

FILED

JUN 16, 2014

Court of Appeals
Division III
State of Washington

No. 31485-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ALFREDO BRICE INOCENCIO,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Michael G. McCarthy, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. RESTATEMENT OF APPELLANT’S ISSUES 1

B. RESPONDENT’S ANSWER TO APPELLANT’S ISSUES 1

C. ARGUMENT IN REPLY TO STATE'S RESPONSE..... 1

 The transfer of Mr. Inocencio’s 2005 amended charges of first and second degree theft to adult court was defective, and his 2005 convictions in adult court cannot be included in the calculation of his current offender score..... 1

D. CONCLUSION.....3

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page</u>
Washington Cases	
<u>In re Pers. Restraint of Cadwaller</u> , 155 Wn.2d 867, 123 P.3d 456 (2005)..2	
<u>State v. Bailey</u> , ___ P.3d ___, 2013 WL 6182933 (Nov. 26, 2013).....2, 3	
<u>State v. Ford</u> , 137 Wn.2d 472 , 973 P.2d 452 (1999).....2	
<u>State v. Knippling</u> , 166 Wn.2d 93, 100-01, 2006 P.3d 332 (2009)....1, 2, 3	
<u>State v. Saenz</u> , 175 Wn.2d 167, 283 P.3d 1094 (2012).....2, 3.	
 Washington Statutes	
RCW 9.94A.030(34).....	2

A. RESTATEMENT OF APPELLANT’S ISSUE

The transfer of Mr. Inocencio’s 2005 amended charges of first and second degree theft to adult court was defective, and his 2005 convictions in adult court cannot be included in the calculation of his current offender score

B. RESPONDENT’S ANSWER TO APPELLANT’S ISSUE

1. There was no error by the court when it refused to strike the prior convictions from Appellant’s offender score.
2. The trial court properly included the previous convictions.

C. ARGUMENT IN REPLY TO STATE’S RESPONSE

Mr. Inocencio relies primarily upon his Brief of Appellant to address all issues raised by the State. He also argues as follows in direct reply to the State’s response.

The transfer of Mr. Inocencio’s 2005 amended charges of first and second degree theft to adult court was defective, and his 2005 convictions in adult court cannot be included in the calculation of his current offender score.

The State responds that the re-sentencing court’s use of the 2005 convictions in calculation of the current offender score was merely a discretionary call. Brief of Respondent (“BOR”) at 2–3, 12–14. This is the wrong standard of review. A trial court’s determination that a conviction can be used for determining an offender score is reviewed de novo. *See State v. Knippling*, 166 Wn.2d 93, 98, 100-01, 2006 P.3d 332

(2009), citing In re Pers. Restraint of Cadwaller, 155 Wn.2d 867, 876, 123 P.3d 456 (2005) (citing State v. Ford, 137 Wn.2d 472 , 479-80, 973 P.2d 452 (1999)).

The State also argues Mr. Inocencio has improperly challenged findings made in connection with his 2005 convictions. MOTM 2–5, 7–10. This assertion is incorrect. Mr. Inocencio is not challenging the constitutional validity of his 2005 guilty pleas. Instead, he presents a statutory challenge to the use of the 2005 convictions for re-sentencing purposes. The State’s burden is to establish that the statutory prerequisites to transfer were met before the 2005 convictions in adult court can be used in calculation of Mr. Inocencio’s current offender score. RCW 9.94A.030(34); Knippling 166 Wn.2d at 101-02; State v. Saenz, 175 Wn.2d 167, 175, 283 P.3d 1094 (2012); State v. Bailey, ___ P.3d ___, 2013 WL 6182933 *4–*5 (Nov. 26, 2013). As set forth in the brief of appellant, the State failed to meet this burden.

The Knippling, Saenz and Bailey courts considered the issue of defective transfer of juvenile charges to adult court/inadequate waiver of declination in the context of the prior conviction being counted in the current sentencing as a prior strike under the Persistent Offender Accountability Act (“POAA”). This case does not involve the POAA.

Mr. Inocencio contends the analysis contained in the Knippling, Saenz and Bailey cases applies equally to non-POAA cases to exclude from offender score calculation the inclusion of all prior offenses arising from defective transfer/inadequate waiver under the juvenile declination statute.

D. CONCLUSION

For the reasons stated above and in the Brief of Appellant, the matter should be remanded for resentencing based on an offender score which does not include the 2005 convictions.

Respectfully submitted on June 15, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 15, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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