

NO. 71029-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VICHAJ SALY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

AMY MECKLING  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

2014 JUN 14 PM 2:50  
COURT OF APPEALS  
STATE OF WASHINGTON  
S

TABLE OF CONTENTS

|  | Page |
|--|------|
| A. <u>ISSUES PRESENTED</u> .....   | 1    |
| B. <u>STATEMENT OF THE CASE</u> .....  | 2    |
| C. <u>ARGUMENT</u> .....   | 4    |
| 1. THE TRIAL COURT PROPERLY ACCEPTED THE<br>PARTIES' AGREED-UPON CALCULATION OF<br>SALY'S OFFENDER SCORE ..... | 6    |
| 2. THE COURT PROPERLY DECLINED SALY'S<br>REQUEST TO CONTINUE THE SENTENCING<br>HEARING .....                   | 8    |
| D. <u>CONCLUSION</u> .....   | 10   |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Cadwallader, 155 Wn.2d 867,  
123 P.3d 456 (2005) ..... 6

State v. Anderson, 23 Wn. App. 445,  
597 P.2d 417 (1979) ..... 9

State v. Barker, 35 Wn. App. 388,  
667 P.2d 108 (1983) ..... 8, 9

State v. Bergstrom, 162 Wn.2d 87,  
169 P.3d 816 (2007) ..... 7, 8

State v. Eller, 84 Wn.2d 90,  
524 P.2d 242 (1974) ..... 9

State v. Ford, 137 Wn.2d 472,  
973 P.2d 452 (1999) ..... 6

State v. Hunley, 175 Wn.2d 901,  
287 P.3d 584 (2012) ..... 6

State v. Mendoza, 165 Wn.2d 913,  
205 P.3d 113 (2009) ..... 6

State v. Ross, 152 Wn.2d 220,  
95 P.3d 1225 (2004) ..... 6

Statutes

Washington State:

RCW 9.94A.525 ..... 4, 7

RCW 9.94A.530 ..... 6

Rules and Regulations

Washington State:

CrR 7.8 .....2, 4, 5, 10

Other Authorities

Sentencing Reform Act ..... 6

**A. ISSUES PRESENTED**

1. The State is required to establish a defendant's criminal history by a preponderance of the evidence. A defendant's affirmative acknowledgement of the offender score suffices. The trial court may decline to consider a pro se motion when the defendant is represented by counsel. At resentencing, Saly's counsel affirmatively agreed that his offender score was "6." Saly himself asked the court for additional time to investigate, stating his belief that his offender score was lower. Saly presented no specific argument or information regarding his claim. Did the sentencing court properly decline to address Saly's unsupported, pro se belief that his offender score was lower than that affirmatively acknowledged by his counsel?

2. A motion for a continuance is addressed to the sound discretion of the trial court, and the trial court's decision will be reversed only when no reasonable person would have taken the view adopted by the trial court. Additionally, the trial court's denial of a motion to continue will be overturned only upon a showing that the defendant has been prejudiced and/or that the result of the hearing would likely have been different had the continuance not been denied. Saly asked the court to consider giving him more time to investigate his belief that his offender score was lower than that acknowledged by his counsel. He offered no facts or argument to support his request,

nor did he present any specific information he hoped to uncover with additional investigation. Did the trial court properly exercise its discretion to deny a continuance of the sentencing hearing?

**B. STATEMENT OF THE CASE**

In May of 2005, Appellant Saly was convicted of first-degree murder with a firearm enhancement for the killing of Satkarl Dang. CP 16, 28-30. Mr. Dang was shot five times. CP 28. Four of the shots were fired at point-blank range while Dang sat in the passenger seat of Saly's car; the fifth shot was likely fired as he lay on the sidewalk. Id.

At his original sentencing hearing, Saly's offender score was calculated to include three convictions for second-degree assault. CP 22. The court also included an adult conviction for taking a motor vehicle without permission, and juvenile convictions for taking a motor vehicle, second-degree unlawful possession of a firearm, and a felony drug offense. CP 22. Saly's offender score was calculated as "8." CP 17, 22.

Almost six years later, in May of 2011, Saly filed a CrR 7.8 motion in the King County Superior Court, alleging that his prior class C felony convictions had "washed out," and should not have been included in his offender score. CP 115-19. The motion was

transferred to this Court for consideration as a personal restraint petition. CP 179. After this Court dismissed the petition, Saly moved for discretionary review in the Supreme Court. CP 167. The State was asked for its response, and it agreed that Saly should be resentenced with an offender score that did not include his prior class C felony convictions. Id. The matter was remanded for resentencing. CP 167-68.

A resentencing hearing was held on September 20, 2013. RP 11. At the hearing, the prosecutor and Saly's appointed counsel agreed that Saly's offender score was properly calculated as "6."<sup>1</sup> CP 227-28; RP 11-12. When the trial court asked if Saly had anything to say before sentence was imposed, Saly told the court that if he had an opportunity to gather "more information and more evidence," he believed he could show that his offender score was "possibly 1." RP 14. Saly did not state any particular reason why he believed his offender score was lower than a "6." Rather, he informed the court that he would like to have the opportunity to address it "all at once," rather than go back to prison and later "appeal." RP 14-15. The trial court responded that it typically addressed such matters by transferring them to the Court of Appeals. CP 15.

---

<sup>1</sup> The deputy prosecutor misspoke when he stated that Saly had originally been sentenced with an offender score of "7." RP 11. As noted above, Saly was previously sentenced with an offender score of "8." CP 17.

The court imposed sentence based upon the agreed offender score of “6,” which included only Saly’s three prior second-degree assault convictions. CP 170, 174. The court did not include any of Saly’s prior class C felony convictions in his offender score.<sup>2</sup> CP 174. Saly now appeals the amended judgment and sentence.<sup>3</sup> CP 178.

**C. ARGUMENT**

Saly argues that the trial court failed to comply with the requirements of CrR 7.8 by not holding a “factual hearing.” Brf. of Appellant at 1. He contends that his original CrR 7.8 motion, filed in May of 2011, challenged *three* of his prior convictions as having washed out, but that on remand, the trial court excluded only *one* of the prior convictions, and failed to address “the other two.” Brf. of Appellant at 5. Saly misapprehends the nature of the proceedings in the trial court and he misstates the factual basis for his claim.

When Saly appeared before Judge Cayce on September 20, 2013, he was there to be resentenced following a successful post-conviction motion, which was originally filed as a CrR 7.8

---

<sup>2</sup> It is unclear whether Saly’s prior juvenile drug offense is a class C or a class B felony. Regardless, it would score only as ½ point. RCW 9.94A.525(9). Because offender scores are calculated by rounding down to the nearest whole number, its inclusion (or exclusion) from Saly’s offender score is of no consequence. RCW 9.94A.525.

<sup>3</sup> Several weeks after the sentencing hearing, on the same day that he filed this appeal, Saly also filed a new CrR 7.8 motion in the superior court, which was transferred to this Court as a personal restraint petition. CP 180-226. The petition is currently pending under Court of Appeals No. 71072-9-I.

motion in the trial court and later transferred to this Court as a personal restraint petition. CP 167-68, 179. After this Court dismissed the petition, and in response to Saly's motion for discretionary review in the Supreme Court, the State agreed Saly should be resentenced based on an offender score that did not include his prior washed-out class C felony convictions. Id. The Supreme Court remanded for resentencing. CP 167-68. Thus, no CrR 7.8 motion was pending at the September 20, 2013 hearing in front of Judge Cayce, and Saly's characterization of the proceeding as governed by CrR 7.8 is wide of the mark.

Furthermore, Saly's contention that the trial court excluded only one prior washed-out conviction from his offender score and failed to address "the other two," is simply inaccurate. Upon resentencing, the trial court excluded *four* of Saly's prior convictions from his offender score—one adult conviction and three juvenile convictions. CP 22, 174. This resulted in Saly's offender score being reduced from "8" to "6." The trial court properly accepted counsels' agreement—that, based solely on his three prior class B felony convictions, Saly's offender score was "6." The court also properly declined to continue the hearing for Saly to "investigate further," when Saly provided no basis for his request for additional time. Saly's argument that the court failed to address "remaining issues" is meritless.

1. THE TRIAL COURT PROPERLY ACCEPTED THE PARTIES' AGREED-UPON CALCULATION OF SALY'S OFFENDER SCORE.

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).

The requirements of due process and the Sentencing Reform Act ("SRA") are satisfied when a sentencing court relies on a defendant's affirmative acknowledgement of the existence and comparability of his prior convictions when calculating the offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); see also State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009) (A defendant's affirmative acknowledgement of the "*facts and information* introduced for the purposes of sentencing" suffices (emphasis in original)). If a defendant disputes facts material to his sentencing, "[T]he court must either not consider the fact or grant an evidentiary hearing on the point." RCW 9.94A.530(2); In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005).

When a defendant is represented by counsel, the attorney has the ultimate authority to decide which legal arguments to advance, both at trial and at sentencing. State v. Bergstrom, 162 Wn.2d 87, 96, 169 P.3d 816 (2007). The trial court may decline to consider a pro se motion when the defendant is represented by counsel. Id. at 97. In Bergstrom, the defendant's lawyer agreed with the State's calculation of the offender score. 162 Wn.2d at 96. However, Bergstrom himself argued that his offender score was lower, contending that several of his prior convictions constituted the same criminal conduct. Id. at 90. The court concluded that, although the trial court had the discretion to not consider Bergstrom's pro se argument, the fact that it *had* considered the argument, and rejected it without a factual hearing, entitled Bergstrom to relief. Id. at 97. Notably, the court assumed for purposes of its decision that Bergstrom's pro se objection to his offender score was sufficiently "specific." Id. at 96 n.3.

Here, Saly's counsel affirmatively agreed that his offender score was "6."<sup>4</sup> CP 228-27; RP 12. Because Saly was represented by

---

<sup>4</sup> Excluding Saly's prior adult conviction for taking a motor vehicle without permission resulted in the loss of one point, while the exclusion of his three juvenile convictions resulted in his offender score being reduced by an additional one and one half points. See RCW 9.94A.525(9) (when calculating the offender score for a serious violent offense—first-degree murder—count one point for each nonviolent adult felony conviction and ½ point for each nonviolent juvenile felony conviction). When rounded down to the nearest whole number, this resulted in Saly's offender score being reduced by two points. RCW 9.94A.525. Because violent offenses count as two points each when scoring a serious violent offense, Saly's three prior convictions for second-degree assault resulted in a total offender score of "6." RCW 9.94A.525(9).

counsel, the sentencing court properly declined to address Saly's unsupported, pro se "belief" that his offender score was lower. Bergstrom, 162 Wn.2d at 97. Furthermore, Saly himself did not present any specific argument or information to support his claim; instead he simply asked the court for additional time to investigate.<sup>5</sup> RP 14-15. As such, the sentencing court did not err when it declined to address Saly's pro se claim regarding his offender score.

**2. THE COURT PROPERLY DECLINED SALY'S REQUEST TO CONTINUE THE SENTENCING HEARING.**

The trial court also properly exercised its discretion to deny Saly additional time to gather "more information." Saly did not present any specific argument as to his score, nor did he inform the court of material facts that he hoped to uncover given additional time.

"A motion for a continuance is addressed to the sound discretion of the trial court," and the trial court's decision is reviewed for abuse of that discretion. State v. Barker, 35 Wn. App. 388, 396-97, 667 P.2d 108 (1983) (citation and internal quotation marks omitted). A trial court abuses its discretion only if "no reasonable person would have taken the view adopted by the trial court." Id. at 397. Further, the trial court's denial of a motion to continue will be "disturbed only

---

<sup>5</sup> Saly does not explain what information or argument the court would have considered at the factual hearing he claims was required.

upon a showing that the accused has been prejudiced and/or that the result of the [hearing] would likely have been different had the continuance not been denied.” State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

Saly made no specific objection to his attorney’s agreement that his offender score was “6.” He did not inform the court of any particular information he hoped to uncover if given more time. Indeed, he made no argument at all; he merely stated his belief that his offender score was “possibly 1.” RP 14-15. Given this, the court was well within its discretion to decline Saly’s request for a continuance of the sentencing hearing. This Court cannot say that no reasonable judge would have proceeded with the sentencing hearing under these circumstances.

Additionally, even if Saly should have been granted further time to “investigate,” he is entitled to relief only if he can show prejudice. Barker, 35 Wn. App. at 396-97 (holding that “[t]he decision to deny the defendant a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted” (internal quotation marks and citation omitted)); State v. Anderson, 23 Wn. App. 445, 449, 597 P.2d 417 (1979) (rejecting a due process claim because defendant failed to show how denial of a continuance prejudiced his

case). Saly has not even attempted to demonstrate prejudice. As such, this Court should conclude that the trial court properly exercised its discretion to proceed with sentencing.

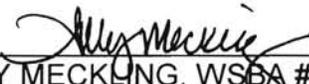
**D. CONCLUSION**

Saly was before the court for resentencing; his characterization of the proceedings as governed by CrR 7.8 is misplaced. The sentencing court properly declined to address Saly's non-specific, pro se claim that his offender score was lower than that agreed to by his counsel. The court also properly exercised its discretion when it declined to continue the sentencing hearing in the absence of any stated basis to do so. The State respectfully requests this Court to affirm Saly's sentence.

DATED this 14<sup>th</sup> day of July, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

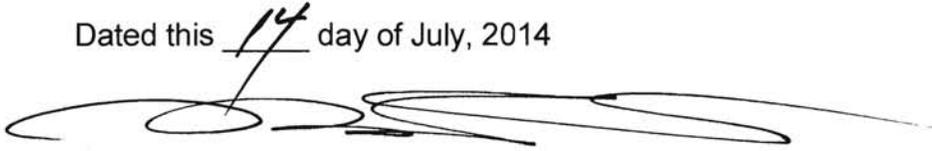
By:   
AMY MECKLING, WSBA #28274  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. VICHAI SALY, Cause No. 71029-0 -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.

Dated this 14 day of July, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

\_\_\_\_\_  
Name  
Done in Seattle, Washington

COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2014 JUL 14 PM 2:50