

FILED
Court of Appeals
Division III
State of Washington
1/9/2019 11:19 AM

NO. 36063-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TROSPER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KLICKITAT COUNTY
Superior Court No. 17-1-118-20

The Honorable Randall Krog, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A.	<u>ISSUES PRESENTED</u>	1
B.	<u>STATEMENT OF THE CASE</u>	1
C.	<u>ARGUMENT</u>	2
	1. The failure to conduct a comparability analysis at the original sentencing requires remand for a new sentencing hearing	2
	2. The failure to conduct a “same criminal conduct” analysis should be addressed at resentencing	4
	3. The court ordered mental health evaluation appears inadvertent and should be addressed at resentencing	5
	4. Legal financial obligations should be addressed at resentencing	5
D.	<u>CONCLUSION</u>	5

TABLE OF AUTHORTIES

Federal Cases

United States v. Ibarra, 737 F.2d 825 (9th Cir.1984).....3

State Cases

Pers. Restraint of Cadwallader, 155 Wn.2d 867,
123 P.3d 456 (2005).....3

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999).....2, 3

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013).....4, 5

State v. Lara, 66 Wn. App. 927, 834 P.2d 70 (1992).....4

State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002).....3

State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).....2, 3, 5

State v. Nitsch, 100 Wn. App. 512, 997 P.2d 1000 (2000).....4

State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993).....3

State v. Ramirez __Wn.2d__, 426 P.3rd 714 (2018).....1, 5

State v. Reinhart, 77 Wn. App. 454, 891 P.2d 735 (1995).....4

State v. Tomgren, 147 Wn. App. 556, 196 P.3d 742 (2008).....4

Statutes

RCW 9.94A.589(1)(a)4

RCW 9.94A.525(5)(a)(i).....4

RCW 9A.76.170(1)(3)(c).....1

A. ISSUES PRESENTED

1. Should this matter be remanded for resensencing where the trial court failed to conduct a comparability analysis of the defendant's Oregon convictions?
2. Should this matter be remanded for resensencing where the trial court failed to sue sponte engage in a "same criminal conduct" analysis of the defendant's prior convictions?
3. Should the trial court have ordered the defendant to obtain a mental health evaluation and follow all treatment recommendations?
4. Does the Supreme Court's recent decision in *State v. Ramirez* __Wn.2d__, 426 P.3rd 714 (2018), require the trial court to waive the imposition of all non-mandatory fees imposed in the defendant's original sentence?

B. STATEMENT OF THE CASE

A jury found the defendant guilty of Bail Jumping, a violation of RCW 9A.76.170(1)(3)(c), on May 11, 2018. CP 59, 51. The defendant was sentenced on May 21, 2018. CP 59-61. At sentencing the court determined that the defendant had an offender score of 10, which resulted in a standard range sentence of 51-60 months. CP 63. The court imposed a prison based Drug Offender Sentencing Option (DOSA) sentence of 27.50 months of incarceration and 27.50 months of community custody. CP 65.

The court also ordered the defendant to obtain a mental health evaluation and follow all treatment conditions. CP 66. Finally, the court, despite finding the defendant indigent for purposes of his appeal, ordered the defendant to pay legal financial obligations which exceeded the mandatory non-discretionary payments required by law. CP 77-78.

At no time during the course of the sentencing hearing did the defendant or his attorney affirmatively object to any prortion the defendant's sentence. VRP 334-342.

C. ARGUMENT

1. THE FAILURE TO CONDUCT A COMPARABILITY ANALYSIS AT THE ORIGINAL SENTENCING REQUIRES REMAND FOR A NEW SENTENCING HEARING.

The State concedes this point. Two out-of-state convictions were used in calculating the defendant's offender score and, despite the lack of any objection by the defendant, there was not an affirmative acknowledgement of his prior out-of-state convictions either. The proper remedy would be remand for a new sentencing hearing. *State v. Mendoza*, 165 Wn.2d 913, 931, 205 P.3d 113 (2009).

Despite a general reluctance to address issues not preserved in the trial court, appellate courts have allowed belated challenges to criminal history relied upon by a sentencing court. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). As explained in *Ford*, the purpose is to preserve the integrity of sentencing laws and allowing review “” tends to

bring sentences in conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.” *Id.* at 478, 973 P.2d 452 (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)).

At sentencing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *Ford*, 137 Wn.2d at 480, 973 P.2d 452). It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination. *Ford*, 137 Wn.2d at 480, 973 P.2d 452. This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing “some minimal indicium of reliability beyond mere allegation.” *Id.* at 481, 973 P.2d 452 (internal quotation marks omitted) (quoting *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir.1984)).

The proper remedy is, as the defendant has requested, remand for resentencing and allowing the State an opportunity to present evidence of the defendants' criminal histories. *Mendoza*, 165 Wn.2d at 931.

2. THE FAILURE TO CONDUCT A “SAME CRIMINAL CONDUCT” ANALYSIS SHOULD BE ADDRESSED AT RESENTENCING.

A sentencing court must calculate an offender score based on an offender’s “other current and prior convictions.” RCW 9.94A.589(1)(a). A sentencing court is bound by an earlier court’s finding under RCW 9.94A.589(1)(a) that multiple offenses encompass the same criminal conduct. RCW 9.94A.525(5)(a)(i).

If the previous court did not make this finding, but nonetheless ordered the offender to serve the sentences concurrently, the current court must independently evaluate whether those prior convictions involve the same criminal conduct and, if they do, must count them as one offense. *Id.*; *State v. Tomgren*, 147 Wn. App. 556, 563, 196 P.3d 742 (2008) (“A sentencing court . . . must apply the same criminal conduct test to multiple prior convictions that a court has not already concluded amount to the same criminal conduct”).

A court has no discretion on this. RCW 9.94A.525(5)(a)(i); *State v. Reinhart*, 77 Wn. App. 454, 459, 891 P.2d 735 (1995); *State v. Lara*, 66 Wn. App. 927, 931-32, 834 P.2d 70 (1992) (abrogated on other grounds by *State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013)).

While a court has no duty to conduct a same criminal conduct analysis sua sponte as to current crimes, *State v. Nitsch*, 100 Wn. App. 512, 522, 997 P.2d 1000 (2000), and the defendant bears the burden of

proving the prior offenses encompass the same criminal conduct, *Graciano*, 176 Wn.2d at 539, in light of the State's earlier concession it would appear that traditional notions of fair play and substantial justice would allow the defendant to raise any same criminal conduct claim at a resentencing, or not.

3. THE COURT ORDERED MENTAL HEALTH EVALUATION APPEARS INADVERTENT AND SHOULD BE ADDRESSED AT RESENTENCING.

The portion of the May 21, 2018 Judgment and Sentence ordering a mental health evaluation and compliance with all treatment recommendations appears to have been inadvertently included without the proper findings. This issue can, and should, be addressed at the subsequent resentencing which is required in this matter.

4. LEGAL FINANCIAL OBLIGATIONS SHOULD BE ADDRESSED AT RESENTENCING.

The State concedes that *State v. Ramirez* __ Wn.2d __, 426 P.3rd 714 (2018), requires the trial court to waive the imposition of all non-mandatory fees imposed. Accordingly, the legal financial obligations can be addressed at the resentencing in this matter to comply with current case law.

D. CONCLUSION

The remedy for a miscalculated offender score is to remand for resentencing. *Mendoza*, 165 Wn.2d at 930. In light of the State's concession, remand for resentencing is requested. At the resentencing

hearing the other issues raised by the defendant can be addressed and a lawful sentence can be entered.

A handwritten signature in black ink that reads "David M. Wall". The signature is written in a cursive style with a large, sweeping arch over the first few letters.

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January 09, 2019 - 11:19 AM

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