

FILED
September 23, 2015
Court of Appeals
Division III
State of Washington
NO. 33342-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ELVIS LOPEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in computing appellant's offender score.

Issue Pertaining to Assignment of Error

Did the court err by including a prior Class C felony conviction in computing appellant's offender score when the State failed to prove appellant had not remained crime-free for a five-year period in the community such that the offense should not longer be counted in his offender score?

B. STATEMENT OF THE CASE

In 2012, appellant Elvis Lopez was convicted and sentenced in Benton County on several felony counts, all committed "on or about the 13th day of April, 2010," including second degree assault with a deadly weapon, third degree assault, first degree robbery, and two counts of attempt to elude. CP 26-43. On appeal, this Court remanded for resentencing because the prosecution had failed to show one of Lopez's prior felony convictions should be included in his offender score calculation. CP 59-89.

On remand, the prosecution filed a sentencing memorandum. *CP 94-97*.¹ The memorandum asserts Lopez's criminal history consists of three felony convictions, all from Benton County, including:

(1) first degree theft committed as a juvenile in August 1999 and sentenced on March 1, 2000;

(2) first degree robbery committed as an adult in January 2000 and sentenced on August 25, 2000; and

(3) possession of a controlled substance committed as an adult in May 2000 and sentenced on August 25, 2000. *CP 94-95*.

Attached to the memorandum is a copy of Lopez's judgment and sentence for "mip/mic,"² entered in Benton County District Court on February 11, 2005.³ The judgment and sentence provides for a sentence of "365 days in jail with 363 days suspended for 2 years. . . ." Exhibit 1.

¹ This citation is to the index numbers counsel expects the Benton County Superior Court Clerk's office will assign to the State's sentencing memorandum, which was designated by a supplemental designation of clerk's papers filed September 15, 2015. Subsequent "CP" citations in **bold, italicized** font refer to this same document.

² Presumably this refers to a conviction under RCW 66.44.27(2)(a), which makes it a gross misdemeanor for anyone under the age of 21 to possess liquor.

³ A certified copy of Lopez's 2005 judgment and sentence for "mip/mic" and March 1, 2000 judgment and sentence for unlawful possession of a controlled substance were admitted at the resentencing hearing as exhibits 1 and 4, respectively.

The prosecution's memorandum argues that because five years did not elapse between Lopez's August 25, 2000 felony sentencing, and his February 11, 2005 gross misdemeanor sentencing, the Class C felony conviction for unlawful possession of a controlled substance should be included in his offender score for purposes of sentencing him for the offenses committed on April 13, 2010. *CP 95*.

A resentencing hearing was held May 12, 2015, before the Honorable Bruce A Spanner. RP 1-29.⁴ Lopez testified he disagreed with the State's claim his offender score was properly calculated all along, and asserted he still agreed with his former appellate counsel that his conviction for unlawful possession of a controlled substance should no longer count in his offender score. RP 22-23.

In closing argument, the prosecutor claimed that Lopez's August 2005 conviction prevented his March 2000 conviction "from washing." RP 26-27. In contrast, Lopez's counsel argued simply the defense disagrees with the prosecution's offender score calculation. RP 27.

The court announced it agreed with the prosecution, concluding that because five years had not elapsed between the August 2000 conviction and the February 2005 conviction, the August 2000 conviction

⁴ "RP" refers to the single verbatim report of proceedings filed in conjunction with this matter.

did not wash for offender score calculation purposes. RP 27-28. The court memorialized its ruling in written findings of fact and conclusions of law. CP 92-93. Lopez once again appeals. CP 90-91.

C. ARGUMENT

THE STATE FAILED TO ADEQUATELY PROVE LOPEZ'S CRIMINAL HISTORY FOR PURPOSES OF COMPUTING THE OFFENDER SCORE, REQUIRING ANOTHER REMAND FOR RESENTENCING.

The State did not prove at resentencing that Lopez's 2000 unlawful possession of a controlled substance conviction should be included as criminal history for purposes of computing his offender score. Specifically, it failed to establish that the conviction did not wash out. Remand for resentencing is once again required.

Offender score calculations are reviewed de novo. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010), review granted and remanded on other grounds, 172 Wn.2d 1009, 260 P.3d 208 (2011). Due process requires the State to prove a defendant's criminal history by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. The State thus bears the burden of proving that a prior conviction has not washed out for the purpose of calculating the offender score. Cross, 156 Wn. App. at 586-87; In re Pers. Restraint of Cadwallader, 155 Wn.2d 867,

875-76, 880, 123 P.3d 456 (2005). "The burden lies with the State because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012) (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

The State must provide sentencing information that has "some minimal indicium of reliability beyond mere allegation." Ford, 137 Wn.2d at 481 (quoting United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984)). This is accomplished by providing a certified copy of a past judgment and sentence or other comparable documents. Hunley, 175 Wn.2d at 910, 915.

Lopez's 2000 unlawful possession conviction is a class C felony. Former RCW 69.50.401 (Laws of 1998 ch. 290, § 1). RCW 9.94A.525(2)(c) governs when prior class C felony convictions may be included in the offender score. That statute provides:

Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

The statute contains a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date resets the five-year clock. Ervin, 169 Wn.2d at 821 (citing State v. Hall, 45 Wn. App. 766, 769, 728 P.2d 616 (1986)). Under RCW 9.94A.525(2)(c), a class C felony conviction washes out if the defendant has five consecutive crime-free years any time following the class C felony in question. Hall, 45 Wn. App. at 769.

Here, the prosecution, on remand, presented a certified copy of Lopez's February 2005 judgment and sentence for a gross misdemeanor out of Benton County District Court. Ex. 1. This constitutes proof that Lopez was not crime-free for five years from the date of the August 2000 sentencing for possession, and the court correctly found as much. CP 92 (finding of fact 1 & 2). But this does not end the inquiry.

The offenses for which Lopez was being resentenced were committed on or about April 13, 2010. CP 26-31. Before concluding his Class C felony possession conviction counts in calculating his offender score, however, it must first be determined there was no five-year crime-

free period at any time from the date of its commission until the date the current offenses were committed. Hall, 45 Wn. App. at 769.

Clearly, the February 2005 gross misdemeanor conviction occurred before five years had elapsed from the date of sentencing on the possession conviction, because only 54 months had elapsed between those events. But what no one on remand seemed to recognize, however, was that there was not evidence presented showing Lopez had committed any crimes leading to a conviction within five years of completing his two-day sentence for 2005 gross misdemeanor offense, which he was required to begin serving on or before February 28, 2005. Ex. 1.

Assuming Lopez did not begin serving his two-day sentence until February 28, 2005, and served the full two days, then his latest release date would have been March 2, 2005. Lopez committed his current offenses on April 13, 2010, more than five years since his latest release on the 2005 matter.

The prosecution, in the course of two sentencing hearings, failed to present any evidence indicating Lopez was anything but crime free for the five year period beginning on March 2, 2005 and ending March 2, 2010. "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113

(2009). It is the State's burden to prove criminal history, which includes the burden of proving a prior offense did not wash out. Cross, 156 Wn. App. at 586-87. The State did not meet that burden here.

D. CONCLUSION

For the reasons set forth, remand for resentencing is warranted.

DATED this 23rd day of September 2015

Respectfully Submitted,

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State v. Elvis C. R. Lopez

No. 33342-6-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 23rd day of September, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 23rd day of September, 2015.

x 