

NO. 29598-2-III
STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

FILED

OCT 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,
Respondent,

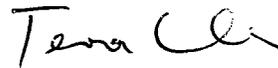
vs.

RONALD LYNDSEY BUTLER
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney



by: Teresa Chen, #31762
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

NO. 29598-2-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

FILED

OCT 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,
Respondent,

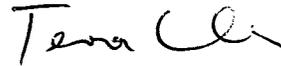
vs.

RONALD LYNDSEY BUTLER
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney



by: Teresa Chen, #31762
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT.....1

II. RELIEF REQUESTED.....1

**RESPONDENT ASSERTS NO ERROR
OCCURRED IN THE SENTENCING OF
THE APPELLANT**.....1

III. ISSUES.....1

**IN RESENTENCING, DID THE SUPERIOR
COURT ERR IN CONSIDERING THE CERTIFIED
COPIES OF JUDGMENTS AND SENTENCES
IN DETERMINING THE DEFENDANT’S
OFFENDER SCORE WHEN THAT EVIDENCE
WAS BEFORE THE COURT AT THE
ORIGINAL
HEARING?**.....1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT.....6

**THE SUPERIOR COURT DID NOT ERR IN
CONSIDERING AT RE-SENTENCING THAT
EVIDENCE OF THE DEFENDANT’S CRIMINAL
HISTORY WHICH WAS CONSIDERED AT
THE ORIGINAL SENTENCING HEARING**.....6

VI. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007)6

Rules

CR 607

CrR 7.87

RAP 7.27

RAP 9.3.....7

RAP 9.9.....7

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

RESPONDENT ASSERTS NO ERROR OCCURRED IN THE SENTENCING OF THE APPELLANT.

III. ISSUE

IN RESENTENCING, DID THE SUPERIOR COURT ERR IN CONSIDERING THE CERTIFIED COPIES OF JUDGMENTS AND SENTENCES IN DETERMINING THE DEFENDANT'S OFFENDER SCORE WHEN THAT EVIDENCE WAS BEFORE THE COURT AT THE ORIGINAL HEARING?

IV. STATEMENT OF THE CASE

On August 29, 2008, the Defendant Ronald Lyndsey Butler was sentenced on two counts of unlawful delivery of methamphetamine. (CP 92.) The prosecutor provided to the court and counsel certified copies of the judgments and sentences from the Defendant's previous convictions.

[Prosecutor]: ... 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.

(RP August 29, 2008 at 6, ll. 5-9.) At the hearing, defense counsel discussed the content of those documents which were before the court.

[Defense Counsel]: Your Honor, the criminal history, of course, has been taken into consideration in establishing the standard range of the offense based upon his criminal history. I think it's apparent to everyone, looking at this history, that the man has a substance abuse problem.

(RP August 29, 2008 at 6, ll. 5-9.)

The Defendant disagreed with the offender score, arguing that some of the previous convictions should not have been included in the score. "The first two, I believe, were supposed to be washed."

(RP August 29, 2008 at 9, ll. 11-15.) The prosecutor also addressed this issue at the hearing. (RP August 29, 2008 at 19, ll. 8-15, 18-25.)

The Honorable Judge Carrie Runge used an offender score of 9. (CP 94.)

The Defendant appealed from his bench trial. (CP 110-18.) While the appeal was ongoing, the Defendant filed CrR 7.8 motions in the superior court, challenging his offender score. (CP 125-43.) The

Defendant's CrR 7.8 motions were transferred to the Court of Appeals as a personal restraint petition. (CP 108.)

Upon discovering that the certified copies of judgments and sentences (filed in support of the offender score) had disappeared from the court's file, the prosecutor asked the Court of Appeals to remand the matter in order that the file be corrected. (RP December 14, 2010 at 2-3.) By agreed order, the matter was remanded to the superior court for resentencing. (CP 108-09.) There the Defendant filed further motions in support of his challenge to the sentence. (CP 71-90.)

At the hearing, the prosecutor explained:

As I prepared to address that personal restraint petition, I asked the clerk to review the court's file because I recalled filing a number of certified copies of judgment and sentences in support of the defendant's offender score, and I wanted to address that with the court of appeals and indicate that the State had established the offender score despite Mr. Butler's objection.

My review of the court's file, based on my conversation with the clerk, was that there were no judgment and sentences, certified judgment and sentences in the court's file. So I went back and reviewed the transcript of the sentencing hearing with Your Honor, and review of that indicates to me that I filed a number of certified copies with the court which are no longer available.

So I indicated to the court of appeals that the evidence wasn't in the court file, and that it should be remanded for a sentencing hearing. I am simply requesting the opportunity to – I've reordered those judgment and sentences. I am prepared to file those with the court today. They are the same ones that I filed last time. They are all reflected in the defendant's judgment and sentence.

(RP December 14, 2010 at 2-3.)

The Defendant argued that the court could not consider his criminal history:

... 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.

(RP December 14, 2010 at 5, ll. 20-24.)

Judge Runge had the same recollection as the prosecutor and admitted the certified copies:

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. I'll ask them to be filed in the court file.

(RP December 14, 2010 at 6.)

The prosecutor then requested the court amend the Defendant's judgment and sentence to reflect a lesser offender score of eight. (RP December 14, 2010 at 7.)

Your Honor, one thing that Judge [Kulik] did point out in that order dismissing, which I had not noticed what had slipped by me at our original sentencing, is that according to the statute the 1998 or '99 convictions for unlawful conviction of a firearm and theft of a firearm do not count against each other. I think they run consecutive by statute but do not count against each other. I think that was not addressed.

Ultimately, I think the offender score probably should have been an eight instead of a nine based on that. So that would be the one thing that I do think that we actually got wrong when we did sentence him, but again that would change one number on his judgment and sentence. It doesn't change the standard range. It doesn't change the State's recommendation or anything.

(RP December 14, 2010 at 5, ll. 2-16.)

The court agreed and the judgment and sentence was amended on January 5, 2011. (CP 8-9.)

Appealing from the re-sentencing, the Defendant argues that the certified copies proving his criminal history are new evidence and cannot be considered for the offender score.

V. ARGUMENT

THE SUPERIOR COURT DID NOT ERR IN CONSIDERING AT RE-SENTENCING THAT EVIDENCE OF THE DEFENDANT'S CRIMINAL HISTORY WHICH WAS CONSIDERED AT THE ORIGINAL SENTENCING HEARING.

The Defendant claims that his criminal history could not be considered in the offender score for the reason that the proof of that history was not presented at the original sentencing hearing. Appellant's Brief at 7, citing State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007). The premise is factually incorrect, so the claim must fail. Certified copies of previous judgments and sentences were considered at the original sentencing hearing. They were not new evidence.

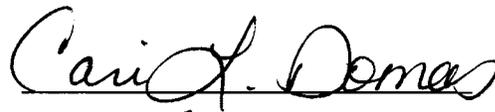
The Defendant relies on State v. Bergstrom. In that case, the court explained that if the state alleges the existence of prior convictions, but the defendant fails to object at sentencing, then the state may present new evidence on remand. State v. Bergstrom, 162 Wn.2d at 93. However, if the defendant does object at sentencing, the state must address the objection at that time and may not bring new evidence after an appeal. Id.

The Defendant Butler argues that he objected, and, therefore, the State is bound to the evidence presented at the first sentencing hearing. In fact, the State maintained that evidence from the first sentencing hearing. No new evidence was presented.

The Defendant claims that (1) the prosecutor's statements on the record evidencing that the copies were provided to the court for review at the original sentencing hearing, (2) the Court of Appeals' decision to remand to correct the record, (3) the sentencing judge's recollection that she reviewed those records, and (4) her decision to readmit previously reviewed documents are all irrelevant. Appellant's Brief at 7-8. In essence, the Defendant argues that the clerk's files can never be in error and never be corrected. There is no authority for this conclusion. In fact, the court rules expressly provide for correction of the record. See CR 60(a); CrR 7.8(a); RAP 7.2(b); RAP 9.3; RAP 9.9.

The corrected record reflects more accurately what actually occurred at the original sentencing hearing. The evidence of the Defendant's criminal history was before the court then. It was properly before the court again on remand. In arriving at the offender

the foregoing was delivered to Ronald L. Butler, DOC #270254, Appellant, Coyote Ridge Corrections Center, PO Box 769, Connell, Washington, 99326 and to Jill Shumaker Reuter, opposing counsel, P.O. Box 9166, Spokane, Washington 99209-9166 by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 10th day of October, 2011.



Notary Public in and for
the State of Washington,
residing at Pasco, WA
My appointment expires:
September 9, 2014

cld