

FILED

MAR 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30230-0-III

**STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III**

STATE OF WASHINGTON,

Respondent,

vs.

TASHA ANN HANSON

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**

**by: Maureen R. Lorincz, # 40987
Deputy Prosecuting Attorney**

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

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I. STATEMENT OF FACTS

The State relies on the Statement of the Case and Procedural History therein as stated by the Appellant in her brief.

II. STANDARD OF REVIEW

As a foundational matter, the State concedes that this appeal was made after entry of a final judgment and that the appeal is properly in this Court. RAP 2.2(a)(1). The only issue to be decided in this appeal is whether the Appellant's juvenile conviction for Taking a Motor Vehicle Without Permission washes out. If it does, her offender score would properly be four (4) instead of five (5) and a resentencing would be required.

III. ARGUMENT

A. THE APPELLANT'S JUVENILE TAKING A MOTOR VEHICLE WITHOUT PERMISSION CONVICTION DOES NOT WASH OUT. UPON RESENTENCING, THE STATE WOULD BE ALLOWED TO PRESENT NEW EVIDENCE TO ACCURATELY REFLECT HER TRUE AND CORRECT OFFENDER SCORE.

The Appellant argues for the first time on appeal that her offender score should be calculated as a four (4) rather than a (5) as her juvenile conviction for Taking a Motor Vehicle Without Permission washes out. The trial judge had no way of correcting the error initially as it was never raised at sentencing. A prosecutor

is a quasi-judicial officer and a trial court has discretion to accept a prosecutor's representations as to facts, especially where the defense does not materially dispute them. See State v. Walker, 16 Wn. App. 637, 639, 557 P.2d 1330 (1976). Here, defense counsel did not object to the calculation of her offender score. The State concedes that, based on the information in the record and the Judgment and Sentence, no evidence was presented as to why the Taking a Motor Vehicle Without Permission did not wash out. The Defendant does have intervening misdemeanor convictions which prevent her Taking a Motor Vehicle charge from washing out. The State is prepared to present evidence of the same on resentencing.

The case of In re Cadwallader, 155 Wash. 2d 867, 876, 123 P.3d 456 (2005) presented a similar situation. In that case, the State failed to include a 1985 Kansas theft conviction as proof that a 1978 Rape conviction did not wash out. The Washington Supreme Court held that the Defendant had no obligation to object to the State's failure to include the 1985 Kansas theft conviction Id. At 876, and explained that "[t]he State bears the burden of proving by a preponderance of the evidence the existence of prior convictions, whether used for determining an offender score or as predicate strike offenses." Id. At 876, citing State v. Ford, 137

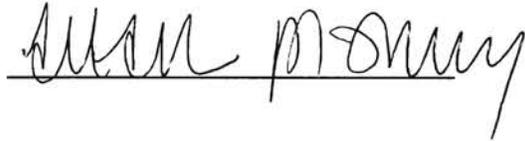
Wash.2d 472, 479-80, 973 P.2d 452 (1999). Cadwallader contended that “where the prosecution does . . . not even allege a necessary prior conviction . . . the defendant has no obligation to object and the State should not be allowed the remedy of an evidentiary hearing to correct its failure,” and the Supreme Court agreed. Cadwallader, 155 Wash. 2d at 878.

Cadwallader, however, has been superseded by statute. The Legislature in 2008 wrote that “[g]iven the decisions in In re Cadwallader, 155 Wn.2d 867 (2005); State v. Lopez, 147 Wn.2d 515 (2002); State v. Ford, 137 Wn.2d 472 (1999); and State v. McCorkle, 137 Wn.2d490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 *in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing.* These amendments are consistent with the United States supreme court holding in Monge v. California, 524 U.S. 721 (1998), that double jeopardy is not implicated at resentencing following an appeal or collateral attack.” Laws of 2008, Ch. 231 § 1 (emphasis added). Most specifically, RCW 9.94A.525(22) says that “[p]rior convictions that were not included in criminal history or in the offender score

oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 15th day of March, 2012, a copy of the foregoing was delivered to Tasha Hanson Appellant, 1800 Elmwood Avenue, West Richland, WA 99353 and to Dennis Morgan, opposing counsel, 120 West Main, Ritzville, WA 99169 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

A handwritten signature in cursive script, appearing to read "Susan Money", written over a horizontal line.

Signed and sworn to before me this 15th day of March, 2012.

A handwritten signature in cursive script, appearing to read "Neil K. Johnston", written over a horizontal line.

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

adp