

**FILED**  
Jun 18, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 312232-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

JAIME TORRES, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 10-1-00068-6

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BRIEF OF RESPONDENT

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ANDY MILLER  
Prosecuting Attorney  
for Benton County

ANITA I. PETRA, Deputy  
Prosecuting Attorney  
BAR NO. 32535  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

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## **I. STATEMENT OF FACTS**

On January 13, 2010, Jaime Torres attempted to steal three boxes of cold medicine from Winco. (CP 3). Winco's Loss Prevention Officers<sup>1</sup> attempted to detain Mr. Torres as he tried to exit the store, and Mr. Torres punched one of the LPOs several times with a closed fist. (CP 3). Nevertheless, the LPOs were successful in detaining Mr. Torres. (CP 3).

Mr. Torres elected to proceed to trial, where he was found guilty of Robbery in the Second Degree. (CP 58). Prior to trial, the defendant's attorney admitted that the defendant had prior juvenile history, as well as an adult Theft in the Second Degree. (RP 3/22/10, 5). On cross examination, Mr. Torres directly admitted that he had been convicted of Theft in the Second Degree in 2009. (RP 3/22/10, 78). The State supplied the court with a rendition of the defendant's criminal history during sentencing. (RP 4/6/10, 123-24). The defendant did not voice any disagreement, nor did his counsel object to anything in the criminal history. The defendant admitted he had prior criminal history before the court sentenced him. (RP 4/6/10, 125). Mr. Torres also signed the Judgment and Sentence, containing said rendition of his criminal history. (CP 61, 66).

Mr. Torres timely filed a notice of appeal. (CP 70-71). During the

pendency of his appeal, Mr. Torres completed his sentence, and the Department of Corrections terminated their supervision of him. (CP 86-89). Both of the defendant's assignments of error pertain to an alleged failure to prove his previous convictions, resulting in what he alleges was an inflated offender score. (App. Brief, 1). The defendant does not appeal anything relating to the trial process.

## **II. ARGUMENT**

### **1. THE DEFENDANT'S ARGUMENTS ARE MOOT.**

Mr. Torres has completed his entire sentence. Both the period of confinement, and the DOC supervision period have expired. Mr. Torres only remaining obligations to the State of Washington are the Legal Financial Obligations, which are not challenged here.

When a defendant challenges only the length of his sentence, after his sentence and the community custody have been served, the defendant's arguments are rendered moot. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). The defendant asks that the case be remanded for resentencing, but having already served the sentence imposed, the resentencing cannot give him the actual relief he seeks, which would be to serve a lesser amount of time, reflecting the recalculated offender score.

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<sup>1</sup> Loss Prevention Officer hereinafter "LPO."

(App. Brief, 6). However, as he cannot serve that reduced sentence, his matter is rendered moot. “We have stated that ‘this court will not consider a question that is purely academic. A case is moot if a court can no longer provide effective relief.’” *Id.*

As this Court can provide no effective relief for the wrongs Mr. Torres argues occurred, his appeal must be dismissed as moot. The defendant has not argued any of the exceptions to the mootness doctrine, and the State will not answer arguments not made.

**2. MR. TORRES AND HIS COUNSEL  
ADMITTED TO THE EXISTENCE OF THE  
CONVICTIONS, OBTAINING ANY NEED TO  
PROVE THEM.**

The State can prove the existence of convictions in a number of ways, and it is not always necessary to provide certified copies of the Judgment and Sentence. “Sentencing courts can rely on defense acknowledgment of prior convictions without further proof.” *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007). In this instance, Mr. Torres specifically confirmed that he had been convicted of a Theft in the Second Degree in 2009, on the record, and before the same judge as the one who sentenced him. (RP 3/22/10, 78). The defendant had clearly acknowledged the existence of the conviction, a position which he never reversed upon throughout the process.

The existence of that conviction formed one point, of the court's assessment of an offender score of one and a half. (RP 4/6/10, 127). The remaining half a point was a prior theft conviction as a juvenile. (CP 61). The record proving the existence of that juvenile conviction is more sparse than the record addressing the adult theft conviction. The defendant's representative alluded to its existence, and none of the parties objected to the admission of the criminal history. However, even if this Court concludes that the record is not sufficient to allow for the inclusion of the juvenile conviction, it is irrelevant. Striking the half point from the defendant's offender score would not change the standard range in any fashion. An error that results in an inflated offender score that has no effect on the standard range has been stated to be harmless. *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996). Indeed, the error in *Argo* was far more significant than the alleged error here. In *Argo*, the error had the effect of adding three points to the defendant's offender score, six times the amount at issue here. *Id.* Nevertheless, because the error did not alter the defendant's standard range, remand was unnecessary, as the error was harmless. *Id.* The State would argue the same applies here. Even if the proof of the juvenile conviction was insufficient for the Court, the error should properly be regarded as harmless.

**3. PROPER REMEDY IF THE COURT FINDS THAT THE DEFENDANT HAS ASSIGNED ERROR CORRECTLY**

Even if the Court finds that there was an error in the sentence, which remains reviewable despite its moot nature, the question arises of what the proper remedy in that circumstance would be. The Court has laid out three clear categories for the analysis of these type of alleged errors.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to “specifically object” before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

...

Second, if 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.

...

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

*State v. Bergstrom*, 162 Wn.2d at 93.

The State believes that this case is clearly an example of the third category crafted by the Court. However, even if the Court does not agree with the State's arguments with respect to that, nowhere in the transcript does the defendant ever disagree with the assessment of his criminal

history. Both the defendant and his representative alluded to prior contacts with the law during his sentencing. Clearly, if the case does not fall into the third category, it falls into the first. Even if Mr. Torres is granted the relief he seeks, the State must be allowed to introduce evidence proving the convictions at the new sentencing hearing.

### **III. CONCLUSION**

Mr. Torres' assignments of error are barred by nature of being moot, due to the time that has passed. Even if the Court elects to take up the arguments, Mr. Torres agreed to the State's assessment of his criminal record, and as such, may not protest it in this Court. Finally, even if the Court concurs with the defendant's assignments of error, the proper remedy is to remand the case back to Superior Court, where the State can provide evidence of the previous convictions.

**RESPECTFULLY SUBMITTED** this 18th day of June 2013.

**ANDY MILLER**

Prosecutor



**ANITA I. PETRA**, Deputy

Prosecuting Attorney

Bar No. 32535

OFC ID NO. 91004

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

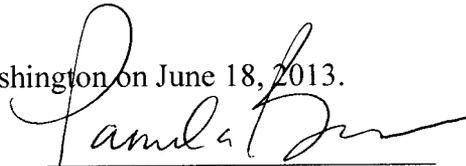
Andrea Burhart  
Burkhart & Burhart PLLC  
6 1/2 N. 2nd Ave., Ste 200  
Walla Walla, WA 99362

E-mail service by agreement was made to the following parties:  
andrea@burkhartandburkhart.com

Jaime Torres  
1821 W. 4<sup>th</sup> Pl., Apt. B  
Kennewick, WA 99336

U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on June 18, 2013.



Pamela Bradshaw  
Legal Assistant