

FILED

JUN 12, 2013

Court of Appeals
Division III
State of Washington

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	NO. 31200-3-III
Plaintiff/Respondent,)	
)	
vs.)	
)	
DENNIS L. SPROUL,)	
Defendant/Appellant.)	

RESPONDENT'S BRIEF

W. GORDON EDGAR, WSBA #20799
Deputy Prosecuting Attorney

STEVEN M. CLEM
Douglas County Prosecutor
P. O. Box 360
Waterville, WA 98858
(509) 745-8535

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A. INTRODUCTION

Respondent, State of Washington, asks this court to uphold defendant Dennis Sproul's sentencing.

B. QUESTIONS PRESENTED

1. Offender Score: Whether defendant waived his right to challenge the offender score after sentencing where defense counsel agreed at sentencing that defendant's two Montana convictions counted towards defendant's offender score.

Answer: Sentencing courts can rely on defense acknowledgement of prior convictions without further proof. State v. Ross, 152 Wash.3d 220, 230, 95 P.3d 1225 (2004); State v. Thomas, 135 Wash. App. 474, 488, 144 P.3d 1178, 1185 (2006); State v. Bergstrom, 162 Wash.2d 87, 94, 169 P.3d 816 (2007).

2. Ability to Pay: Whether the finding that defendant has the current and future ability to pay legal financial obligations must be stricken for the court's failure to make an

inquiry even though defendant offered no objection to the state's repayment plan.

Answer: RAP 2.5(a) does not automatically require unsupported findings in a sentencing order to be vacated where there was no objection made at the sentencing, and where the defendant is not alleging a disability. State v. Blazina, 2013 WL2217206, COA No. 42728-1-II (May 21, 2013).

C. STATEMENT OF THE CASE

Out of state convictions. Defendant was convicted by jury of one count of second degree burglary. CP 5-6, 62. In advance of the sentencing hearing the State submitted a memorandum discussing defendant's Montana convictions and their comparability to Washington's theft second degree statute. CP 87-94. At the sentencing hearing prior to making its recommendation, the State raised the issue of whether there was any objection to the State's determination of criminal history. The state expressly asked defense counsel "whether

or not Mr. Sproul is agreeing to the state's determination of criminal history, number of convictions and offender score." 10/8/12 RP 144. To which defense counsel responded to the court, in pertinent part, "[t]here are also two additional theft charges in Montana both of which were felony offenses in Montana and also would be here. Each of those would count a point." 10/8/12 RP 145. When the State asserted the offender score to be a five, with a standard range of 17 to 22 months, the court asked defense counsel if that was the standard range he too calculated, to which defense counsel replied, "yes." 10/8/12 RP 145. The only challenge raised at sentencing concerning the offender score was by the defendant himself who questioned the calculation for his Snohomish County convictions, but that issue is not now on appeal. 10/8/12 RP 147. In its pronouncement of sentence the court indicated it had reviewed the state's sentencing memorandum and agreed that the Montana convictions would count as criminal history.

10/8/12 RP 148. Neither defendant nor his counsel offered an objection to the court's finding on this issue.

Ability to pay. The state then verbally recommended a sentence within the standard range, and imposition of legal financial obligations along with an expressly stated recommendation that defendant pay \$25 a month to commence immediately. 10/8/12 RP 146. Neither defendant nor his counsel commented on, or objected to that recommendation. The court did not make mention of the state's request for costs or repayment during its pronouncement, and it did not inquire as to the defendant's ability to pay. The defendant and his attorney, without objection or comment, signed the judgment and sentence, which memorialized the state's recommendation. CP 95, 103.

D. ARGUMENT

1. The trial court did not err when it included out of state convictions in the offender score where defense

counsel attorney expressly agreed that they should be included.

Out of state convictions count towards an offender score if they meet the “comparable offense definitions.” RCW 9.94A.525(3). Our Supreme Court has adopted a two-part test to determine whether an out-of-state conviction is comparable to a Washington offense and counts as part of the offender score. State v. Morley, 134 Wash.2d 588, 605-606, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wash.2d 249, 255, 111 P.3d 837(2005).

The state bears the burden of proving criminal history, including the existence and comparability of out-of-state convictions, by a preponderance of the evidence. State v. Bergstrom, 162 Wash.2d 87, 93, 169 P.3d 816 (2007); State v. Lopez, 147 Wash.3d 515, 519, 55 P.3d 609 (2002); and State v. Ford, 137 Wash.2d 472, 480, 973 P.2d 452 (1999).

But “the Washington Supreme Court held that although the State generally bears the burden of proving the existence

and comparability of a defendant's prior out-of-state conviction, a defendant's affirmative acknowledgment that a prior out-of-state conviction is properly included in the offender score satisfies the requirements of the Sentencing Reform Act and requires no further proof.” State v. Thomas, 135 Wash. App. 474, 488, 144 P.3d 1178, 1185 (2006)(citing State v. Ross, 152 Wash.3d 220, 230, 95 P.3d 1225 (2004)).

Defendant’s challenge to the court’s inclusion of his out-of-state convictions for the first time on appeal should be denied where his defense counsel affirmatively acknowledged the Montana convictions at the sentencing hearing.

2. Unsupported findings of current or future ability to pay need not be stricken where no objection was made at the time of sentencing.

In State v. Bertrand, 165 Wash.App. 393, 404, 267 P.3d 511 (2011), the court held that where the record does not support a boilerplate finding that the defendant has the current or future ability to pay legal financial obligations, such finding

should be stricken. But recently in State v. Blazina, 2013 WL2217206, COA No. 42728-1-II (May 21, 2013), a defendant was precluded from raising this issue for the first time on appeal because he had not objected to the finding at sentencing.

“While we addressed the finding of current or future ability to pay in *Bertrand* for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case. We noted that *Bertrand* had disabilities that might reduce her likely future ability to pay and that she was required to begin paying her financial obligations with 60 days of sentencing. Nothing suggests that *Blazina*’s case is similar. Because he did not object in the trial court finding 2.5, we decline to allow him to raise it for the first time on appeal.”

State v. Blazina, Id (citations omitted).

Similarly, defendant raises this issue for the first time on appeal, and, like *Blazina*, he did not object to the inclusion of

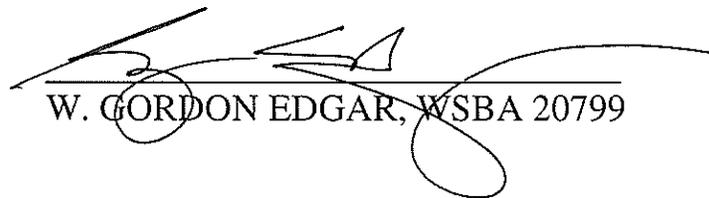
the finding at the time of sentencing. Further, this is not a situation where there was no discussion on the record. The state expressly recommended a repayment plan of \$25 per month, and neither the defendant nor his attorney commented on or objected to such a request. Finally, defendant, unlike in *Bertrand*, is not alleging any disability that might reduce his ability to pay.

Where the defendant did not object to the state's expressed recommendation for a repayment plan, he should not now be allowed to raise the issue for the first time on appeal.

E. CONCLUSION

The defendant's appeal should be denied for the reasons stated above.

Respectfully submitted this 12th day of June, 2013.


W. GORDON EDGAR, WSBA 20799

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

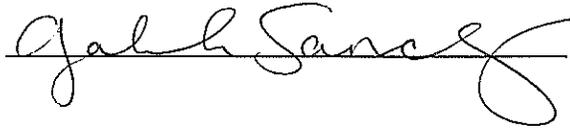
STATE OF WASHINGTON,) NO. 31200-3-III
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vs.) AFFIDAVIT OF MAILING
DENNIS L. SPROUL,)
Defendant/Appellant.)

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

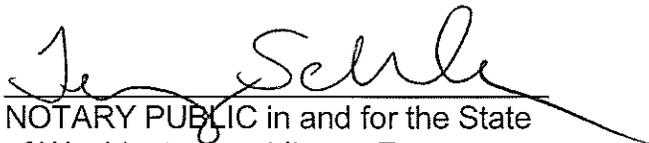
The undersigned, being first duly sworn on oath deposes and says: That on the 12TH day of June, 2013, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of Respondent addressed to:

Susan Marie Gash
Attorney for Appellant
P.O. Box 30339
Spokane, WA 99223-3005

Dennis Sproul
#811270
Brownstone Work Release
223 South Browne
Spokane, WA 99201

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

SUBSCRIBED AND SWORN to before me this 12th day of June,
2013.

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

NOTARY PUBLIC in and for the State
of Washington, residing at East
Wenatchee; my commission expires
02/26/2015.