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NO. 70224-6-1

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

STATE OF WASHINGTON

Respondent

v.

JOSHUA M. REAVELEY,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

Did the trial court error in including in the defendant's offender score his prior out of state convictions for burglary and operating a vehicle without owner's consent without first determining the comparability with Washington felonies?

II. STATEMENT OF THE CASE

The defendant (appellant), Joshua Reaveley, was charged with second degree burglary. CP 55. A jury found him guilty as charged. CP 3, 23.

The defendant did not contest his offender score at sentencing. 4/09/13 RP 3. During the trial, the state indicated they had provided the defendant with certified copies of the out of state convictions. 2/19/13 RP 2. There is nothing in the record to indicate the certified copies were provided to the court for sentencing, or that an evidentiary hearing was held to determine the comparability of the out of state convictions of burglary and operating a vehicle without owner's consent with Washington felonies. The defendant was sentenced to 38 months confinement based on the offender score of "7" that included the out of state convictions. CP 5-6; 4/09/13 RP 4.

III. ARGUMENT

THE STATE CONCEDES THAT THE COMPARABILITY OF THE DEFENDANT'S OUT-OF-STATE CONVICTIONS WAS NOT PROVED AT SENTENCING.

The test for determining whether an out-of-state conviction is comparable to a Washington crime is set out in State v. Larkins, 147 Wn. App. 858, 862, 199 P.3d 441, 442 (2008):

The State bears the burden of proving both the existence and the comparability of an offender's prior out-of-state conviction. The Supreme Court has adopted a two-part test for determining whether such a conviction is comparable to a Washington crime which, with one exception, must rise to the level of a felony to be included in the offender score. First, a sentencing court compares the legal elements of the out-of-state crime with those of the Washington crime. If the crimes are so comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. If the elements of the out-of-state crime are different, then the court must examine the undisputed facts from the record of the foreign conviction to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington crime.

Id. at 862-63.

If the defendant affirmatively acknowledges the comparability of the out-of-state conviction, further proof is unnecessary. Mere acquiescence to the offender score is not sufficient. State v. Lucero, 168 Wn.2d 785, 788-89, 230 P.3d 165, 166 (2010).

In the present case, the defendant acquiesced in the offender score, but he did not affirmatively acknowledge comparability of the out-of-state convictions. Nor did the State provide proof of comparability. The appropriate remedy is to remand the matter to the sentencing court for resentencing, including an evidentiary hearing on the comparability of the out of state convictions with Washington felonies. State v. Ford, 137 Wn.2d 472, 486, 973 P.2d 452, 459 (1999).

IV. CONCLUSION

For the reasons stated above, the case should be remanded for hearing to determine the comparability of the defendant's out-of-state convictions and resentencing.

Respectfully submitted on November 21, 2013.

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