

² Because Heath disputes that these offenses are “convictions” under RCW 9.94A.030, they are not termed as such in this brief.

Florida matter of a factual basis for the plea; and (3) the Florida priors were not “convictions” under Washington law because the adjudication had been withheld.

At the sentencing hearing, the State called as a witness a Florida prosecutor, Keri Fleck. Although Fleck was not the prosecutor at the hearing in Heath’s case and had no personal knowledge of the facts of his case or the file in his case, RP 4-5,³ Fleck was permitted to testify that in a *nolo contendere* plea an accused person waives all constitutional rights. RP 14. She claimed that before such pleas are accepted, the court will orally find sufficient facts to support the plea and the defense and prosecution must stipulate that the facts are sufficient to support the plea. RP 15, 22. She further asserted that in federal court a “withhold of adjudication” is counted as a conviction. RP 28.

The trial court ruled that Heath’s prior Florida offenses should be counted towards his SRA offender score. RP 35; CP 155. Accordingly the court imposed a standard range sentence of 14 months on the felony count, based upon an offender score of 3. CP 139, 141. Heath appeals. CP 137-49.

³ Multiple transcripts of pretrial, trial, and sentencing proceedings were prepared in the instant case. Only the volume from the sentencing hearing on December 3, 2010 is cited. It is referenced herein as “RP” followed by page number.

D. ARGUMENT

THE WITHHELD ADJUDICATIONS BASED ON *NOLO CONTENDERE* PLEAS WERE NOT CONVICTIONS AND SHOULD NOT HAVE BEEN COUNTED IN HEATH'S SRA OFFENDER SCORE.

1. Principles of due process impose the burden to prove criminal history on the State. “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, ___ Wn. App. ___, 253 P.3d 448, 452 (2011) (citing State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)). 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). “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. (emphasis in original, citation deleted).

2. Only convictions count toward the SRA offender score.

According to the SRA, the offender score is calculated based upon prior and current convictions. RCW 9.94A.525(1). “Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(9). The SRA provides that “[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” RCW 9.94A.525(3).

a. A Florida “withhold of adjudication” is not an adjudication of guilt and thus is not a “conviction” under Washington law. Florida provides greater discretion to judges adjudicating felony offenses than Washington. Under Florida law,

If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation. If the defendant is found guilty of a nonfelony offense as the result of a trial or entry of a plea of guilty or *nolo contendere*, regardless of whether adjudication is withheld, the court may place the defendant on probation.

Fla. St. Ann. §948.01(2). When an adjudication of guilt is withheld, the only mandatory requirement is that the defendant must be placed on probation. Id.; State v. Tribbles, 984 So.2d 639, 640-41 (Fla. App. 2008).

At the sentencing hearing in this matter, Fleck acknowledged that “[t]he consequences of a [withhold of adjudication] are unusual in the sense that if a person goes out and applies for a job, they have to say whether or not they’re a convicted felon. If they have a withhold, they can legitimately say no, I don’t have any felony convictions.” RP 24. Fleck opined, however, that under Florida law if the person returns to court the withheld adjudication is treated as a prior offense for scoring purposes. Id.

Fleck’s representation to the court was inaccurate and a misstatement of Florida law.⁴ Only “a *nolo contendere* plea where adjudication is not withheld or where there is subsequently an adjudication of guilt is a conviction under Florida law.” United States v. Drayton, 113 F.3d 1193, 1197 (11th Cir. 1997); see also United States v. Willis, 106 F.3d 966, 968 (11th Cir. 1997) (“The

⁴ For this reason, the trial court’s Findings of Fact 8 and 9 (which are more properly termed legal conclusions) must be stricken.

plea of guilty is an absolute condition precedent before the lack of adjudication can be considered a conviction”).⁵

In Willis, applying Florida law, the Court concluded that the district court erred in denying Willis’ motion to dismiss a charge of possession of a firearm by a convicted felon:

Willis pleaded *nolo contendere* to the felony charges underlying count two of the present indictment, and adjudication of guilt was withheld. According to the cases discussed above, Willis has not been “convicted” of a felony under Florida law. Therefore, we hold . . . that the district court erred in denying Willis’s motion to dismiss count two of the indictment.

106 F.3d at 969.

Although this line of cases has to some extent been limited by subsequent decisions, the extent to which withheld adjudications following *nolo contendere* pleas may constitute “convictions” in Florida rests upon the particular language of the pertinent Florida sentencing statute. See Montgomery v. State, 897 So.2d 1282, 1288-89 (Fla. 2005) (construing Fla. St. Ann. §921.0021(2)). In sharp contrast to the definition of “conviction” provided in the SRA, §921.0021(2) provides: “‘Conviction’ means a determination of guilt

⁵ Fleck also claimed that a withheld adjudication can be a supporting offense for a federal charge of felon in possession of a firearm. Under Drayton and Willis, it appears this will only be true if the court subsequently adjudicates the defendant guilty or if the defendant pleaded guilty to the underlying offense.

that is the result of a plea or a trial, regardless of whether adjudication is withheld.”

In including *nolo contendere* pleas in this category, the Court in Montgomery explained that it considered the legislative goal of “emphasiz[ing] incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties previously imposed.” 897 So.2d at 1286 (quoting Fla. St. Ann. §921.0001). Considering the provisions in their entirety, the Court concluded, “the logical inference is that a no contest plea, where adjudication was withheld, is included as a conviction because the statute does not distinguish between guilty pleas and *nolo contendere* pleas.” Id.

b. Any other result is contrary to the “plain meaning” rule of statutory construction. A result prohibiting the prior Florida offenses from qualifying as “convictions” is consistent with the “plain meaning” rule of statutory construction. That rule provides that “if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Id. (quoting Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The “plain meaning” of a

statutory provision is discerned “from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” Id.

The SRA expressly requires an “adjudication of guilt” in order for a prior offense to qualify as a “conviction.” RCW 9.94A.030(9). Indeed, the SRA recognizes that there may be alternatives to convictions that may be included in an offender’s “criminal history” which is defined as “the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.” RCW 9.94A.030(11). However the Legislature has stipulated that “[t]he determination of a defendant’s criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant’s criminal history.” RCW 9.94A.030(11)(c).

Further, there is no sentence that is comparable to a withheld adjudication, nor is there a sentencing option that allows a convicted felon to be treated as if he or she has no felony convictions. Finally, as discussed more fully below, Washington

does not recognize *nolo contendere* pleas. The prior Florida offenses lack the essential requirements for a prior “conviction” under the SRA, and should not have been included in Heath’s SRA offender score.

3. The *nolo contendere* pleas are invalid under Washington law and cannot provide a valid basis for a conviction under Washington law. Washington neither recognizes nor permits *nolo contendere* pleas. CrR 4.2(d);⁶ see also Reynolds v. Donaho, 39 Wn.2d 451, 455, 236 P.2d 552 (1951). As the Eleventh Circuit Court of Appeal aptly stated in Willis,

A *nolo [contendere]* plea means “no contest,” not “I confess.” It simply means that the defendant, for whatever reason, chooses not to contest the charge. He does not plead either guilty or not guilty, and it does not function as such a plea.

106 F.3d at 969.

As noted supra, the SRA only permits prior convictions to count in the offender score. RCW 9.94A.525; RCW 9.94A.030(9). In Washington convictions require a formal adjudication of guilt following “a verdict of guilty, a finding of guilty, [or] acceptance of a plea of guilty.” RCW 9.94A.030(9).

⁶ CrR 4.2(d) provides: “[a] defendant may plead not guilty, not guilty by reason of insanity, or guilty.”

Although under Washington law an accused person may enter an Alford⁷ plea to a charge where, as in a *nolo contendere* plea, the accused does not admit guilt, there must be a factual basis for the charge and a formal determination of guilt. State v. Zhao, 157 Wn.2d 188, 197-98, 137 P.3d 835 (2006). If the accused is entering an Alford plea to an amended charge to take advantage of a plea bargain, there must be a factual basis for the originally-charged offense. Id.

Below, the State cited State v. McInally, 125 Wn. App. 854, 106 P.3d 794 (2005), for the proposition that the Florida offenses could be counted in Heath's offender score. But McInally is not on point; in fact, the Court's statutory construction in McInally supports Heath's argument, not the State's.

Broadly speaking, McInally concerned whether someone who had entered a *nolo contendere* plea in California as a juvenile was disqualified from receiving a Special Sex Offender Sentencing Alternative (SSOSA). This Court construed RCW 9.94A.670(2)(b), which provides that an offender is ineligible to receive a SSOSA if he has suffered "prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any

⁷ North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

other state.” McInally, 125 Wn. App. at 862. Construing the plain meaning of the statute, this Court concluded that the language, “any other felony sex offenses in this or any other state” “includes both out-of-state sex offenses that are comparable to Washington felony sex offenses and all other out-of-state felony sex offenses.” Id. at 864.

In its analysis, this Court expressly distinguished the circumstance of an offender’s SRA offender score from his eligibility for a SSOSA:

The SSOSA statute does not refer to an offender score; it only addresses the effect of prior sex offense convictions on an offender’s SSOSA eligibility. The statutory concept of an “offender score” is separate from the SSOSA provision. Compare RCW 9.94A.525 with RCW 9.94A.670. The difference between what convictions count toward an offender score and what convictions disqualify an offender from obtaining a SSOSA under RCW 9.94A.670(2)(b) does not create an ambiguity. This conclusion is consistent with the distinction between an offender’s criminal history and his offender score. See RCW 9.94A.030(13)(c) (“The determination of a defendant’s criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant’s criminal history.”)

McInally, 125 Wn. App. at 864 n. 14.⁸

⁸ Interestingly, the State quoted from this footnote in its brief to the trial court, but excerpted only the language, “[t]his conclusion is consistent with the distinction between an offender’s criminal history and his offender score.” CP 135.

This Court thus acknowledged (a) that there is a difference between “convictions,” which count towards an offender score, and the prior offenses that disqualify an offender from obtaining a SSOSA, and (b) that this is a distinction that the Legislature intended and made explicit.

The State also cited generally to “federal law”, both in the hearing and in the findings of fact which the State proposed and the court entered. CP 155; RP 28. Missing from the analysis, however, is a crucial understanding of the statutory differences between the pertinent federal sentencing statutes and Washington’s SRA.

First, the fact of a *nolo contendere* plea is no bar to an offense counting as a “prior sentence” under 18 U.S.C. §4A1.2.⁹ Second, the Sentencing Guidelines provide that so-called “diversionary dispositions” “resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding [are]

⁹ 18 U.S.C. §4A1.2(a)(1) provides: “The term ‘prior sentence’ means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.”

counted as a sentence under [18 U.S.C. §4A1.1(c)]^[10] even if a conviction is not formally entered[.]”

Unlike the federal statutes, only current and prior “convictions” may be included in the SRA offender score. RCW 9.94A.525(1). In Washington “conviction” has a specific and narrow meaning, requiring at a minimum an adjudication of guilt and a verdict, finding, or plea of guilty.

In this case, the Florida offenses involved a plea that is not valid under Washington law and includes no adjudication of guilt. The trial court should not have included these offenses in Heath’s SRA offender score.

¹⁰ 18 U.S.C. §4A1.1(c) creates as a scoring category “other sentences.” The Eleventh Circuit has held that a Florida *nolo contendere* plea followed by a withheld adjudication counts as an “other sentence” and a “diversionary disposition” under the Guidelines. United States v. Rockman, 993 F.2d 811, 814 (11th Cir. 1993).

E. CONCLUSION

For the foregoing reasons, this Court should conclude that the trial court erroneously included in Heath's SRA offender score Florida offenses that did not qualify as "convictions." Heath must be resentenced.

DATED this 29th day of July, 2011.

Respectfully submitted:

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RAYMOND HEATH,)

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