

No. 44646-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sandy Fehr,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01066-5

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

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ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MS. FEHR OF POSSESSION WITH INTENT TO DELIVER METHAMPHETAMINE.

Ms. Fehr stands on the argument set forth in her Opening Brief.

II. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MS. FEHR'S CRIMINAL HISTORY AND OFFENDER SCORE.

Due process requires the prosecution to prove prior convictions at sentencing. *State v. Hunley*, 175 Wn.2d 901, 910-917, 287 P.3d 584 (2012). Absent proof by a preponderance of the evidence, a prior conviction cannot contribute to the offender score. *Id.*

At sentencing, Ms. Fehr did not acknowledge any prior felony convictions. RP 183-193. The prosecutor did not present any evidence of criminal history. RP 183-193. Ms. Fehr should have been sentenced with an offender score of zero.

Respondent erroneously claims that Ms. Fehr and her attorney acknowledged her prior convictions. Brief of Respondent, pp. 4-5, 7-8. Respondent points first to Ms. Fehr's arguments in support of release pending sentencing.¹ Brief of Respondent, pp. 4, 8. Respondent next

¹ Respondent mischaracterizes the request as a request for an appeal bond.

points to defense counsel's sentencing arguments. Brief of Respondent, p. 8 (citing RP 187).

Neither of these purported "acknowledgments" allowed the court to include fourteen felony convictions in Ms. Fehr's criminal history or fourteen points in her offender score.

A. Ms. Fehr did not make an acknowledgment allowing the court to include three prior felony bail jumping convictions in her criminal history and offender score.

According to Respondent, Ms. Fehr "personally acknowledged the bail jump convictions." Brief of Respondent, p. 4; *see also* p. 8 ("Appellant specifically acknowledged the bail jump convictions...")

Respondent's assertion that the bail jump convictions should be included in the offender score is incorrect.

First, Ms. Fehr did not acknowledge bail jump convictions for sentencing purposes. As Respondent notes, her statements came in the context of a request for release on bail. RP 180-181.

Second, Ms. Fehr had a right to remain silent pending sentencing. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). The court did not warn her that her statements on the issue of release pending sentencing could be used to increase her sentence. RP 180-181. Because of this, her statements should not have been used against her at sentencing. *Id.*, at 467.

Third, Ms. Fehr did not specifically acknowledge prior *felony* bail jump convictions. RP 180-181. Her statements may have related only to misdemeanor or gross misdemeanor convictions. *See* RCW 9A.76.170(3)(d). Such convictions would not contribute to her offender score. RCW 9.94A.525.

Fourth, Ms. Fehr did not specifically acknowledge that she had *three* prior felony bail jump convictions. RP 180-181. Her acknowledgement did not provide a basis for adding three points to her offender score.

Fifth, Ms. Fehr did not acknowledge the date of any prior bail jumping convictions. Instead, she told the court the charges were from “a long time ago.” RP 180. Felony bail jumping convictions do not contribute to an offender score if the offender has spent sufficient crime-free time in the community since conviction.² RCW 9.94A.525(2). Ms. Fehr did not acknowledge facts allowing the court to conclude that any bail jumping convictions were recent enough to count toward the offender score.

For all these reasons, the trial court erred by including bail jumping convictions in Ms. Fehr’s criminal history and offender score. Her

² The sole exception is for bail jumping for a charge of first-degree murder, which is itself a class A felony. *See* RCW 9A.76.170(3); RCW 9.94A.525(2).

sentence must be vacated and the case remanded for a new sentencing hearing.

- B. Defense counsel did not make an acknowledgment allowing the court to include fourteen prior felonies in Ms. Fehr's criminal history and offender score.

Respondent erroneously contends that "[d]efense counsel specifically acknowledged the prior drug convictions and bail jumps..." Brief of Respondent, p. 8 (citing RP 187). This is incorrect.

Defense counsel did not acknowledge any specific prior convictions. Instead, defense counsel referred generally to "a lot of points," and mentioned several categories of prior convictions. RP 187. These included "possession of drug cases," one "possession with intent to deliver," and "a couple bail jumps" which he believed were class C felonies. RP 187.

This so-called acknowledgement does not establish fourteen prior felony convictions. First, defense counsel did not stipulate to the date of any particular conviction. RP 187. Thus, nothing in the purported acknowledgment allowed the court to determine whether or not prior convictions washed out. *See* RCW 9.94A.525(2).

Second, although counsel mentioned "possession of drug cases," he did not agree that any of these prior convictions were for felony

possession cases, as opposed to (for example) marijuana convictions. RP 187. Such convictions do not add to the offender score. RCW 9.94A.525.

Third, even if counsel’s “acknowledgment” can be used against Ms. Fehr, it is not clear how many prior offenses it covers. Arguably, the highest offender score that can be derived from this “acknowledgment” would be five—two “possession of drug cases,” one “possession with intent to deliver,” and two “bail jumps” that are class C felonies. RP 187.

In any event, the offender score of fourteen cannot stand. Ms. Fehr’s sentence must be vacated and the case remanded for a new sentencing hearing. Because Ms. Fehr did not object to the inclusion of any priors, the prosecution will have the opportunity to prove her criminal history by a preponderance of the evidence. *In re Cadwallader*, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

III. MS. FEHR’S SENTENCE VIOLATED HER RIGHT TO A JURY DETERMINATION OF HER PRIOR CONVICTIONS BY PROOF BEYOND A REASONABLE DOUBT.

Respondent correctly notes the presence of clerical errors in Ms. Fehr’s Opening Brief. Brief of Respondent, p. 9. The references to a “persistent offender” sentence should have been deleted. *See* Appellant’s Opening Brief, pp. ii, 11, 15, 17. Ms. Fehr’s arguments pertain to any sentence higher than a person would receive with an offender score of zero.

IV. THE IMPOSITION OF A 60-MONTH SENTENCE VIOLATED MS. FEHR'S RIGHT TO PROCEDURAL DUE PROCESS.

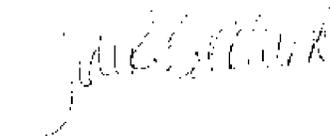
Respondent correctly notes the presence of clerical errors in Ms. Fehr's Opening Brief. Brief of Respondent, p. 9. The references to a "persistent offender" sentence should have been deleted. *See* Appellant's Opening Brief, pp. ii, 11, 15, 17. Ms. Fehr's arguments pertain to any sentence higher than a person would receive with an offender score of zero.

CONCLUSION

Ms. Fehr's conviction must be reversed and the charge dismissed with prejudice. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on January 22, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Sandy Fehr, DOC #843426
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Gig Harbor, WA 98332

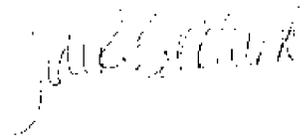
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 22, 2014.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

January 22, 2014 - 10:51 AM

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