

FILED
Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN C. CONIGLIO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00151-05

BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the inclusion of the Arkansas conviction in Coniglio's offender score was erroneous when no record established the relevant facts by admission, stipulation, or finding beyond a reasonable doubt?
2. Whether the imposition of legal financial obligations should be affirmed because the record does not establish that Coniglio was indigent under RCW 10.101.010(a)-(c)?

II. STATEMENT OF THE CASE

Coniglio entered a plea of guilty to the crime of Harassment-Threats to Kill on May 21, 2018 and was sentenced on May 29, 2018. CP 16. The parties disputed whether Coniglio's Arkansas conviction for Aggravated Assault upon a Certified Law Officer should be included in the offender score. RP 30.

The State provided documentation of the conviction in the form of a certified copy of the Felony Information, Sentencing Order, and Prosecutor's Short Report of Circumstances (Prosecutor's Report). CP 8-14. In support of the State's argument for factual comparability, the State relied upon the following handwritten statement in the Summary of Facts in the Prosecutor's Report: "Def. then spat on Officer that arrested him." CP 14. The trial court stated that the Prosecutor's Report presented by the State was not a stipulation or an admission but appeared to be a finding of the Court. RP 35.

The court then found that the Arkansas conviction would satisfy the criteria of assault of a law enforcement officer in the State of Washington. RP 44. The court based its decision on the Summary of the Facts in the Prosecutor's Report. RP 44; CP 14.

The trial court inquired of Coniglio about his financial ability and asked about his work history. RP 48. Coniglio reported that he received Social Security Disability benefits but that he could work. RP 47. The last time Coniglio received benefits was in 2014 or 2015. RP 47. Coniglio reported that he makes \$2000 per month and that he has a job waiting for him in Cheyenne as well. RP 48. Coniglio reported that he has no other legal obligations in Wyoming or anywhere else and that he can pay fines. RP 48. Coniglio has one biological daughter that was adopted. RP 48–49.

The court imposed the recommended financial obligations of \$500 for attorney fee reimbursement, \$500 victim assessment fee, \$200 court costs, and a \$100 DNA fee. RP 44, 49; CP 21–22.

The court granted a stay of the sentence pending appeal over the offender score at defense counsel's request. RP 49–50.

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III. ARGUMENT

A. THE STATE CONCEDES THAT THE INCLUSION OF THE ARKANSAS CONVICTION IN CONIGLIO'S OFFENDER SCORE WAS ERRONEOUS.

“[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *Matter of Canha*, 189 Wn.2d 359, 365, 402 P.3d 266 (2017) (quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002)). “And when a trial court has entered an erroneous sentence, ‘the defendant is entitled to be resentenced.’” *Id.* at 365–66 (citing *Goodwin*, 146 Wn.2d at 869).

“If a defendant has been erroneously sentenced, we remand his case to the sentencing court for resentencing.” *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citing *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) superseded by statute on other grounds as stated in *State v. Cobos*, 182 Wn.2d 12, 15, 338 P.3d 283 (2014)).

“To compare offenses, we use a two-part test.” *Matter of Canha*, 189 Wn.2d at 367 (*In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005)).

Here, the parties agreed at sentencing that the Arkansas conviction was not legally comparable to Assault in the Third Degree of a Law Enforcement Officer or Custodial Assault. RP 25, 31.

“[I]f the offenses are not legally comparable, the court analyzes factual comparability.” *Matter of Canha*, 189 Wn.2d at 367 (citing *Lavery*, 154 Wn.2d at 255–57). “Offenses are factually comparable when the defendant’s conduct would have violated a Washington statute.” *Matter of Canha*, 189 Wn.2d at 367 (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)).

“To comply with *Apprendi*,¹ the court may rely only on facts that were admitted, stipulated, or proved to the fact finder beyond a reasonable doubt.” *Matter of Canha*, 189 Wn.2d at 367 (citing *Lavery*, 154 Wn.2d at 255).

Here, the trial court pointed out that the statement “Def. then spat on Officer that arrested him” (CP 14) was not a stipulation or admission. The “Prosecutor’s Short Report of Circumstances” was not signed by the defendant and does not give any indication as to whether it was an admission. CP 14. The trial court stated that the statement appeared to be the court’s findings. RP 35. There is no statement that the court made such a finding and more importantly, that it was the fact finder at trial and found Coniglio to be guilty of those facts beyond a reasonable doubt. The record is insufficient to establish that the facts were admitted to, stipulated to, or proved to a fact finder beyond a reasonable doubt.

Therefore, the State concedes that the case should be remanded for

¹ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

resentencing. The State requests this court to refrain from holding that the Arkansas conviction may not be included in the offender score as the State may have the opportunity to find additional evidence necessary to establish that the foreign conviction is factually comparable. RCW 9.94A.530(2) (“On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.”); *see State v. Vanhollebeke*, 197 Wn. App. 66, 76, 387 P.3d 1103 (2016) (citing *State v. Jones*, 182 Wn.2d 1, 10–11, 338 P.3d 278 (2014) (a sentencing court is permitted to consider new, permissible evidence on remand)).

B. THE IMPOSITION OF COSTS SHOULD BE AFFIRMED BECAUSE THE RECORD DOES NOT ESTABLISH CONIGLIO’S INDIGENCY.

The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

"Indigent" means a person who, at any stage of a court proceeding, is:
(a) Receiving one of the following types of public assistance:
Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans'

benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income. . . .

RCW 10.101.010(3) (a)–(c).

“House Bill 1783, which prohibits the imposition of discretionary LFOs on an indigent defendant, applies on appeal to invalidate [] discretionary LFOs (and the \$200 criminal filing fee).” *State v. Ramirez*, 191 Wn.2d 732, 750, 426 P.3d 714 (2018).

However, claims of error on direct appeal must be supported by the existing record on review. *See* RAP 9.1. A claim of error based on a factual assertion that the defendant is indigent necessarily fails on direct appeal if there is nothing in the record to show the defendant actually established indigency. *See State v. Thibodeaux*, 430 P.3d 700, 703, 2018 WL 6174962, at *3 (Wn. App. 2018); *State v. Lewis*, 194 Wn. App. 709, 721, 379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016); *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015).

In *Ramirez*, the court ordered certain fees stricken because the record showed that the defendant established indigency on the record when he filed a declaration including a financial statement section in his motion for indigency. *Ramirez*, 191 Wn.2d at 744–44.

Here, Coniglio stated that the last time he received disability benefits was in 2014 or 2015 which was not at the time of sentencing in May 2018.

RP 47. Coniglio reported that he makes \$2000 per month and that he had a job waiting for him in Cheyenne as well. RP 48.

Further, although the trial court found that Coniglio did not have sufficient funds to prosecute his appeal, there is no finding that he meets the requirements for indigency under RCW 10.101.010(3)(a)-(c). CP 4.

Therefore, this Court should find that the record does not support Coniglio's claim for relief from the imposition of legal financial obligations.

IV. CONCLUSION

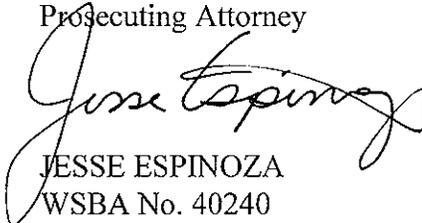
The State concedes that the inclusion of the Arkansas conviction was included in the offender score erroneously due to an insufficient record. The case should be remanded for resentencing.

The record does not establish indigency under of RCW 10.101.010(a)-(c). Therefore, this Court should affirm the imposition of legal financial obligations.

Respectfully submitted this 31st day of December, 2018.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

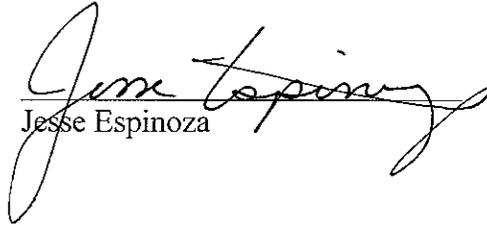


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Kathryn Russell Selk on December 31, 2018.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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Appellate Court Case Title: State of Washington, Respondent v. Jonathan C. Coniglio, Appellant
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