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Apr 17, 2015
Court of Appeals
Division I
State of Washington

NO. 72246-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MANUEL RAMIREZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State must prove a defendant's criminal history by a preponderance of the evidence. Although a defendant's failure to object to the prosecutor's understanding of his criminal history is insufficient, the State meets its burden when the defendant affirmatively acknowledges it. At sentencing, the State presented the court with a summary of Ramirez's criminal history and a scoring sheet that reflected an offender score of "7." Ramirez affirmatively agreed in writing that his offender score was "7." Did the sentencing court properly rely on Ramirez's affirmative acknowledgment of the State's understanding of his criminal history and calculation of his offender score?

Although the court properly relied on Ramirez's affirmative acknowledgment of his criminal history, Appendix B to the Judgment and Sentence does accurately reflect the convictions used to calculate the offender score. Should the matter be remanded solely to enter a corrected Appendix B, clarifying the convictions upon which the offender score of "7" was based?

2. RCW 9.94A.701(9) requires the sentencing court to reduce the term of community custody "whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime."

This statute applies only to standard-range sentences. The sentencing court calculated Ramirez's standard range as 51-60 months, with a maximum sentence of 60 months. However, Ramirez received an exceptional sentence of only 36 months incarceration. Did the trial court properly set Ramirez's term of community custody at 12 months?

B. STATEMENT OF THE CASE

On March 5, 2014, Appellant Manuel Ramirez was charged in King County Superior Court with Domestic Violence Felony Violation of a Court Order. CP 1-2. In April of 2014, Ramirez exercised his right to represent himself. 04/17/14RP 2-12; CP 7-8. Standby counsel was later appointed. CP 37. On June 16, 2014, Ramirez waived his right to a jury trial and agreed to a bench trial in front of the Honorable Judge James Cayce. 06/16/14RP 2; CP 38.

Following presentation of the evidence, the trial court found Ramirez guilty as charged. 06/16/14RP 46-47; CP 39-40. The court concluded that on February 13, 2014, Ramirez was observed by King County Sheriff's Deputies standing in the road at the end of his mother's driveway in SeaTac, Washington. 06/16/14RP 16-18, 34; CP 39-40. The deputies had been dispatched after a neighbor called 911. 06/16/14RP 10-11. At the time, there was an order prohibiting

Ramirez from coming within 1000 feet of his mother's residence.

06/16/14RP 20-22; CP 39. Ramirez was aware of the order.

06/16/14RP 23; CP 40. The court found that Ramirez knowingly and willfully violated the order, and that he had been convicted twice previously of violating domestic violence protection orders.

06/16/14RP 46-47; CP 40.

On July 17, 2014, the court sentenced Ramirez. 07/17/14RP; CP 46-56. The court calculated Ramirez's offender score as "7," and his standard range as 51-60 months. CP 47. The State recommended an exceptional sentence below the standard range of 36 months confinement, and drafted proposed findings of fact and conclusions of law in support of the exceptional sentence. 07/17/14RP 2-3; CP 53-54. The findings included a stipulation that Ramirez's offender score was a "7." CP 53. Ramirez signed the findings of fact, affirmatively agreeing to the State's understanding and calculation of his criminal history. CP 54. The court imposed an exceptional sentence of 36 months in custody and 12 months of community custody. CP 49-50. Ramirez now appeals his sentence. CP 65.

C. ARGUMENT

Ramirez challenges his sentence on two grounds. First, he alleges that the trial court erred by calculating his offender score as a "7." However, Ramirez affirmatively agreed, in writing, with the State's calculation of his offender score and the sentencing court properly relied on Ramirez's affirmative acknowledgement. Although the court properly concluded that Ramirez's offender score was "7," Appendix B to the Judgment and Sentence does not contain an accurate listing of the convictions relied upon to calculate Ramirez's offender score. Thus, the matter should be remanded for the sole purpose of entering a corrected Appendix B, clarifying the convictions used to calculate the offender score as "7."

Secondly, Ramirez contends that RCW 9.94A.701(9) required the sentencing court to reduce the statutory 12-month term of community custody to no more than 9 months. However, RCW 9.94A.701(9) applies only to standard range sentences and Ramirez received an exceptional sentence below the standard range. The court's imposition of 12 months of community custody was proper.

1. THE COURT PROPERLY RELIED ON RAMIREZ'S AFFIRMATIVE ACKNOWLEDGMENT OF THE STATE'S UNDERSTANDING OF HIS CRIMINAL HISTORY AND CALCULATION OF HIS OFFENDER SCORE.

A sentencing court's calculation of an offender score is reviewed *de novo*. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). A defendant may challenge his offender score for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The State is required to establish a defendant's criminal history by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); 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). Although a certified judgment and sentence is the best evidence of a prior conviction, the State may rely on means other than a certified judgment to prove criminal history. Hunley, 175 Wn.2d at 910-13 (citations omitted).

The requirements of both the SRA and due process are satisfied when a sentencing court relies on the defendant's affirmative acknowledgement of the existence and comparability of his prior convictions when calculating his offender score. State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). As such, the State's burden to prove a defendant's criminal history is satisfied when a defendant affirmatively acknowledges his criminal history. Ford, 137 Wn.2d at 482-83; Mendoza, 165 Wn.2d at 928. While a defendant's mere failure to object to the prosecutor's summary of his criminal history is insufficient to constitute an acknowledgment, an affirmative agreement with the facts and information presented by the State suffices. Hunley, 175 Wn.2d at 912 (citing Ford, 137 Wn.2d at 482-83).

Here, the State presented the court with a written summary of Ramirez's criminal history and a scoring sheet demonstrating that it believed Ramirez's offender score to be a "7." See Scoring Form, Supp. CP __ (Sub. No. 43, Statement of Prosecuting Attorney, filed June 26, 2014). Ramirez affirmatively agreed in writing that his offender score was a "7." CP 53-54. Therefore, the State met its

burden to prove criminal history, and the sentencing court properly relied on Ramirez's affirmative acknowledgment.¹

Even though the court properly accepted Ramirez's affirmative agreement that his offender score was "7," Appendix B to the Judgment and Sentence does not accurately reflect which convictions comprise that score. See CP 52. Contrary to the Appendix B, the State did *not* include Ramirez's juvenile conviction for Taking a Motor Vehicle in its calculation of the offender score. See Scoring Form, Supp. CP __ (Sub. No. 43, Statement of Prosecuting Attorney, filed June 26, 2014). Similarly, the State included three of Ramirez's misdemeanor domestic violence convictions in the offender score,

¹ Ramirez likely agreed with the State's calculation of his offender score because it is correct. Ramirez's 2012 felony conviction for a protection order violation under cause number 12-1-05058-5 scores as 2 points because it was committed after August 1, 2011, and was pled and proven to include a domestic violence special allegation. See Ex. 4, 6; RCW 9.94A.525(21)(a). Ramirez's 2007 felony conviction for a protection order violation under cause number 07-1-09414-4 scores as 1 point. See Ex. 3; RCW 9.94A.525(7). Ramirez's 2007 felony conviction for unlawful possession of a firearm in the second degree scores as 1 point. RCW 9.94A.525(7). Ramirez's 2013 misdemeanor conviction for no contact/protection order violation under SeaTac Municipal Court number Y13195603 scores as 1 point because it is a "repetitive domestic violence offense" where domestic violence was pled and proven after August 1, 2011. See Appendix C to State's Trial Memorandum, Supp. CP __ (Sub. No. 38, State's Trial Memorandum, filed June 16, 2014); RCW 9.94A.525(21)(c); RCW 9.94A.030(41)(a)(ii). Likewise, Ramirez's two 2011 assault in the fourth degree convictions under SeaTac Municipal Court number Y11223062 score as 1 point each because they are "repetitive domestic violence offenses" where domestic violence was pled and proven after August 1, 2011. See Appendix C to State's Trial Memorandum, Supp. CP __ (Sub. No. 38, State's Trial Memorandum, filed June 16, 2014); RCW 9.94A.525(21)(c); RCW 9.94A.030(41)(a)(i). None of these 2007 to 2013 convictions, which total 7 points, "wash out" under RCW 9.94A.525(2)(c) or (f), because Ramirez never spent five, much less ten, years in the community crime free.

which are not reflected on Appendix B. See Scoring Form, Supp. CP ___ (Sub. No. 43, Statement of Prosecuting Attorney, filed June 26, 2014); CP 53. This Court should remand for the sole purpose of correcting Appendix B to reflect the correct criminal history used to calculate Ramirez's offender score as "7."

2. THE COURT PROPERLY IMPOSED 12 MONTHS OF COMMUNITY CUSTODY.

Ramirez argues that RCW 9.94A.701(9) required the trial court to reduce his community custody term to no more than 9 months. However, RCW 9.94A.701(9) applies only to sentences imposed within the standard range. Ramirez received an exceptional sentence below the standard range, and the sentencing court properly imposed 12 months of community custody.

A sentencing court is prohibited from imposing a term of confinement or community custody that exceeds the statutory maximum for the crime. RCW 9.94A.505(5). Domestic Violence Violation of a Court Order is a class C felony with a maximum sentence of 5 years. RCW 26.50.110(5); RCW 9A.20.021(1)(c).

RCW 9.94A.701(9) requires the court to reduce the term of community custody "whenever an offender's *standard range term of confinement* in combination with the term of community custody exceeds the statutory maximum for the crime." (emphasis added).

“By its plain language, RCW 9.94A.701(9) applies only to terms of confinement imposed within the *standard range*.” In re Pers. Restraint of McWilliams, 182 Wn.2d 213, 225, 340 P.3d 223 (2014) (emphasis in original). In McWilliams, the Washington State Supreme Court concluded that applying RCW 9.94A.701(9) to an exceptional sentence would “read the phrase ‘standard range’ out of the statute,” and refused to interpret it in a manner that rendered a portion of its language superfluous. 182 Wn.2d at 225-26.

Ramirez received an exceptional sentence below the standard range of 36 months. CP 46-56. Together with the 12 months of community custody imposed, his sentence totaled 48 months – well under the statutory maximum sentence of 60 months. McWilliams makes clear that RCW 9.94A.701(9) has no applicability to Ramirez, who fails to cite it as controlling authority. His claim is frivolous.

D. CONCLUSION

Ramirez affirmatively agreed with the State’s understanding of his criminal history. The court properly relied on his affirmative acknowledgment in calculating his offender score. Resentencing is unnecessary. Nevertheless, because Appendix B to the Judgment and Sentence does not accurately list the convictions included in Ramirez’s offender score, the case should be remanded to correct the

Appendix B. Because the sentencing court imposed an exceptional sentence below the standard range, the court properly imposed 12 months of community custody.

DATED this 17th day of April, 2015.

Respectfully submitted,

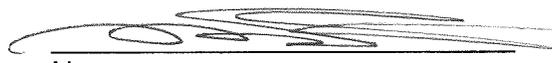
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Gregory Link, the attorney for the appellant, at greg@washapp.org, containing a copy of the Brief of Respondent, in STATE V. MANUEL RAMIREZ, Cause No. 72246-8-I, in Division One of the Court of Appeals for the 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.


Name

04-17-15
Date

Done in Seattle, Washington