

FILED
Court of Appeals
Division II
State of Washington
3/20/2019 1:43 PM
NO. 52794-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROY DONALD STEEN, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 14-1-03270-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this matter be remanded for resentencing for the State to prove defendant's criminal history and offender score by a preponderance of the evidence? (Appellant's assignments of error 1 and 2).
2. Upon resentencing, should this Court direct the sentencing court to comply with RCW 10.82.090(1) in defendant's judgment and sentence? (Appellant's assignment of error 3).

B. STATEMENT OF THE CASE.

On August 20, 2014, the State charged Roy Donald Steen, III, ("defendant") with one count of first degree trafficking in stolen property and one count of second degree theft. CP 1-2. On October 16, 2014, defendant petitioned to enter a drug court program whereby he agreed to "appear in Drug Court on a regular basis[.]" maintain "law abiding behavior" and have no "criminal law violations[.]" and to "not possess or consume alcohol." CP 8-11. Directly above his signature, defendant acknowledged that "[a] charge of DUI after admission will result in automatic termination from the Drug Court Program." CP 11. Defendant

agreed that if he was terminated from drug court, his case would proceed to a stipulated facts bench trial based on facts set forth in the police report. CP 8-11. On October 16, 2014, the court granted defendant's petition to participate in drug court. CP 7.

On January 13, 2016, the court issued a bench warrant for defendant's failure to appear for a drug court review hearing. CP 17, 19. Defendant appeared to quash the warrant nearly three years later on October 3, 2018. CP 92. A drug court termination hearing was subsequently held on October 16, 2018. RP 5. In addition to defendant's prolonged absence from drug court, the State argued that a DUI charge and noncompliance with treatment were also grounds for termination. RP 5-6. The court agreed with the State and signed an order terminating defendant from the drug court program. CP 21-22. At a hearing on October 24, 2018, the court read the police reports, found defendant guilty of the charges beyond a reasonable doubt, and entered written findings of fact and conclusions of law. CP 28-62; RP 11.

Sentencing began on October 24, 2018, and extended over until October 25, 2018. RP 11-20. The State presented a "Stipulation on Prior Record and Offender Score" and argued that defendant had an offender score of nine. CP 64-67; RP 17. Defendant objected to his criminal record as stated in the stipulation. CP 64-67; RP 18. Specifically, defendant

objected to the inclusion of three Shasta County, California, misdemeanor convictions between April 28, 2008, and August 27, 2009. RP 18.

Defendant argued that without those convictions, some of his prior Class C felonies would wash out resulting in a lower offender score. *Id.* Neither defendant nor defense counsel signed the stipulation. CP 64-67.

The State responded that it was

looking at the criminal history, the CHRIs that we have, and the State notes that it is a conviction. In the information that we gather from the Washington State Patrol and the National -- NCIC, how would the Court like to proceed? Would the Court like the State [to] try to prove that up? Would the Court just like to proceed?

RP 19. The Court held it was “satisfied with the material that I’ve received to date that that is a legitimate conviction, and he can preserve it for appeal if he wants to do that.” *Id.* Based on an offender score of nine, the court sentenced defendant to a total of 84 months in prison. CP 72, 76.

C. ARGUMENT.

1. THIS MATTER SHOULD BE REMANDED FOR RESENTENCING FOR THE STATE TO PROVE DEFENDANT’S CRIMINAL HISTORY AND OFFENDER SCORE BY A PREPONDERANCE OF THE EVIDENCE.

To establish a defendant’s criminal history for sentencing purposes, the State must prove a defendant’s prior convictions by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The preponderance of the evidence “standard is ‘not

overly difficult to meet[;]’ the State must at least introduce ‘evidence of some kind to support the alleged criminal history,’” and this evidence must “bear some ‘minimum indicia of reliability.’” *Hunley*, 175 Wn.2d at 910 (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). A challenge to a defendant’s criminal history relied on by the sentencing court may be raised for the first time on appeal. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009).

In *Hunley*, the Washington Supreme Court affirmed the Court of Appeals’ decision to remand for resentencing a case where the defendant was sentenced based on an offender score that was established “solely on the prosecutor’s summary assertion of the offenses.” *State v. Hunley*, 175 Wn.2d 901, 913, 287 P.3d 584 (2012). Holding that the State failed to present any evidence documenting the defendant’s alleged convictions, the Court indicated that a “certified judgment and sentence or other comparable document of record, like a DISCIS criminal history summary[,]” would have been sufficient to establish the defendant’s criminal history and offender score. *Id.*

Division II considered this issue in an unpublished opinion in *State v. Eidsmoe*, No. 47028-4-II, 2016 WL 2658200, at *4 (Wash. Ct. App. May 3, 2016) (unpublished). There, this Court upheld the trial court’s reliance on the defendant’s criminal history where the trial court

considered two sworn statements created by DOC in risk assessment reports, and one of the reports “stated the sources of the information upon which the criminal history summary was based.” *Eidsmoe*, 2016 WL 2658200 at *4. This Court further held

[a]lthough it is certainly better practice to also submit the information actually supplied by the sources (NCIC, WACIC, SCOMIS, and DCIS), we hold that the sworn reports from neutral agencies, such as DOC, containing summaries of a defendant’s prior criminal history based on well-known information sources were sufficiently reliable to establish Eidsmoe’s prior criminal history by a preponderance of the evidence.

Id.

The State agrees that it was error for the court to sentence defendant with an offender score of nine. Although the State mentioned that it gathered information from the Washington State Patrol and the NCIC, RP 19, the record does not show that the court relied on anything other than the Stipulation on Prior Record and Offender Score that defendant objected to and refused to sign when it determined defendant’s criminal history and offender score. RP 17-19. Accordingly, the State agrees that it did not prove defendant’s criminal history by a preponderance of the evidence. See *Hunley*, 175 Wn.2d at 913. The State further agrees that the appropriate remedy is to remand for resentencing. *Mendoza*, 165 Wn.2d 913, 928-30, 205 P.3d 113 (2009).

2. UPON RESENTENCING, THIS COURT
SHOULD DIRECT THE SENTENCING COURT
TO COMPLY WITH RCW 10.82.090(1) IN
DEFENDANT’S JUDGMENT AND SENTENCE.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, eliminates any interest accrual on non-restitution legal financial obligations. As the court held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 applies to cases that are on appeal and not yet final.

Defendant was sentenced on October 25, 2018. CP 68-83. At sentencing, the trial court reaffirmed restitution in the amount of \$120 and imposed a \$500 crime victim penalty assessment. CP 73-74. The court did not impose any other legal financial obligations. *Id.* However, the judgment and sentence included an interest provision, stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full[.]” CP 74. Because House Bill 1783 eliminates any interest accrual on non-restitution legal financial obligations, this Court should direct the sentencing court to comply with RCW 10.82.090(1) in defendant’s judgment and sentence.

D. CONCLUSION.

For the reasons stated above, this Court should affirm defendant's conviction and remand for re-sentencing. This Court should further direct the sentencing court to not impose interest on any non-restitution legal financial obligations in defendant's judgment and sentence in compliance with RCW 10.82.090(1).

DATED: March 20, 2019.

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Madeline Anderson
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-20-19 Therun Ko
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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Superior Court Case Number: 14-1-03270-8

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