

No. 303829

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

BILLY DEAN DOYLE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE RUTH E. REUKAUF, JUDGE

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in imposing an agreed exceptional sentence based upon an offender score of nine, in the absence of proof of the defendant's prior criminal convictions, the constitutionality of which he challenged?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not err in determining that the defendant had an offender score of nine. The defendant challenged the constitutionality of his prior convictions in separate collateral attack proceedings, but affirmatively acknowledged his prior criminal history in this case, and that his offender score was nine. The acknowledgement obviated the need for the State to produce evidence of the prior convictions.

II. STATEMENT OF THE CASE

The state is satisfied with the Appellant's statement of the case, but supplements that narrative here. RAP 10.3(b).

After informing the court that he wished to accept the State's offer of a mitigated sentence in exchange for an *Alford* plea, Mr. Doyle informed the court that he had "two prior – I got PRPs in the Court of

Appeals right now challenging two of my prior felony convictions. Should any of those be overturned it would change the standard range and it would also change my decision about the proposed offer. Okay? I want that on the record –“. **(RP 5-7)**

Later, Doyle reiterated that he was challenging the constitutionality of his prior convictions, but “. . . I agree with the – the State’s – of my – my felony conviction, the history of it; but I – I do challenge the constitutionality of it all.” **(RP 7)**

Additionally, Doyle stated that he would not have entered two prior *Alford* pleas if he had known that there would be a condition while on community custody that he not consume alcohol. **(RP 9)** However, “. . . I understand that that’s not before the Court today.” **(RP 9-10)**

Once again, before the court accepted Doyle’s plea, there was an acknowledgment of his prior history:

THE COURT: Now, understanding that you are still challenging the constitutionality of the convictions that have been listed out on your prior criminal history; I believe you stated that you do acknowledge those as convictions, however, that it would be to the offender score of nine. Is that correct?

MR. DOYLE: Yes.

THE COURT: Based upon that offender score of nine, Mr. Doyle, that does lead to a fifty-one to sixty month standard range, up to a maximum term and fine of five years and/or a \$10,000.00 fine with twelve months of community custody. Do you understand that:

MR. DOYLE: Yes.

(RP 13-14)

III. ARGUMENT

**1. As the prior criminal history and offender score was agreed, the State met its burden. The State is not required to prove the constitutional validity of prior convictions.**

It is well-settled that, under the Sentencing Reform Act, the State has the burden of establishing a defendant's criminal history by a preponderance of the evidence. RCW 9.94A.500; State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796, *cert. denied* 479 U.S. 930, 93 L. Ed. 2d 351, 107 S. Ct. 398 (1986); In re Personal Restraint of Cadwallader, 155 Wn.2d 867 876, 123 P.3d 456 (2005).

It is true that the mere failure of the defendant to object to the State's bare assertions of prior criminal history does not relieve the State of its burden. State v. Hunley, 161 Wn. App. 919, 927-28, 253 P.3d 448, *review granted* 172 Wn.2d 1014, 262 P.3d 63 (2011), (citations omitted).

It is also true, however, that in determining a sentence, the superior court "rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing . . . " RCW 9.94A.530.

The Supreme Court has stated that an acknowledgement which would relieve the State from its obligation to present evidence of prior

criminal history must be “an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing.” State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009), *citing* State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999), (emphasis in the original).

Here, Mr. Doyle did not merely fail to object to the criminal history provided by the prosecutor, he affirmatively acknowledged his prior convictions, and agreed that he had an offender score of nine, both in his written plea statement, as well as in his colloquy with the court. While he indicated that he was at that moment challenging the constitutionality of two prior convictions entered after he had entered *Alford* pleas, his colloquy evidences his clear understanding that that issue was not before the court during sentencing in this matter, and was being addressed elsewhere. With the clear, affirmative acknowledgement, the State need not have presented independent evidence of the prior criminal convictions.

It cannot be emphasized enough that while the State has the burden of proving the existence of prior criminal convictions, it is *not* burdened with proving the constitutional *validity* of the defendant’s prior convictions. Rather, the constitutional validity of the defendant’s prior convictions is generally not subject to challenge in sentencing proceedings. A sentencing court may not include in criminal history a

prior conviction “[1] which has been previously determined to have been unconstitutionally obtained or [2] which is constitutionally invalid on its face.”. Ammons, 105 Wn.2d at 187-88. Thus, if Mr. Doyle’s collateral attack of his prior convictions were successful, he would be entitled to resentencing in this matter.

Mr. Doyle argues, though, that since he was in the process of contesting the constitutionality of his prior convictions, the State was under an obligation to present certified copies of the prior judgments in order to have the court determine their facial validity. (**Appellant’s Brief, p. 4**) His position is not supported by the case authorities.

The Supreme Court has recently held that:

It is well settled that the State is not required to prove the constitutional validity of prior convictions used to calculate a defendant’s offender score on a current conviction. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). And a criminal defendant generally has no right to contest the validity of a previous conviction in connection with a current sentencing. Ammons, 105 Wn.2d at 188. Requiring the State to make such a showing, or allowing the defendant to assert such a challenge, would turn the current sentencing proceeding into an appellate review of all of the defendant’s prior convictions. Id. Consequently, a defendant seeking to challenge the validity of a prior conviction must exhaust established postconviction avenues of relief, such as a personal restraint petition. Id.

State v. Irish, 173 Wn.2d 787, 789-90, 272 P.3d 207 (2012).

The sentencing hearing was not the time or place to challenge the validity of the prior convictions; it is apparent from the record that Mr. Doyle understood that given his colloquy with the court, and the fact that he had instituted personal restraint petitions, attacking the prior convictions. With his affirmative acknowledgement of his criminal history here, the court properly relied upon that information in determining his offender score.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the sentence.

Respectfully submitted this 6<sup>th</sup> day of September, 2012.

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***Certificate of Service***

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 6<sup>th</sup> day of September, 2012

/s/ Kevin G. Eilmes