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No. 52569-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AUSTEN MICHAEL CARTER,

Appellant.

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

The Honorable Erik D. Price
Cause Nos. 17-1-01497-34, 17-1-01923-34, 17-1-02212-34,
17-1-02255-34, 17-1-02256-34, 17-1-02257-34

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

 1. Carter is correct that the evidence presented through stipulated facts does not support a conviction for the possession of heroin on count 2 of Cause No. 17-1-01497-34..... 5

 2. Carter is correct that the evidence presented through stipulated facts does not support a conviction for attempting to elude a pursuing police vehicle on count 2 of Cause No. 17-1-02212-34..... 7

 3. Carter is correct that the evidence presented through stipulated facts does not support two convictions for identity theft in the second degree of Cause No. 17-1-02257-34..... 10

 4. Due to the dismissal of one count of possession of heroin, one count of attempting to elude a police vehicle, and one count of identity theft in the second degree, this Court should remand for entry of orders to vacate the convictions..... 12

D. CONCLUSION..... 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Batson</u> , 194 Wn. App. 326, 377 P.3d 238 (2016)	4
<u>State v. Feeser</u> , 138 Wn. App. 737, 158 P.3d 616 (2007)	8
<u>State v. Galisia</u> , 63 Wn. App. 833, 822 P.2d 303 (1992)	4
<u>State v. Hudson</u> , 85 Wn. App. 401, 932 P.2d 714 (1997)	9
<u>State v. Kilgore</u> , 141 Wn. App. 817, 172 P.3d 373 (2007), aff'd, 167 Wn.2d 28, 216 P.3d 393 (2009)	14

Decisions Of The Court Of Appeals

<u>State v. Chacon</u> , 192 Wn.2d 545, 431 P.3d 477 (2018)	4
<u>State v. Drum</u> , 168 Wn.2d 23, 25 P.3d 237 (2010)	4
<u>State v. Johnson</u> , 104 Wn.2d 338, 705 P.2d 773 (1985)	4
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	6
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	4, 7, 11

U.S. Supreme Court Decisions

Sullivan v. Louisiana,
508 U.S. 275 (1993) 4

Statutes and Rules

RCW 46.61.024..... 9

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence presented through stipulated facts support a conviction for the possession of heroin on count 2 of Cause No. 17-1-01497-34.

2. Whether the evidence presented through stipulated facts support a conviction for attempting to elude a pursuing police vehicle on count 2 of Cause No. 17-1-02212-34.

3. Whether the evidence presented through stipulated facts support two convictions of identity theft in the second degree of Cause No. 17-1-02257-34.

4. Whether the defendant is entitled to resentencing where the adjustment of his offender score does not change the standard range of his sentence.

B. STATEMENT OF THE CASE.

Austen Carter was charged with 13 felony offenses under six separate superior court cases. CP 1-6. He was accepted into the Thurston County Drug Court program on January 16, 2018. CP 7-30. Drug Court participants must sign a contract that requires them to abide by program requirements. CP 7,11,15,19,23,27. If a participant does not abide by the requirements, the contract gives the trial court the discretion to terminate the participant from the

program. CP 8,12,16,20,24,28. Carter faced the possibility of termination several times during his term in drug court. 1 RP 14.¹

Carter signed six separate Drug Court contracts which included an identical provision detailing the consequences of termination:

18. If he/she is terminated from the program, he/she agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the law enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitute the basis for prosecution of the pending charge(s). He/she further agrees and stipulates that the facts presented by such reports, declaration, statements, and/or expert examination are sufficient for the Court to find him/her guilty of the pending charge(s).

CP 9,13,18,21,25,29. On September 7, 2018, Carter was officially terminated from Drug Court. 1 RP 11. Carter was terminated for using heroin while on work release in violation of the Drug Court guidelines. 1 RP 3.

Carter came before the court for a stipulated facts bench trial on October 16, 2018. 2 RP 6. At the start of the proceedings, the

¹ The verbatim report of proceedings in this matter appears in six volumes. Volume 1, transcribed by Kathryn A. Beehler, contains a hearing on a Motion to Terminate held September 7, 2018 and will be referred to as 1 RP in this brief. Volume 2, transcribed by Kathryn A. Beehler, contains a Stipulated Facts Bench Trial that took place on October 16, 2018 and will be referred to as 2 RP in this brief.

State presented the court with the proposed findings of facts and conclusions of law on all six cause numbers with attached police reports. 2 RP 7. The court announced that it had reviewed both the proposed findings and police reports prior to taking the bench. 2 RP 7. The court adopted the findings and police reports and found Carter guilty of all charges in each of the cause numbers: 17-1-01497-34, 17-1-01923-34, 17-1-02212-34, 17-1-02255-34, 17-1-02256-34, and 17-1-02257-34. 2 RP 7-8. The court imposed the median of standard range sentences for each offense to run concurrently. 2 RP 16-17. The court also imposed 12 months of community custody with drug evaluation. 2 RP 17.

Carter now appeals portions of each judgment and sentence for sufficiency of the evidence as it relates to count 2 of Cause No. 17-1-01497-34, possession of heroin; count 2 of Cause No. 17-1-02212-34, attempting to elude a police vehicle; and one count of identity theft in the second degree of Cause No. 17-1-02257-34. Additional facts relating to specifics of each of the challenged charges appear below in the argument section of this brief.

C. ARGUMENT.

“In a stipulated facts trial, the judge or jury still determines the defendant's guilt or innocence [and] the State must prove

beyond a reasonable doubt the defendant's guilt." State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). "The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." State v. Chacon, 192 Wn.2d 545, 549, 431 P.3d 477 (2018) (quoting Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A defendant's "stipulation to the sufficiency of the evidence [is] not binding on either the trial court or the Court of Appeals." State v. Drum, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The remedy for insufficient evidence is a reversal of the defendant's conviction with prejudice. State v. Batson, 194 Wn. App. 326, 339, 377 P.3d 238 (2016).

After review of the facts presented to the trial court, the State concedes that insufficient evidence supported the conviction for the possession of heroin on count 2 of Cause No. 17-1-01497-34, the conviction for attempting to elude a pursuing police vehicle on count 2 of Cause No. 17-1-02212-34, and one of the counts of identity theft in the second degree of Cause No. 17-1-02257-34.

1. Carter is correct that the evidence presented through stipulated facts does not support a conviction for the possession of heroin on count 2 of Cause No. 17-1-01497-34.

The stipulated facts presented to the trial court in Cause No. 17-1-01497-34 are contained in a collection of police reports detailing incidents that occurred at a vacant home located at 2210 Walnut Rd. NW, Olympia, WA. CP 33-53. The owner of the home passed away several weeks before these incidents occurred, and the executor of the estate was the sole person in care and custody of the home. CP 36. On August 18, 2017, Carter and two other individuals entered the home and loaded items from the home, such as checkbooks and identification documents, into Carter's truck. CP 48. The items taken from the home were found in Carter's vehicle when it was searched pursuant to a search warrant on September 8, 2017. CP 51. These facts provide a substantial basis

for the conviction for count 1 of Cause No. 17-1-01497-34, residential burglary.

The police reports also contain the details of a second break-in that occurred at the vacant home on August 19, 2017. According to the police reports, four people were discovered by police on the property after a neighbor called to report “a white male prying boards off the home.” CP 37. Carter was not a member of this group. Two of the individuals in the group were contacted by police on the property while sitting in a white Honda Civic. CP 45. There is no information provided in the police reports linking the Honda Civic to Carter. Heroin and methamphetamine were discovered in the Civic, however, the police officers were not able to decide which passenger the narcotics belonged to. CP 53. The officer requested that the narcotics be destroyed. CP 53.

There was not information in the record to support Carter’s conviction for possession of heroin on August 20, 2017. It appears that police reports supporting heroin charges for Carter are missing from what was provided to the court, however; “[m]atters outside of the record at trial are not considered in a direct appeal.” State v. McFarland, 127 Wn.2d 322, 355, 899 P.2d 1251 (1995). Evidence is sufficient to support a conviction if, viewed in the light most

favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201. Here, there is insufficient evidence in the record to support the conviction of possession of heroin. For this reason, it must be dismissed with prejudice.

2. Carter is correct that the evidence presented through stipulated facts does not support a conviction for attempting to elude a pursuing police vehicle on count 2 of Cause No. 17-1-02212-34.

The stipulated facts presented to the trial court in Cause No. 17-1-02212-34 are a collection of police reports detailing an encounter between the Nisqually Police and a suspicious vehicle parked at the Red Wind Casino on December 3, 2017. CP 71-76. A Nisqually Police officer located a maroon 1993 Honda Accord 4-door vehicle with red duct tape over the rear license plate. CP 71. The officer attempted to obtain the VIN number from the vehicle but before he was able to do so, Carter emerged from the casino and removed the duct tape from the license plate. CP 71.

Carter sped away from the casino and the officer gave chase in his police vehicle with his siren and lights activated. CP 71. Carter refused to stop the vehicle and led the officer on a chase reaching speeds of 70+ miles per hour. CP 71. Carter passed

vehicles in the opposite lane of travel and the officer slowed to allow cars to pull out of the way. CP 71. Slowing abruptly caused the officer to lose traction in the police vehicle and slide onto the shoulder of the road. CP 71. He radioed other officers from the Thurston County Sheriff's Office and the Yelm Police Department to continue the pursuit. CP 71. The Honda was eventually found at a Shell gas station, but Carter was unable to be located. CP 71.

A local newspaper published the photo of the suspect who had been involved in the chase, asking the public for any leads. CP 72. Carter was identified as the driver of the maroon Civic by several members of the community, including his father. CP 72-73. Carter was charged with Possession of a Stolen Vehicle and Eluding Law Enforcement. CP 73.

In order to "[o]btain and to sustain a conviction, the State must prove every essential element of a crime beyond a reasonable doubt." State v. Feeser, 138 Wn. App. 737, 741, 158 P.3d 616 (2007). The eluding statute provides:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be

by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024. The collection of police reports clearly prove that Carter was given a signal to stop his vehicle, failed to stop, and operated his vehicle in a reckless manner; however, the police reports contain no direct indication that the pursuing officer was in uniform. "The eluding statute clearly requires evidence that the officer giving the signal to stop shall be in uniform." State v. Hudson, 85 Wn. App. 401, 403, 932 P.2d 714 (1997).

There are many compelling indicators in the record to suggest the police officer was in uniform, such as the officer's report about being "in a patrol vehicle" or the use of a canine officer in pursuit of Carter, but there is no direct mention of the uniform in the proceedings. CP 71. The trial court made this inference when it found Carter guilty of Eluding a Police Vehicle. However, the controlling caselaw states that "[e]vidence that the officers were in a marked vehicle and that [the defendant] probably knew they were police officers, without more, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that [the] officers were in uniform." Hudson, 85 Wn. App. at 405. In light of the Hudson ruling, the evidence presented in the police reports is insufficient to

support the eluding conviction; therefore, the conviction must be dismissed with prejudice.

3. Carter is correct that the evidence presented through stipulated facts does not support two convictions for identity theft in the second degree of Cause No. 17-1-02257-34.

The stipulated facts presented to the trial court in Cause No. 17-1-02257-34 are a collection of police reports regarding a stolen vehicle and credit card that was kept in that vehicle. According to the police reports, the victim's 1999 Ford F250 truck was stolen from his driveway at approximately 1:47 am on September 26, 2017. CP 128-129. The victim reported that the stolen credit card was used at the following locations at the following times: "Walmart, 5900 Littlerock Rd. 09-26-17 22:31 hr, \$132.42; Jack in the Box, 110 Trosper Rd. 09-25-17 09:56 hr, \$18.81; Shell gas station, 6131 Capitol Blvd. \$73.56" (no date or time available). CP 124. The victim alerted the investigating officer that he had already contacted the Shell station in an attempt to obtain video footage of the transaction, but there was no footage available. CP 124. Police investigation of the Shell gas station charge was not pursued any further.

The investigating officer contacted the asset protection manager at the Walmart store. CP 124. The manager was able to find records of the transaction and the corresponding surveillance video. CP 124. The officer recognized the suspect, Carter, from previous interactions with law enforcement. CP 124. The suspect's identity was also verified by Carter's mother. CP 124. Carter stipulates that this evidence is sufficient to support one of the two charges of identity theft. Brief of Appellant, at 12.

The investigating officer contacted a manager at Jack in the Box hoping to find a record of the transaction or video footage of the drive-thru. CP 124. The on-duty manager stated that she would contact the officer with any follow-up information. CP 124. There is no follow-up included in the record. This evidence "viewed in the light most favorable to the prosecution," would not be enough to "permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Salinas, 119 Wn.2d at 201. For this reason, the State concedes that the charge should be dismissed.

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4. Due to the dismissal of one count of possession of heroin, one count of attempting to elude a police vehicle, and one count of identity theft in the second degree, this Court should remand for entry of orders to vacate the convictions.

Carter's offender scores must be recalculated to reflect the dismissal of count 2 possession of heroin in Cause No. 17-1-01497-34, count 2 attempting to elude a police vehicle in Cause No. 17-1-02212-34, and one count of identity theft in the second degree in Cause No. 17-1-02257-34. The State recalculates the offender scores for each of the remaining felony offenses as follows: On count 1 of Cause No. 17-1-01497-34, Residential Burglary, the State calculates an offender score of 11, carrying a standard range of 63-84 months with the median sentence at 73.5 months.

On count 1 of Cause No. 17-1-01923-34, Taking a Motor Vehicle without Permission in the First Degree, the State calculates an offender score of 13, carrying a standard range of 72-96 months with a median sentence at 83 months. On count 2 of Cause No. 17-1-01923-34, Unlawful Possession of a Controlled Substance - Methamphetamine, the State calculates an offender score of 9, carrying a standard range of 12+-24 months with a median sentence at 18 months. On count 3 of Cause No. 17-1-01923-34,

Unlawful Possession of a Controlled Substance - Heroin, the State calculates an offender score of 9, carrying a standard range of 12+-24 months with a median sentence at 18 months.

On count 1 of Cause No. 17-1-02212-34, Possession of a Stolen Motor Vehicle, the State calculates an offender score of 13, carrying a standard range of 43-57 months with a median range sentence of 50 months.

On count 1 of Cause No. 17-1-02257-34, Identity Theft in the Second Degree, the State calculates an Offender Score of 9, carrying a standard range of 43-57 months with a median range sentence of 50 Months.

On count 1 of Cause No. 17-1-02256-34, Identity Theft in the Second Degree, the State calculates an Offender Score 9, carrying a standard range of 43-57 months with a median range sentence of 50 Months. On count 2 of Cause No. 17-1-02256-34, Forgery, the State calculates an offender score of 9, carrying a standard range of 22-29 months with a median range sentence of 25.5 months.

On count 1 of Cause No. 17-1-02255-34, Burglary in the Second Degree, the State calculates an offender score of 10, carrying a standard range of 51-68 months with a median range sentence of 59.5 months. On count 2 of Cause No. 17-1-02255-34,

Theft of a Motor Vehicle, the State calculates an offender score of 13, carrying a standard range of 43-57 months with a median range sentence of 50 months.

Carter requests that he be resentenced in conjunction with the dismissals; however, resentencing is unnecessary because the dismissals do not lower his standard sentencing ranges. Elimination of the three reversed convictions leaves Carter with offender scores equal to or greater than 9, and, consequently, the same standard sentencing ranges as those which he was originally sentenced with.

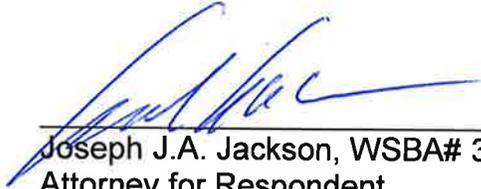
“[A] reduced standard range, not a reduced offender score, requires resentencing on remand.” State v. Kilgore, 141 Wn. App. 817, 824, 172 P.3d 373 (2007), *aff'd*, 167 Wn.2d 28, 216 P.3d 393 (2009). Carter fails to show how a recalculated offender score greater than or equal to 9 would change his sentence. The trial court imposed the median sentence within the standard range for each conviction. 2 RP 16-17. The standard sentencing ranges for his affirmed convictions remain the same. Therefore, he should not be entitled to a resentencing.

D. CONCLUSION.

Carter's case should be remanded to vacate count 2 possession of heroin in Cause No. 17-1-01497-34, count 2

attempting to elude a police vehicle in Cause No. 17-1-02212-34, and one count of identity theft in the second degree in Cause No. 17-1-02257-34. Resentencing is unnecessary because the vacated charges do not affect Carter's median standard range sentence.

Respectfully submitted this 8th day of August, 2019.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 8, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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