

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 4

MR. TRUJILLO'S SENTENCE MUST BE
REVERSED WHERE THE STATE DID NOT PROVE
HIS OFFENDER SCORE 4

1. The State must prove the offender score. 5

1. The State must prove the offender score. 5

2. No prior judgments were placed in the record and Mr.
Trujillo did not affirmatively acknowledge his offender score. 7

3. The State must be held to the existing record on
remand 8

E. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Ammons</u> , 105 Wn.2d 175, 186, 713 P.2d 719 (1986) . . .	5
<u>State v. Bergstrom</u> , 162 Wn.2d 87, 169 P.3d 816 (2007)	4,6
<u>State v. Bresolin</u> , 13 Wn. App. 386, 534 P.2d 1394 (1975)	5
<u>In re Pers. Restraint of Cadwallader</u> , 155 Wn.2d 867, 123 P.3d 456 (2005)	5,8
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).	4,5
<u>State v. Ford</u> , 125 Wn.2d 919, 891 P.2d 712 (1995)	7
<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002).	4
<u>State v. Harris</u> , 148 Wn. App. 22, 197 P.3d 1206 (2008)	8
<u>State v. Jones</u> , 96 Wn. App. 649, 980 P.2d 791 (1999)	3
<u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002).	9
<u>State v. Mendoza</u> , 165 Wn.2d 913, 920, 205 P.3d 113 (2009)	4,5,6,9
<u>State v. Reed</u> , 116 Wn. App. 418, 66 P.3d 646 (2003)	3
<u>In re Pers. Restraint of Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988).	5

STATUTES

RCW 9.94A.530(2).	5
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UNITED STATES COURT OF APPEALS CASES

United States v. Miller, 588 F.2d 1256 (9th Cir. 1978), cert. denied,
440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). 7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14 4

A. ASSIGNMENT OF ERROR

The defendant's sentence must be reversed where the State failed to prove his prior convictions and his offender score, including its assertion Mr. Trujillo was on community custody at the time of the current offense.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. In a plea of guilty, Mr. Trujillo stated he was on community custody status at the time of the current offense, but reserved his right to challenge his offender score. Subsequently, at sentencing, he specifically objected to the community custody point, and refused to sign a document entitled "Stipulation On Prior Record and Offender Score," in which the State asserted he had two prior convictions and the community custody point. The State did not thereafter introduce copies of any prior judgment and sentence documents. Must this Court reverse Mr. Trujillo's sentence?

2. On remand, may the State introduce additional evidence to prove Mr. Trujillo's prior convictions and offender score, where he objected to his offender score below?

C. STATEMENT OF THE CASE

James Trujillo was charged with possessing a controlled substance (oxycontin) with intent to deliver following execution of a

search warrant. CP 1-2. His CrR 3.6 motion to suppress was denied. CP 20. During plea negotiations, an amended information was filed, adding allegations that he was on community custody and that the crime was committed within 1,000 feet of a school bus stop zone, and adding an additional count of possession of marijuana. CP 25.

Mr. Trujillo agreed to plead guilty to the oxycontin count in exchange for dismissal of the marijuana charge, and with the understanding that he would be seeking a DOSA evaluation and sentence. CP 27.

In his Statement of Defendant On Plea of Guilty, Mr. Trujillo stated that he was on community custody at the time of the current offense. CP 27 (Statement of Defendant on Plea of Guilty). Mr. Trujillo's plea statement did not include any statement of criminal history and noted that any dispute about offender scoring would be resolved by the trial court at sentencing. CP 28-29.

At the sentencing hearing, defense counsel noted that Mr. Trujillo was arguing that he had not been on community custody at the time of the current offense. Counsel stated:

DOC did not put him on community custody. What they did, as soon as he got out of prison the last time, rather than put him on probation, have him check in, have him report, get some help, he went in and they

said, "We are not even going to supervise you. We are going to kick you loose."

12/6/11RP at 18-19.¹ Subsequently, Mr. Trujillo wrote, or someone wrote, "refused to sign" in the location for the defendant's signature in the document entitled "Stipulation on Prior Record and Offender Score," which asserted Mr. Trujillo's two prior convictions and that he had a point for community custody status, and which was signed by counsel. CP 37-38 (filed 12/6/10).

However, the State did not file any prior judgment and sentence documents as evidence of Mr. Trujillo's alleged prior convictions or his community custody status.

The trial court then sentenced Mr. Trujillo based on a score including two prior convictions and a community custody point, imposing 64 months incarceration. 12/6/10RP at 23-24.

Mr. Trujillo appeals. CP 53.

¹ Counsel also informed the court that he had "explained" to Mr. Trujillo that the cases of State v. Jones and State v. Reed provided that he had nonetheless been on community placement at the time of the crime for purposes of the additional point in his offender score. 12/6/11RP at 19. The cases cited by counsel do not appear to address this precise issue. State v. Jones, 96 Wn. App. 649, 652-53, 980 P.2d 791 (1999), involves whether the court's judgment and sentence imposing the statutory one-year term of community placement adequately set forth the mandatory term of supervision, in the context of sentencing and an order of community placement for a current offense. State v. Reed, 116 Wn. App. 418, 423-24, 66 P.3d 646 (2003), simply holds that the defendant was under community placement at the time of the current offense because she was subject to the conditions of the community custody ordered in her DOSA sentence.

D. ARGUMENT

MR. TRUJILLO'S SENTENCE MUST BE REVERSED WHERE THE STATE DID NOT PROVE HIS OFFENDER SCORE.

"[I]n general a defendant cannot waive a challenge to a miscalculated offender score." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Despite its general reluctance to address issues not preserved in the trial court, the Washington Supreme Court does "allow belated challenges to criminal history relied upon by a sentencing court." State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Thus, where the State fails to meet its burden of proof at sentencing, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85. When the State fails to meet its burden of proof at sentencing, the defendant must be resentenced. Mendoza, 165 Wn.2d at 930.

1. The State must prove the offender score.

Constitutional due process² requires the State prove the existence of prior convictions by a preponderance of the evidence. State v.

² The Fourteenth Amendment provides "[N]or shall any state deprive any person of life, liberty, or property, without due process of law "

Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); see RCW 9.94A.530(2). The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine the offender score. See In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480; In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988).

In assessing the State's proof, due process requires "that in imposing sentence, the facts relied upon by the [sentencing] court must have some basis in the record." Ford, 137 Wn.2d at 482 (quoting State v. Bresolin, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). These principles specifically "require that a sentencing court base its decision on information bearing 'some minimal indicium of reliability beyond mere allegation.'" Mendoza, 165 Wn.2d at 920 (quoting Ford, 137 Wn.2d at 481).

2. No prior judgments were placed in the record and Mr. Trujillo did not affirmatively acknowledge his offender score.

Certified copies of the prior judgment and sentence documents supporting a defendant's criminal history are the best evidence to

establish a defendant's prior convictions. Bergstrom, 162 Wn.2d at 93, 169 P.3d 816.

Here, however, the State did not present any prior judgment and sentence documents, to establish Mr. Trujillo's criminal history and offender score, including his alleged community custody status at the time of the current offense, to which Mr. Trujillo also, through counsel, voiced specific objections.

In addition, Mr. Trujillo did not "affirmatively acknowledge" the State's assertions of his criminal history and offender score. "[T]he State must provide evidence of a defendant's criminal history, generally a certified copy of the judgment and sentence, unless the defendant affirmatively acknowledges the criminal history on the record." Mendoza, 165 Wn.2d at 930. If a defendant affirmatively acknowledges his criminal history, he "thereby obviate[s] the need for the State to produce evidence." Mendoza, 165 Wn.2d at 920, 205 P.3d 113; RCW 9.94A.530(2).

However, the mere failure to object to the prosecutor's assertions of criminal history does not constitute such an affirmative acknowledgement. Mendoza, 165 Wn.2d at 928. Instead, the Supreme Court has "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information*

introduced for the purposes of sentencing." Id. (emphasis in Mendoza).

In the present case, although Mr. Trujillo stated in his Statement of Plea of Guilty that he was on community custody, he reserved the right to object to his offender score computation, and objected to his offender score prior to the trial court's imposition of sentence, both by factually contesting the community custody point through counsel, and by affirmatively refusing to sign the Stipulation to his prior convictions and offender score at sentencing.³

Certainly, Mr. Trujillo did not "affirmatively acknowledge" his offender score at sentencing. Although defense counsel did sign the stipulation, counsel could not stipulate to the offender score by signing that document, and the trial court could not accept such a stipulation, over the known objections of the defendant. It is the responsibility of the trial judge when accepting a defense stipulation to assure, in some manner, that it is made with the consent of the defendant. A stipulation cannot be entered over the known or expressed objections by the accused. See State v. Ford, 125 Wn.2d 919, 922, 891 P.2d 712 (1995); United States v. Miller, 588 F.2d 1256 (9th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct.

1426, 59 L.Ed.2d 636 (1979).

3. The State must be held to the existing record on

remand. When a defendant specifically objects to the State's proof at sentencing, the State should be held to the existing record on remand, and should not be able to present further evidence of the defendant's criminal history and offender score In the Pers. Restraint of Cadwallader, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005) (citing Ford, 137 Wn.2d at 485).

Mr. Trujillo voiced objections (through counsel) to the alleged community custody point in his score, and his affirmative notation that he "refused to sign" the stipulation to history and score, was a specific objection placing the party prosecutor on notice of the deficiencies of proof of the offender score and the community custody matter particularly. This is particularly true given that Mr. Trujillo previously reserved that very right to challenge his score at sentencing, and the prosecutor had never provided a statement of prior history in the plea forms. See State v. Harris, 148 Wn. App. 22, 29, 197 P.3d 1206 (2008) (no waiver of right to challenge score where plea agreement stated standard range sentence was to be determined at later date and plea form provided that defendant

³ Mr. Trujillo's negotiated plea of guilty was not predicated on a particular length of a term of incarceration; the parties acknowledged in the plea that the

agreed with prosecutor's "attached" criminal history, but no such history was attached). The *only* summary of the defendant's alleged prior history was vocally objected to and affirmatively disagreed with in writing. Mr. Trujillo thus raised a specific objection at sentencing, and the State failed to respond with evidence of the defendant's convictions and score, thus the State must be held on remand to the record as it existed at the sentencing hearing. Cadwallader, supra; Mendoza, 165 Wn.2d at 930 (citing State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002)).

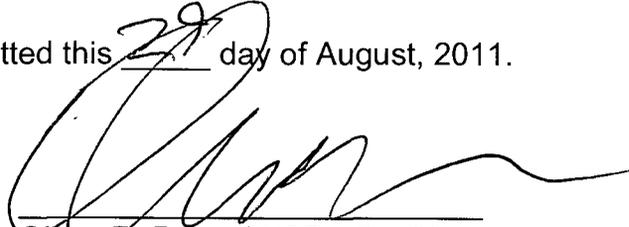
Furthermore, Mr. Trujillo's refusal to sign the stipulation placed the State on notice that there was no proof whatsoever of the defendant's criminal history in terms of his prior convictions. The State did not provide a pre-sentencing report from DOC and thereafter did not proffer proof in the form of copies of the judgment and sentence documents from the alleged prior cases. On remand, the State must be held to the existing record and Mr. Trujillo must be sentenced based on offender score of zero.

defendant would be seeking a DOSA sentence. CP 27-35.

E. CONCLUSION

Mr. Trujillo respectfully requests this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 29 day of August, 2011.

A handwritten signature in black ink, appearing to read 'O. R. Davis', written over a horizontal line.

Oliver R. Davis (WSBA 24560)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41748-1-II
v.)	
)	
JAMES TRUJILLO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TERRY LANE, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF AUGUST, 2011.

X _____ 

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