

NO. 43985-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY ANDERSON,

Appellant.

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

The Honorable Carol Murphy, Judge
The Honorable James J. Dixon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court failed to bring appellant to trial within the speedy trial period established in CrR 3.3.

2. The State failed to prove appellant’s prior out of state conviction, and it should not have been included in his offender score.

3. The court failed to determine whether appellant’s prior concurrently sentenced offenses encompassed the same criminal conduct.

Issues pertaining to assignments of error

1. Where the court failed to ensure that appellant was brought to trial within the time specified in CrR 3.3, must appellant’s convictions be reversed and the charges against him dismissed?

2. The State alleged that appellant had a prior felony conviction from California, but it presented no certified documents to establish that conviction and it offered no explanation for its failure to present this necessary evidence. Where appellant objected to the State’s

offender score calculation, is remand for resentencing without consideration of the California conviction required?

3. Appellant's criminal history includes prior offenses for which he served concurrent sentences. Appellant argued at sentencing that these offenses encompassed the same criminal conduct and thus they should be counted as one offense in his offender score. The court refused to make a same criminal conduct determination, however, stating the defense did not present any evidence to contradict the State's offender score calculation. Since the court is statutorily required to make a same criminal conduct determination as to prior concurrently sentenced offenses, and the State bears the burden of proving a defendant's criminal history, is remand for resentencing required?

B. STATEMENT OF THE CASE

1. Setting of Trial Date

On March 28, 2012, the Thurston County Prosecuting Attorney charged Appellant Randy Anderson with felony violation of a post-conviction domestic violence no contact order. CP 3; RCW 26.50.110(5); RCW 10.99.020; RCW 10.99.050. The case went to jury trial on June 6, 2012, but the jury could not reach a verdict, and the court declared a

mistrial. On June 7, 2012, the parties agreed to a new trial date the week of July 30, 2012. 2RP¹ 4.

At a hearing before the Honorable Carol Murphy on July 9, the prosecutor moved to continue the trial date. She explained that when the trial date was set in June, she did not realize that it conflicted with her prescheduled vacation. 1RP 3. The defense objected to the continuance, arguing that the delay proposed by the State was not fair to Anderson, who had been in custody since late March. 1RP 5. The court noted that the prosecutor had agreed to the July 30 trial date and said it did not understand how the date had been set when the prosecutor was unavailable. 1RP 6-7. The court stated that the case needed to be scheduled as soon as the prosecutor was possibly available, and the case should be given priority because Anderson had been in custody a long time. 1RP 6-7. It granted the motion for continuance and set the trial for August 13, 2012. 1RP 6-7.

The State brought a second motion for continuance on July 19 2012, before the Honorable Gary R. Tabor. This time, the investigating officer was unavailable for the scheduled trial date. 2RP 3. Again, the defense objected. 2RP 3. The court noted that the speedy trial period had

¹ The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—7/9/12; 2RP—7/19/12, 9/25/12 (p.m.); 3RP—9/4-5/12; 4RP—9/25/12 (sentencing).

been extended to September 13 when the continuance was granted on July 9. It reset the trial date to September 4. 2RP 5.

The defense filed a motion to dismiss for violation of Anderson's right to a speedy trial. CP 7-12. When the case came on for trial before the Honorable James J. Dixon, Anderson testified in support of the motion that he had never agreed to waive his speedy trial rights, and he had asserted those rights both times the court rescheduled the trial. 3RP 7-8. Counsel argued that the court abused its discretion by scheduling the trial for September 4, rather than within the speedy trial period following the mistrial, given that the State could have proceeded with a different officer witness. The delay was prejudicial to Anderson because he had spent a considerable amount of time in jail waiting for trial. 3RP 9-10.

The court denied the motion to dismiss, saying it would not second guess the previous judge's decision to grant the continuance over the defense objection. 3RP 12. It also noted that the defense did not file a written objection that the current trial date was outside the speedy trial period within 10 days of the date being set, as required under CrR 3.3(d)(3), and it found that argument waived. 3RP 12-13.

2. Trial Evidence

The case proceeded to jury trial. The State presented evidence that on March 25, 2012, Anderson went to his mother's home to visit her. 3RP

53. He was turned away by his mother's caretaker, who called the police. 3RP 52, 55. Anderson was waiting outside the residence when the police arrived, and he said he had gone to the door to see his mother. 3RP 52-53. The State presented evidence that an order prohibiting Anderson from contacting his mother was entered on June 8, 2004, and the order remained in effect until June 8, 2014. 3RP 62-64. The State also established that Anderson had at least two prior convictions for violation of a protection order. 3RP 67, 70-71.

Anderson testified that in November 2011, his uncle contacted him and said that his mother wanted him to visit her. 3RP 99-100. Anderson was on probation until January 2012, and although he had signed the no contact order in June 2004, he mistakenly believed that it had expired by the time he finished his probation. 3RP 101-03. If he had realized the no contact order was still in effect in March 2012, he would not have visited his mother. 3RP 104.

The jury returned a guilty verdict and a special verdict finding Anderson and his mother were members of the same family or household. CP 59-60.

3. Sentencing

At sentencing, the State offered certified copies of Anderson's prior Washington convictions. It also alleged that Anderson had a prior

conviction from California for a felony drug crime, but the documents it offered to prove that conviction were not certified. The State did not explain why it failed to obtain a certified copy of the California judgment and sentence. 4RP 11-12; Supp. CP (Sub. No. 92, copies of prior judgments and sentences for sentencing, filed 9/25/12).

The defense objected to the State's offender score calculation, saying new evidence had been added at the last minute. 4RP 8. Defense counsel argued for an exceptional sentence below the standard range. 4RP 7. And Anderson asserted that his 2004 convictions constituted the same criminal conduct. 4RP 8.

The court did not address the State's failure to present certified copies of documents to prove the California conviction, but simply included that offense in Anderson's offender score. 4RP 12. It also found no basis for an exceptional sentence. 4RP 13.

Finally, the court rejected Anderson's contention that the 2004 offenses constituted the same criminal conduct. The court stated that the only information it had regarding the prior offenses was the information provided by the State, which leads to a conclusion that Anderson's offender score is 7. The court stated that the defense had provided no evidence that the 2004 convictions constituted the same criminal conduct,

and it would be improper for the court to even consider that issue. 4RP 11.

Defense counsel explained that Anderson was contending the 2004 unlawful imprisonment and second degree assault were committed against the same person on the same day and should therefore be counted as the same criminal conduct. 4RP 12. The court responded that it had no idea what happened in 2004. While those facts may be subject to debate, it had a responsibility to consider all of Anderson's prior convictions in calculating the offender score. 4RP 12.

Based on an offender score of 7, the court determined that Anderson's standard range was 51-60 months. 4RP 12-13. It imposed a mid-range sentence of 56 months, with four months of community custody. 4RP 13-14; CP 87-97. Anderson filed this appeal. CP 73.

C. ARGUMENT

1. TRIAL DID NOT COMMENCE WITHIN THE TIME ESTABLISHED BY CRR 3.3, AND THE CHARGE AGAINST ANDERSON MUST BE DISMISSED.

When a mistrial was declared on June 7, 2012, following the first trial, the time for trial period was restarted. CrR 3.3(d)(2)(iii). Because Anderson was in custody, his speedy trial expiration date was set at 60 days. Supp. CP (Sub. No. 37, Order Setting Trial, filed 6/7/12).

Anderson's trial did not commence until September 4, 2012, however. The court granted a motion for continuance on July 9, 2012, setting the trial date as August 13, 2012, and extending the speedy trial period to September 13, 2012. Anderson objected to this continuance, and he objected when the trial date was reset within that extended speedy trial period to September 4, 2012.

A defendant who is held in jail must be brought to trial within 60 days of the commencement date, unless a period of time is excluded from the time for trial. CrR 3.3(b)(1), (c)(2). When a period of time is excluded from the speedy trial period, the speedy trial period extends to at least "30 days after the end of that excluded period." CrR 3.3(b)(5). A delay pursuant to a properly granted continuance is excluded from the time for trial period. CrR 3.3(e)(3).

A motion for continuance is properly granted only if it is "required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). While the court's decision to grant a continuance under CrR 3.3(f)(2) is generally reviewed for an abuse of discretion, a violation of the time for trial rule is reviewed de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

Once the 60-day time for trial period expires without a lawful basis for further continuances, CrR 3.3 requires dismissal, and the trial court

loses authority to try the case. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009); CrR 3.3(h). “The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials.” Saunders, 153 Wn. App. at 220 (citing CrR 3.3(a)(1)-(2)).

In Saunders, the trial court granted six continuances over the defendant’s objections. For the last three, neither party demonstrated that continuances were required in the administration of justice. One was granted to allow for further negotiations, despite the defendant’s statement that he was done negotiating and ready to go to trial. The other two were granted because the case had not yet been assigned to the deputy prosecutor who would try the case. The trial court recognized that there was no satisfactory reason for the continuances but granted them anyway. Saunders, 153 Wn. App. 212-15. On appeal this Court held that because the State provided no meaningful explanation for the requested continuances, the court abused its discretion in granting them. This Court reversed Saunders’s convictions and remanded for dismissal of the charge with prejudice. Id. at 221.

Here, as in Sanders, the trial court granted the State’s motion for continuance, despite the State’s failure to provide a legitimate reason for

the delay. The prosecutor's explanation was that she had failed to realize, when she agreed to the July 30 trial date, that the date conflicted with her prescheduled vacation. IRP 4-5. A deputy prosecutor's reasonably planned vacation is generally good cause for continuance. State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). But here, it was not the vacation that necessitated the continuance but the prosecutor's failure to inform the court of her vacation at a time when a different trial date within the speedy trial period could have been set. By the time the prosecutor realized her error and moved to continue, the court was unable to schedule trial within the speedy trial period. The prosecutor's forgetfulness is not a legitimate reason to continue a trial beyond the speedy trial period, and the lower court abused its discretion in granting the continuance. Anderson's conviction should therefore be reversed and the charge dismissed with prejudice. See Sanders, 153 Wn. App. at 221.

2. THE STATE FAILED TO PROVE THAT THE ALLEGED CALIFORNIA CONVICTION SHOULD BE INCLUDED IN ANDERSON'S OFFENDER SCORE.

It is well established that the State has the burden of proving the defendant's convictions by a preponderance of the evidence at sentencing. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); State v. Ford, 137

Wn.2d 472, 479-80, 973 P.2d 452 (1999). “The best evidence of a prior conviction is a certified copy of the judgment.” Ford, 137 Wn.2d at 480. The State may introduce other comparable evidence of the conviction only if it demonstrates that a certified copy of the judgment is unavailable for some reason other than the fault of the prosecutor. Lopez, 147 Wn.2d at 519; State v. Rivers, 130 Wn. App. 689, 698-99, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007). Other acceptable proof of a conviction usually consists of other court-certified records. Rivers, 130 Wn. App. at 701.

When the State fails to offer a certified copy of the judgment for a prior conviction and fails to satisfactorily explain the absence of this evidence, it does not carry its burden of proof as to that offense. Rivers, 130 Wn. App. at 705. In Rivers, the State did not present a certified copy of an alleged prior robbery conviction, and it offered no explanation why that document was not presented. Rivers, 130 Wn. App. at 701. The State did present certified copies of other convictions which showed the robbery conviction in the defendant’s criminal history. Because the defendant challenged the criminal history presented by the State, however, these other documents were not sufficient to carry the State’s burden of proof as to the robbery. Rivers, 130 Wn. App. at 701-02.

Similarly here, the State failed to prove one of the alleged prior convictions. The State alleged that Anderson had seven prior felony convictions, including one from California. Supp. CP (Sub. No. 93, First Amended Prosecutor's Statement of Criminal History, filed 9/25/12). At sentencing, the State presented certified copies of the judgments from the six Washington convictions. It presented only uncertified documents relating to the California judgment, however. Id. The State offered no explanation as to why it did not obtain a certified copy of the California judgment. 4RP 11-12. In Rivers, the State's proof was insufficient, even though some of the certified documents it presented listed the challenged offense in the defendant's criminal history. Rivers, 130 Wn. App. at 701-02. Here, not only did the State fail to present a certified copy of the California judgment or an explanation for that failure, but none of the certified copies of the Washington judgments even listed the California conviction in Anderson's criminal history. Supp. CP (Sub. No. 92).

The State's unexplained failure to produce a certified copy of the California judgment, and its failure to present other evidence of comparable reliability, is fatal to the proof of that conviction. It may not be used in the calculation of Anderson's offender score.

On remand, the State may present additional evidence in support of its offender score calculation only if there was no specific objection at the

initial sentencing hearing. Lopez, 147 Wn.2d at 523; Ford, 137 Wn.2d at 485-86. Here, while defense counsel did not specifically address the State's failure to present a certified copy of the California judgment, counsel challenged the offender score calculation and the evidence offered to support it. 4RP 8. The State was thus on notice that it needed to prove each conviction relied on in reaching its offender score calculation. This Court should remand for resentencing on the record as it stands.

3. THE COURT'S FAILURE TO DETERMINE WHETHER ANDERSON'S PRIOR CONCURRENTLY-SENTENCED OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING.

The sentencing court calculates an offender score based on the defendant's other current and prior convictions. RCW 9.94A.589(1)(a). If prior convictions were found to encompass the same criminal conduct, the current sentencing court must count those convictions as one offense. RCW 9.94A.525(5)(a)(i). If the prior sentencing court did not make that finding, but concurrent sentences were imposed, the current sentencing court must independently evaluate whether the prior convictions encompass the same criminal conduct. Id.; State v. Tornngren, 147 Wn.

App. 556, 563, 196 P.3d 742 (2008), abrogated on other grounds in State v. Graciano, ___ Wn.2d ___, 2013 WL 376076, 5 (January 31, 2013)².

Here, the record shows that Anderson was sentenced to concurrent sentences for seven separate offenses on June 8, 2004. Supp. CP (Sub. No. 92). The court below was therefore required to determine whether these offenses encompassed the same criminal conduct. RCW 9.94A.525(5)(a)(i). The court did not appear to understand its obligation. In response to the defense argument that some of the 2004 convictions encompassed the same criminal conduct, the court stated that “it would be improper for the Court to consider – for today’s purpose to consider even the issue of whether those prior convictions constitute the same course of conduct for sentencing purposes. So I will not make any finding that any of those prior convictions constitute same course of conduct.” 4RP 11.

Moreover, the court improperly shifted the burden of proof to the defense to establish that the prior offenses encompassed the same criminal conduct. The State bears the burden of proving the existence of prior

² At issue in Graciano was the appropriate standard of review of a trial court’s “same criminal conduct” determination. The Torngren Court had applied a de novo standard, but the Supreme Court held that the abuse of discretion standard applies. The Court also noted that whether the sentencing court abused its discretion may depend on who carries the burden of proof. It held that the defendant bears the burden of proving that current convictions encompass same criminal conduct, as distinguished from State’s burden of proving criminal history: “The State’s burden to prove the existence of prior convictions at sentencing does not include establishing that *current* offenses—treated as prior convictions for purposes of offender score calculation—constitute separate criminal conduct.” Graciano, Slip Op. at 3 (emphasis in original).

convictions by a preponderance of the evidence, including whether concurrently sentenced prior convictions encompass the same criminal conduct. State v. Bergstrom, 162 Wn.2d 87, 89, 169 P.3d 816 (2007) (trial court erred in relying on the State's offender score calculation without requiring the State to prove that the prior offenses should be counted separately). The defendant has no obligation to provide separate proof of his criminal history. Lopez, 147 Wn.2d at 520-21.

At the sentencing hearing in this case, the defense argued that some of Anderson's 2004 convictions encompassed the same criminal conduct. The court stated that the defendant had provided no evidence to contradict the State's offender score calculation, and the court could not make a same criminal conduct determination without evidence to support it. 4RP 11. Even when defense counsel explained that the 2004 unlawful imprisonment and second degree assault convictions involved the same victim and occurred at the same time and place³, the court failed to hold the State to its burden of proving those offenses did not encompass the same criminal conduct. 4RP 12.

Remand for a same criminal conduct determination is required. Because Anderson specifically raised this issue at sentencing and the State

³ Offenses encompass the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

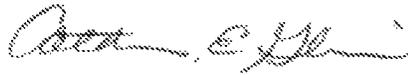
failed to produce any evidence regarding the challenged prior convictions, the State may not present any new evidence on remand. Bergstrom, 162 Wn.2d at 93; In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

D. CONCLUSION

Because Anderson was not brought to trial within the speedy trial period, the charge against him must be dismissed. Moreover, the State's failure to prove the California conviction and the court's failure to make a same criminal conduct determination require remand for resentencing on the existing record.

DATED March 8, 2013.

Respectfully submitted,



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