

FILED

MAR 15 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29507-9-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JIMMY GEORGE BUCKMAN,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The Court improperly included Class C felonies which had washed out when it resentenced Jimmy George Buckman.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does RCW 9.94A.525(22) negate the requirements of *State v. Mendoza*, 165 Wn. 2d 913, 205 P. 3d 113 (2009) ?

STATEMENT OF CASE

Mr. Buckman pled guilty to attempted first degree theft on February 8, 2006. Judgment and Sentence was entered on the same date. Mr. Buckman's offender score was calculated as an (8) eight. (CP 3; CP 11).

Mr. Buckman filed a Notice of Appeal claiming that his offender score was miscalculated. The Court of Appeals issued a mandate under cause no. 25835-1-III on June 23, 2010. In an unpublished decision the Court remanded the case to the trial court for reconsideration of its calculation of the offender score. (CP 21).

An Amended Judgment and Sentence was entered on November 4, 2010. The State presented certified copies of Judgments from Yakima County along with Defendant's Criminal History (DCH) and an NCIC printout. The sentencing court did not alter the prior calculation. (CP 34; Exs. "A", "B", "C", "D" and "E").

Mr. Buckman again filed a Notice of Appeal on November 10, 2010. (CP 44).

SUMMARY OF ARGUMENT

The State's failure to present the requisite proof to support the calculation of Mr. Buckman's offender score precludes reconsideration upon resentencing under *State v. Mendoza, supra*.

ARGUMENT

RCW 9.94A.525(22) states, in part:

The fact that a prior conviction was not included in an offender's score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. ... Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

The issue that has predominated in both of Mr. Buckman's appeals concerns the washout provisions for Class C felonies.

RCW 9.94A.525(2)(c) states, in part:

...[C]lass C prior felony convictions...shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender has spent five consecutive years in

the community without committing any crime that subsequently results in a conviction.

The State, at the original sentencing hearing, failed to provide the sentencing court any documentation concerning Mr. Buckman's underlying convictions.

The best evidence of a prior conviction is a certified copy of the judgment. *Cabrera*, [*State v. Cabrera*, 73 Wn. App. 165, 868 P. 2d 179 (1994)] at 168. However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history.

State v. Ford, 137 Wn. 2d 472, 480, 973 P. 2d 452 (1999).

The State provided the Court with exhibits of prior judgment and sentences at the resentencing hearing. The State also provided Mr. Buckman's DCH and NCIC.

The exhibits show the following felony convictions:

<u>COUNTY</u>	<u>CAUSE NO.</u>	<u>SENTENCING DATE</u>	<u>OFFENSE</u>
Yakima	81 1 00734 7	1/5/82	VUCSA
Yakima	91 1 01284 4	10/28/91	PSP 1 st
Yakima	91 1 01968 7	2/27/92	VUCSA
Yakima	92 1 00093 0	2/27/92	VUCSA
Yakima	93 1 01956 0	2/28/94	VUCSA
Yakima	94 1 01501 5	2/10/95	2° Escape
Yakima	98 1 02096 8	3/12/99	Eluding

Yakima	05 1 01439 9	1/20/06	PSP 2°
Yakima	05 1 01138 1	1/20/06	2° Theft

It appears there is a lapse of the requisite (5) five years allowing for a washout of all prior Class C felonies. (CP 27).

The conviction for PSP 1st ° on October 28, 1991 is a Class B felony and requires a (10) ten year washout period. See: RCW 9.94A.525(2)(b).

Mr. Buckman contends that his offender score for purposes of re-sentencing is a (3) three. This is based upon the following convictions:

<u>COUNTY</u>	<u>CAUSE NO.</u>	<u>SENTENCING DATE</u>	<u>OFFENSE</u>
Yakima	91 1 01284 4	10/28/91	PSP 1 st °
Yakima	05 1 01439 9	1/20/06	PSP 2°
Yakima	05 1 01138 1	1/20/06	2° Theft

Mr. Buckman's NCIC lists (3) three driving while suspended convictions occurring on July 25, 2000, June 27, 2002 and October 2, 2003.

RCW 9.94A.525(2)(d) provides, in part:

[S]erious traffic convictions shall not be included in the offender score if, since the last date of release from confinement...pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

Mr. Buckman contends that the driving while suspended offenses do not constitute serious traffic convictions and should not have been considered in conjunction with the washout issue.

Mr. Buckman's DCH shows convictions for the following offenses:

<u>COURT</u>	<u>CAUSE NO.</u>	<u>DATE</u>	<u>OFFENSE</u>
Yakima District Court	CR17099	6/27/02	Possession of less than 40 grams of marijuana.
Yakima Municipal Court	E765558	9/23/02	Use of drug paraphernalia
Yakima Municipal Court	F54279	11/20/03	Fighting in public.
Yakima Municipal Court	050029	5/27/05	Illegal dumping.

The State had an opportunity to present Mr. Buckman's DCH and NCIC at the original sentencing hearing. It did not do so.

The State also had an opportunity to present the DCH and NCIC at a reference hearing held on October 3, 2008. It failed to do so. (CP 24).

Query: How many opportunities does the State need to establish an individual's offender score?

It seems as if every time that the State fails to perform its required duties it turns to the Legislature for a remedy. The Legislature seems to be attuned to the complaints of prosecuting attorneys. It amended RCW

9.94A.525 by adding subsection (22) in Laws of 2008, ch.231, § 1. The provision is retroactive. Laws of 2008, ch. 231, § 5.

RCW 9.94A.441 states:

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be decided at the sentencing hearing.

It appears that neither the State nor defense counsel complied with RCW 9.94A.441 at the original sentencing hearing.

The State has the burden of proof in establishing an offender's criminal history. The burden of proof is the minimal burden; *i.e.*, "by a preponderance of the evidence." *See: State v. Ford, supra*, 479-80.

Mr. Buckman contends that the Court should not have considered either the NCIC or the DCH at resentencing. The legislative enactment of RCW 9.94A.525 (22) does not negate the requirements of *State v. Mendoza, supra*. The *Mendoza* case provides, at 920:

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn. 2d 867, 123 P. 3d 456 (2005). "The best evidence of a prior conviction is a certified copy of the judgment." *State v. Lopez*, 147 Wn. 2d 515, 519, 55 P. 3d 609 (2002) (quoting *Ford*, 137 Wn. 2d at 480). **It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination.** *Ford*, 137 Wn. 2d at 480.

When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior conviction, then the State is held to the record as it existed at the sentencing hearing.

State v. Mendoza, supra, 930.

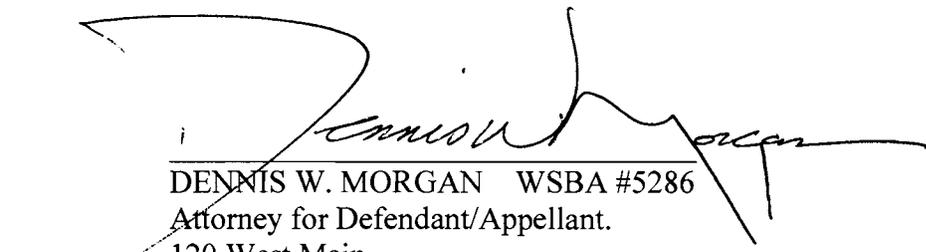
CONCLUSION

The State failed to carry its burden of proof at the original sentencing hearing. The Court should have disregarded Mr. Buckman's misdemeanor criminal history.

State v. Mendoza is the controlling authority; not RCW 9.94A.525(22). Mr. Buckman needs to be resentenced with an offender score of (3) three.

DATED this 4TH day of March, 2011.

Respectfully submitted,



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