

FILED

JUL 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

29598-2-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RONALD LYNDSEY BUTLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

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Attorney for Appellant

Jill S. Reuter
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A. ASSIGNMENT OF ERROR

1. During resentencing, the trial court erred in accepting and considering new evidence from the State regarding Mr. Butler's criminal history.

B. ISSUE

1. At his original sentencing, the defendant objected to the calculation of his offender score. The State did not present any evidence of his prior convictions. The defendant filed a CrR 7.8 motion to correct the sentence. At resentencing, the trial court permitted the State to file certified copies of the judgment and sentences for each of the defendant's prior convictions. Did the trial court err in accepting and considering this new evidence from the State regarding the defendant's criminal history?

C. STATEMENT OF THE CASE

On August 29, 2008, Ronald Lyndsey Butler was convicted of two counts of unlawful delivery of a controlled substance (methamphetamine). (CP 92-104).

At sentencing, the State offered the following regarding Mr.

Butler's offender score:

I have reviewed [Mr. Butler's] criminal history and for purposes of sentencing I've obtained certified copies of the Judgment and Sentence for all those convictions previously. I previously provided those to counsel. *I am prepared to file those with the Court today, but there is a substantial criminal history.*

(8/29/2008 RP 6) (emphasis added). The Judgment and Sentence lists an offender score of nine, based on nine prior convictions. (CP 93-94; 8/29/2008 RP 16).

There is no indication that the State ever filed the certified copies of the judgment and sentences for Mr. Butler's previous convictions. (8/29/2008 RP 6-22; 12/14/2010 RP 2-6). After defense counsel gave his sentencing recommendation, Mr. Butler objected to the calculation of his offender score:

The criminal history is not quite right. I do have extensive history and have been charged with all these charges, but there was charges that washed through the period of time. The first two, I believe, were supposed to be washed.

(8/29/2008 RP 9).

The State responded to Mr. Butler's objection, arguing that his prior convictions do not wash out and are therefore properly included in his offender score. (8/29/2008 RP 19-20).

The trial court sentenced Mr. Butler based upon an offender score of nine. (CP 93-94; 8/29/2008 RP 16-17). Mr. Butler appealed, and this Court affirmed his convictions in an unpublished opinion, dated October 29, 2009. (CP 111-118).

Mr. Butler filed a CrR 7.8 motion for modification or clarification of his sentence. (CP 143). This motion was transferred to this Court for consideration as a personal restraint petition. Because the State conceded that the case should be remanded for resentencing, this Court transferred the motion back to the trial court for consideration on the merits. (CP 107-109).

Mr. Butler, *pro se*, then submitted two supplemental memoranda of authorities in support of his motion. (CP 71-85). In his first memorandum, Mr. Butler argued that several of his prior convictions included in his offender score had either washed out, were same criminal conduct, or with respect to an out-of-state conviction, was not proven comparable to a Washington offense. (CP 79-83). In his second memorandum, Mr. Butler argued that he objected to the calculation of his offender score at the time of sentencing and therefore requested to be resentenced “with an offender

score, according to the criminal history proven by the State at the original sentencing hearing.” (CP 71-72).

The trial court held a hearing on Mr. Butler’s motion. (12/14/2010 RP 1-11). The State argued that Mr. Butler’s offender score should have been an eight instead of a nine because the “‘99 convictions for unlawful conviction [sic] of a firearm and theft of a firearm do not count against each other.” (12/14/2010 RP 5). The State offered certified copies of the judgment and sentences for each of Mr. Butler’s prior convictions. (CP 12-68; 12/14/2010 RP 2-5). The State conceded that these documents were not in the trial court file. (12/14/2010 RP 2-3). The trial court accepted these documents for filing:

Well, I certainly recall the State handing forward the copies of the previous judgment and sentences. Why they’re not in the court file I don’t know, but I specifically recall that. So, I will accept these certified copies of judgment and sentences.

(12/14/2010 RP 6).

Defense counsel objected to the State’s filing of the judgment and sentences:

[I]t is our position that Mr. Butler had made a specific objection to his offender score. Therefore, the court is bound by the information presented by the State at the original hearing and it is our position that if it’s not in the court file, then obviously something occurred and the court should not consider it.

(12/14/2010 RP 5).

Defense counsel argued that Mr. Butler “should be resentenced with an offender score of zero because that is, in fact, the information from the court file, and I believe by case law the court is bound by that since he had made that specific objection.” (12/14/2010 RP 6). After the trial court accepted the judgment and sentences offered by the State, defense counsel made the alternative arguments regarding the calculation of Mr. Butler’s offender score, addressing wash-out, same criminal conduct, and comparability of an out-of-State conviction. (12/14/2010 RP 7, 9).

The trial court entered a Motion and Order Amending Judgment and Sentencing, ordering that “the offender score in the Judgment and Sentence be amended to show an 8.” (CP 8-9; 1/5/2011 RP 2).

Mr. Butler appealed the Motion and Order Amending Judgment and Sentence. (CP 6-7).

D. ARGUMENT

1. THE TRIAL COURT ERRED DURING RESENTENCING BY ACCEPTING AND CONSIDERING NEW EVIDENCE FROM THE STATE REGARDING MR. BUTLER'S CRIMINAL HISTORY.

“On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding” based upon several enumerated reasons, including “[a]ny other reason justifying relief from the operation of the judgment.” CrR 7.8(b). “A decision on a CrR 7.8 motion is reviewable for abuse of discretion.” *In re Cadwallader*, 155 Wn.2d 867, 879-80, 123 P.3d 456 (2005) (citing *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996)). But a sentencing court’s calculation of an offender score is reviewed *de novo*. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

“The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence.” *Id.* at 93. “Absent a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score.” *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). “[D]ue process requires the State to offer *some* evidence of criminal history, and a prosecutor’s assertions are not evidence.” *State v. Hunley*, No. 39676-9, 2011 WL

1856074, at *6 (Wash. Ct. App. May 17, 2011). “Defendants have a constitutional right to be sentenced based on evidence in the record”
Id.

“[I]f the defense does specifically object during the sentencing hearing but the State fails to produce *any* evidence of the defendant’s prior convictions, then the State may not present new evidence at resentencing.” *Bergstrom*, 162 Wn.2d at 93 (citing *Ford*, 137 Wn.2d at 476). “After the defense specifically objects, putting the sentencing court on notice that the State must present evidence, the State is held to the initial record on remand.” *Id.* at 93-94 (citing *Ford*, 137 Wn.2d at 485).² At his original sentencing, Mr. Butler objected to the calculation of his offender score. (8/29/2009 RP 9). Although the State indicated an intent to provide certified copies of the judgment and sentences for Mr. Butler’s prior convictions, these were not made part of the record. (8/29/2009 RP 6-22; 12/14/2010 RP 2-6). In addition to Mr. Butler’s objection, defense counsel did not affirmatively agree to the offender score. *Cf. Bergstrom*,

² The Sentencing Reform Act now contains the following language: “[o]n 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.” RCW 9.94A.530(2). This language was not in effect at the time of Mr. Butler’s offenses. *See* Laws of 2008, ch. 231, § 4 (effective June 12, 2008); RCW 9.94A.345 (stating that “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”).

62 Wn.2d at 95 (defense presentence report agreed with the State's proposed sentencing range).

At resentencing the trial court stated, "I certainly recall the State handing forward the copies of the previous judgment and sentences[,] but the record shows otherwise. (12/14/2010 RP 6). In imposing sentence, the court did not make reference to the documents mentioned by the prosecutor and made no findings as to the existence of the individual prior convictions, merely referencing the criminal history in the judgment and sentence the prosecutor had prepared. (8/29/2009 RP 16)

When resentencing Mr. Butler, based upon his CrR 7.8 motion, the trial court erred in accepting and considering additional evidence not presented at the original sentencing: specifically, the certified copies of the judgment and sentences for Mr. Butler's prior convictions. Because Mr. Butler objected during his sentencing hearing, and the State presented no evidence of his prior convictions, the State was not entitled to present additional evidence. *See Bergstrom*, 162 Wn.2d at 93-94. Mr. Butler should have been resentenced based on the evidence in the record at the time of his original sentencing. There was no evidence of any prior convictions in the record at that time; Mr. Butler should have been resentenced with an offender score of zero.

E. CONCLUSION

In resentencing Mr. Butler, the trial court erred in accepting and considering the certified copies of the judgment and sentences for Mr. Butler's prior convictions. The case should be remanded for resentencing based on the evidence of prior convictions presented by the State at the time of Mr. Butler's original sentencing.

Dated this 15th day of July, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
Respondent,) No. 29598-2-III
)
vs.) CERTIFICATE
) OF MAILING
RONALD LYNDSEY BUTLER,)
)
Appellant.)

I certify under penalty of perjury under the laws of the State of Washington that on July 15, 2011, I mailed copies of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on July 15, 2011.


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