FILED

JAN 03, 2017

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34513-1-III

STATE OF WASHINGTON, Respondent,

v.

SILVER GARCIA, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....7

A. Defense counsel's failure to timely move to suppress the contents of the warrantless backpack search constituted ineffective assistance 7

B. The State failed to prove the offender score 11

C. The 18-month community custody term is unauthorized by law 13

D. Due to Garcia's continuing indigency, appellate costs should not be imposed if requested ..14

VI. CONCLUSION.....15

CERTIFICATE OF SERVICE 16

AUTHORITIES CITED

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....7, 8

State Cases

In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).....11

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007).....13

State v. Bean, 89 Wn.2d 467, 573 P.2d 1102 (1978).....10

State v. Bessette, 105 Wn. App. 793, 21 P.3d 318 (2001).....10

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....14

State v. Carter, 151 Wn.2d 118, 85 P.3d 887 (2004).....10

State v. Coombes, 191 Wn. App. 241, 361 P.3d 270 (2015).....13

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....11

State v. Goldberg, 123 Wn. App. 848, 99 P.3d 924 (2004).....8

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....7, 10

State v. Howland, 66 Wn. App. 586, 832 P.2d 1339 (1992).....7

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012).....12

State v. Ladson, 148 Wn.2d 343, 979 P.2d 833 (1999).....9, 10

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....7

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002).....7

State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).....12

State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).....12

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999).....9

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004).....8

State v. Roche, 75 Wn. App. 500, 878 P.2d 497 (1994).....11

State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).....14, 15

State v. Stump, 185 Wn.2d 454, 374 P.3d 89 (2016).....15

State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010).....10

State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003).....11

State v. Weaver, 171 Wn.2d 256, 251 P.3d 876 (2001).....12

Statutes

RCW 9.94A.030(55).....14

RCW 9.94A.411(2).....14

RCW 9.94A.701.....13

Court Rules

CrR 3.6.....8

RAP 14.2.....15

I. INTRODUCTION

Silver Garcia was convicted of multiple charges arising from a high-speed police chase and, several days later, his arrest in flight from his mother-in-law's home. His attorney failed to timely bring a motion to suppress evidence under CrR 3.6 concerning identification documents obtained from a warrantless search of a backpack found inside the fleeing suspect's vehicle. Absent those documents, and a subsequent eyewitness identification based upon those documents, the jury likely would not have been able to connect Garcia with the fleeing vehicle beyond a reasonable doubt. This deficiency deprived Garcia of a fair trial.

Two sentencing errors also require remand.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Garcia received ineffective assistance of counsel when his attorney failed to timely challenge the warrantless search of his backpack.

ASSIGNMENT OF ERROR 2: The State failed to present sufficient evidence substantiating Garcia's offender score.

ASSIGNMENT OF ERROR 3: The trial court erred in imposing an 18 month term of community custody for a nonviolent offense.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Would a timely filed motion to suppress identification evidence found in a warrantless search of a backpack found inside a suspect vehicle likely have been granted? YES.

ISSUE 2: Can the failure to timely bring a motion to suppress pursuant to CrR 3.6 be justified as a strategic decision? NO.

ISSUE 3: Did the State meet its burden of proof to support the alleged offender scores of 6 and 5 on counts 1 and 2, respectively? NO.

ISSUE 4: Is unlawful imprisonment a violent offense for which an 18 month community custody term is authorized? NO.

IV. STATEMENT OF THE CASE

On July 28, 2015, a patrol officer with the Quincy Police Department saw a man he believed to be Silver Garcia driving a car with a female passenger. 2 RP 62-65. The vehicle had no front license plate, and the officer attempted to stop the vehicle. 2 RP 67, 69. The vehicle did not stop, and the officer pursued the vehicle for about three minutes through Quincy at speeds reaching as much as 80-90 miles per hour. 2 RP 73, 87. After temporarily losing sight of the vehicle, the officer located it parked. 2 RP 83, 86.

Inside the vehicle, police recovered a backpack in which they found a black wallet. 2 RP 89. The wallet contained identification cards bearing Silver Garcia's name. 2 RP 98. The officer showed the photo ID to a witness at a nearby park, who had seen two people running across the street stripping off clothes and behaving strangely. 2 RP 103, 120, 121. The witness identified the man on the ID card as the man she had seen. 2 RP 121.

A few days later, acting on a tip that Garcia was at Michelle Ybarra's home, police went there at 3:30 a.m. to serve an arrest warrant. 2 RP 126-27, 149. After knocking and announcing, the door opened and Ashley Guerrero came out, telling police she knew that she had a warrant. 2 RP 129. Police also contacted Ybarra, who was crying and excited and told them Garcia was present in the back. 2 RP 130. Police eventually kicked in a bedroom door and found Garcia inside. 2 RP 131. When they entered, Garcia jumped out of a window, breaking it, and ran away. 2 RP 133-34. During the escape, a flat screen TV was knocked to the floor and found broken. 2 RP 136, 258. Police chased him and eventually caught him. 2 RP 165.

While police transported her to the station, Ashley Guerrero told the arresting officer that she had been in the car with Garcia during the

eluding incident. 2 RP 259. She also allegedly told him that during the eluding incident, Garcia told her she better run and punched her in the face. 2 RP 200.

The State charged Garcia with attempting to elude a police vehicle and assaulting Ashley Guerrero in the fourth degree on July 28, 2015, as well as unlawfully imprisoning and assaulting Michelle Ybarra on August 2, 2015 and maliciously damaging her property in the second degree during the flight from her home. CP 1-3. At trial, the State sought to introduce the wallet and ID cards it had found inside the backpack in the car. 2 RP 89, 94. Garcia objected on the grounds that the police did not obtain a warrant to search the backpack and no exigent circumstances were shown justifying the entry. 2 RP 89. But the State argued that Garcia did not file a CrR 3.6 motion, and the court overruled the objection. 2 RP 89-90, 95. The State thereafter introduced the ID cards as well as Brittany Tait's identification of Garcia as the man she had seen from the park based upon the pursuing officer showing her the ID card. 2 RP 96, 94, 103, 121.

Both Ybarra and Guerrero did not want to cooperate with the prosecution, and they were compelled to appear as material witnesses. 1 RP 50-53. Ybarra testified that both the window and the TV were broken

before Garcia left the room and denied that the TV was worth more than $200. 2 RP 151-53. On cross-examination, she stated that she was under the influence of prescription medications the night of the raid and she did not recall describing an assault by Garcia to police. 2 RP 163. On re-cross, the State confronted Ybarra with a prior written statement in which she described being grabbed and pushed by Garcia when she attempted to let the police into her house. 2 RP 165.

Ashley Guerrero also testified and denied telling police that Garcia had struck her on any occasion, and further denied being in the car during the pursuit. 2 RP 179-82. The State then sought to introduce Guerrero's prior statement as substantive evidence. 2 RP 198. Following a colloquy with the court, the State then limited its request to introducing only Guerrero's prior statement about having been in the car during the pursuit, and only for impeachment purposes. 2 RP 245.

At the close of the State's case, the State moved to dismiss the assault charge involving Guerrero and amend the malicious mischief charge to third degree, based upon failures of proof to establish those charges. 2 RP 270. Garcia testified on his own behalf and denied involvement in the pursuit, claiming he had left his backpack in the car the day before. 2 RP 274, 276. He admitted running from the police at

Ybarra's house but denied physically restraining her, testifying that he just asked her not to open the door so he could hide. 2 RP 277-78.

The jury convicted Garcia on all counts. 2 RP 348-55, CP 69-72. At sentencing, the State calculated Garcia's offender score as 6 on the attempting to elude and 5 on the unlawful imprisonment based upon multiple prior convictions that were alleged but not proven. CP 77, RP (Sentencing) 2. Defense did not acknowledge or object to the prosecutor's representations about Garcia's prior history but requested a mid-range sentence with the terms run concurrently. RP (Sentencing) 5-6. The court imposed concurrent mid-range terms of 19.5 and 15 months on counts 2 and 1 respectively, along with an 18 month term of community custody on the unlawful imprisonment charge. CP 79, 80, RP (Sentencing) 8-9. On the misdemeanor counts, the court suspended all but 30 days and ran both concurrent to each other but consecutive to the felony counts. RP (Sentencing) 12. Only mandatory LFOs were imposed. CP 82.

Garcia now appeals and has been found indigent for that purpose. CP 98, 99-100.

V. ARGUMENT

A. Defense counsel's failure to timely move to suppress the contents of the warrantless backpack search constituted ineffective assistance.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee every criminal defendant the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington,* 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel for a defendant is ineffective when his or her performance falls below an objective standard of reasonableness, and when counsel's poor work prejudices the defendant. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In order to establish prejudice, a defendant must show that, but for the errors of counsel, the result would have been different. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). There is a strong presumption that counsel was effective at the trial level, but this can be overcome by showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and Article I, Section 22. *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. Actions by trial counsel which constitute "legitimate trial strategy or tactics" cannot serve as a basis for a claim of ineffective assistance. *State v. Goldberg,* 123 Wn. App. 848, 852, 99 P.3d 924 (2004).

When arguments to suppress key evidence are available to counsel but not raised, the failure to challenge the evidence is ineffective when it is prejudicial to the defendant's case. *See State v. Reichenbach,* 153 Wn.2d 126, 131-32, 101 P.3d 80 (2004). Here, counsel recognized that the warrantless search of the vehicle was problematic, as counsel challenged the introduction of evidence based upon the lack of the warrant. 2 RP 89. But, as the State pointed out, counsel failed to comply with the requirements of CrR 3.6 to challenge the evidence. 2 RP 90. That rule states:

> Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion.

CrR 3.6(a). The rule plainly requires a written motion and legal argument, which counsel did not prepare.

The evidence resulting from the search of the backpack consisted of critical physical evidence tending to identify Garcia as the driver of the vehicle, including his wallet and identification cards. 2 RP 89, 98-99. Police then used the recovered identification to question a bystander witness and obtain an identification of Garcia as the person she saw behaving strangely in the vicinity of the parked vehicle. 2 RP 120-21. Without this evidence, the State could only point to the pursuing officer's brief glimpse of the passing driver as its basis for identifying Garcia as the driver. 2 RP 64, 108-09. Because the evidence was an important component of the State's case, and because counsel recognized the appropriateness of challenging its admission on the grounds that it was improperly obtained, no conceivable tactical reason exists to explain the failure to file a CrR 3.6 motion to suppress it.

Furthermore, there is a reasonable likelihood that a motion to suppress that was timely filed would have been granted. Searches without the authority of a warrant are presumptively unreasonable. *State v. Ladson*, 148 Wn.2d 343, 349, 979 P.2d 833 (1999). In Washington, the right to be free from unreasonable intrusions into private affairs extends to vehicles and their contents. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). However, a few "jealously and carefully drawn" exceptions will overcome the warrant requirement when societal interests

outweigh the rationale for prior recourse to a neutral magistrate. *Ladson*, 148 Wn.2d at 349. Those exceptions exist for consensual searches, exigent circumstances, searches incident to arrest, inventory searches, plain view, and *Terry* investigative stops. *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (*citing State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)).

The totality of the circumstances said to justify a warrantless entry are closely scrutinized. *State v. Bean*, 89 Wn.2d 467, 472, 573 P.2d 1102 (1978). The State bears the burden of proving the exception. *Hendrickson*, 129 Wn.2d at 71.

Police may enter a protected area without a warrant under the "exigent circumstances" exception to the warrant requirement if delay will probably result in the destruction of evidence or endanger the safety of officers or third parties. *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004). Because the justification for the exigent circumstances exception is that police would not have enough time to obtain a search warrant, there must be a showing why it would be impractical or unsafe to obtain a warrant. *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001).

Hot pursuit of a fleeing suspect is a circumstance that can, but does not necessarily, justify a warrantless search. *Tibbles*, 169 Wn.2d at 370.

While the seriousness of the flight here is significant, by the time the police located the car, the threat was no longer continuing. There was no testimony or evidence suggesting police had reason to believe the driver was armed. Moreover, retrieving identification information was not necessary to assist in the immediate apprehension of the driver where the pursuing officer already identified the driver visually. To the contrary, retrieving the documentary evidence to confirm the officer's visual identification is precisely the kind of evidence gathering activity that is preparatory for prosecution and trial, and for which a warrant must constitutionally be obtained.

Because of the failure to timely file a CrR 3.6 motion to suppress, counsel prejudiced Garcia's case. This error requires reversal.

B. The State failed to prove the offender score.

The Court of Appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on a miscalculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin,* 146

Wn.2d 861, 868, 50 P.3d 618 (2002). Remand is required when the offender score has been miscalculated. *State v. Parker,* 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court discussed the State's burden of proof to establish the offender score, stating:

> It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." Further, unless convicted pursuant to a plea agreement, the defendant has "no obligation to present the court with evidence of his criminal history." (Internal citations omitted.)

While evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but mere argument. *Hunley*, 175 Wn.2d at 911-12. A defendant's failure to object to the State's assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State's burden. *Id.* at 913 (*citing State v. Mendoza*, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)).

Here, the trial court sentenced Garcia using offender scores of "6" and "5" based upon the State's assertion of six prior convictions. CP 77-78. The record does not contain any acknowledgment of the prior convictions by the defendant, or any independent proof of them. Under *Hunley*, the State failed to meet its burden to establish the offender score asserted. Consequently, the sentence must be vacated and the case remanded for resentencing.

C. The 18-month community custody term is unauthorized by law.

Washington's Sentencing Reform Act of 1981 ("SRA") establishes the trial court's authority to impose community custody. *State v. Coombes*, 191 Wn. App. 241, 250, 361 P.3d 270 (2015), *review denied*, 185 Wn.2d 1020 (2016). The reviewing court considers *de novo* whether the trial court's sentence is authorized. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

When a defendant is sentenced to a term of confinement exceeding one year, the SRA directs the trial court to impose a community custody term of 3 years for sex offenses and serious violent offenses, 18 months for violent offenses, and 12 months for crimes against persons and other specified crimes. RCW 9.94A.701. The trial court here imposed an 18 month term of community custody on count 2, the unlawful imprisonment

charge. CP 75, 80. But unlawful imprisonment is not a violent offense. RCW 9.94A.030(55). It is, however, a crime against a person, requiring a 12 month term of community custody. RCW 9.94A.411(2).

Accordingly, the sentence should be reversed and the case remanded to reduce the community custody term to the 12 month term authorized by the SRA.

D. Due to Garcia's continuing indigency, appellate costs should not be imposed if requested.

Garcia was found to lack sufficient funds to prosecute an appeal and was found indigent for that purpose by the trial court. CP 99-100. The presumption of indigence continues throughout review. RAP 15.2(f).

The Court of Appeals has recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). This is because appellate cost assessments contribute to the "broken LFO systems" identified in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), by creating the same problems – difficulty re-entering society, doubtful collection, and inequities in administration. *Sinclair*, 192

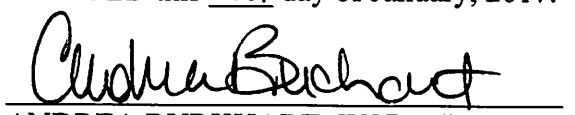
Wn. App. at 391. The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Here, Garcia was found to be indigent for appeal purposes. His completed Report as to Continued Indigency will be submitted within 60 days, as required by this court's General Order issued on June 10, 2016.[1] Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs.

VI. CONCLUSION

For the foregoing reasons, Garcia respectfully requests that the court REVERSE his conviction and sentence and REMAND the case for retrial and/or resentencing, and DECLINE to impose costs in favor of the State.

RESPECTFULLY SUBMITTED this 3rd day of January, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

[1] Garcia completed and returned the report to counsel, but it has been inadvertently misplaced and could not be located at the time of filing of the brief. If the original cannot be located, counsel will obtain another report from Garcia and submit it with a reply brief or a motion to decline appellate costs within 60 days, as required by the General Order.

DECLARATION OF SERVICE

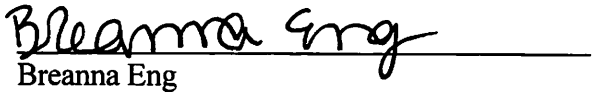
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Garth Louis Dano
Attorney at Law
35 C St NW
Ephrata, WA 98823

Silver Garcia, DOC #351678
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of January, 2017 in Walla Walla, Washington.



Breanna Eng