

FILED
DECEMBER 29, 2014
Court of Appeals
Division III
State of Washington

NO. 32508-3-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANTONIO ZAMUDIO, JR.,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Defendant/Appellant
PO Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES ii

STATUTES ii

ARGUMENT 1

TABLE OF AUTHORITIES

CASES

State v. Jackson, 150 Wn. App. 877, 209 P.3d 553 (2009) 2

STATUTES

RCW 9.94A.030(11)..... 1

ARGUMENT

The State, in its brief, conflates the meaning of “criminal history” and “offender score.”

RCW 9.94A.030(11) provides, in part:

“Criminal history” means the list of a defendant’s prior convictions and juvenile adjudications ...

...

(c) The determination of a defendant’s criminal history is distinct from the determination of an offender score. ...

(Emphasis supplied.)

Defense counsel, at sentencing, agreed to Mr. Zamudio’s criminal history. He did not agree that the offender score was correctly calculated.

The statement that defense counsel and the prosecuting attorney were in agreement on the offender score does not preclude Mr. Zamudio’s raising the issue on appeal.

A defendant may challenge an offender score calculation for the first time on appeal because the sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002); *State v. McDougall*, 132 Wn. App. 609, 612, 132 P.3d 786 (2006). “Moreover, a sentence that

is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *Goodwin*, 146 Wn.2d at 868 (citing *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997)). “We review a sentencing court’s calculation of an offender score *de novo*.” *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007) (citing *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003)).

State v. Jackson, 150 Wn. App. 877, 891, 209 P.3d 553 (2009).

The State’s claim that a declaration has to be filed on behalf of Mr. Zamudio with regard to the washout of prior convictions is totally erroneous. The State bears the burden of proof as to the offender score. The State failed to introduce that evidence at the time of sentencing.

The State’s argument totally misconstrues the state of the law concerning offender score calculations.

The State also argues that Mr. Zamudio’s challenge to the sufficiency of the evidence represents a challenge to the credibility of a witness. Again, the State is in error.

The alleged victim, Mr. Berndt, did not testify at trial. His credibility is not in issue.

In essence, the State argues transferred intent. Mr. Zamudio’s case is not one involving transferred intent. Mr. Lumsden was not the alleged

victim. Just because Mr. Lumsden may have been frightened, does not mean that Mr. Berndt was frightened.

Mr. Zamudio otherwise relies upon the argument contained in his original brief.

DATED this 29th day of December, 2014.

Respectfully submitted,

s/Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Phone: (509) 775-0777/Fax: (509) 775-0776
nodblspk@rcabletv.com

NO. 32508-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DOUGLAS COUNTY
Plaintiff,)	NO. 13 1 00192 0
Respondent,)	
)	CERTIFICATE
v.)	OF SERVICE
)	
ANTONIO ZAMUDIO, JR.,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 29th day of December, 2014, I caused a true and correct copy of the and *APPELLANT'S REPLY BRIEF* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

CERTIFICATE OF SERVICE

DOUGLAS COUNTY PROSECUTOR'S OFFICE
Attention: Jason Mercer
PO Box 360
Waterville, WA 98858-0360

U. S. MAIL

ANTONIO ZAMUDIO JR. #821579
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272

U.S. MAIL

s/Dennis W. Morgan

Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
PO Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE