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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36075-0-III

STATE OF WASHINGTON, Respondent,

v.

FELIPE MERCADO BARAJAS, JR., Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Felipe Barajas, Jr. was convicted of possessing a controlled substance and received a prison sentence. He was sentenced based upon an offender score of “7” that included a class C felony conviction, but Barajas was not convicted of another felony for more than 5 years and the record includes no evidence that would prevent the class C felony from washing out. Additionally, the trial court imposed a \$200 criminal conviction fee and a \$100 DNA collection fee after finding Barajas indigent due to extended unemployment, and finding Barajas’s offender score to be 7 based upon prior felony convictions that required DNA collection. These costs should be stricken in accordance with *State v. Ramirez*, __ Wn.2d ___, 426 P.3d 714 (Sept. 20, 2018).

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in calculating Barajas’s offender score as a “7” and including a conviction for attempting to elude a pursuing police vehicle, a Class C felony, when more than five years had elapsed between Barajas’s sentence for that charge and a subsequent felony offense.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in imposing a \$200 criminal filing fee and a \$100 DNA collection fee when Barajas was indigent.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the State proved that Barajas's prior conviction for attempting to elude a pursuing police vehicle should be included in his offender score when he was sentenced for that conviction on February 19, 2002, and did not commit another felony until October 1, 2007, more than five years later?

ISSUE NO. 2: Whether Barajas's lack of income due to extended unemployment constitutes indigency within the meaning of RCW 10.101.010(3)(c), thus barring the imposition of the criminal filing fee.

ISSUE NO. 3: Whether the trial court's acknowledgment of Barajas's prior felony convictions, which required DNA collection, precluded the imposition of another \$100 DNA collection fee.

IV. STATEMENT OF THE CASE

The underlying facts of the case are only nominally relevant to the issues presented on appeal. In summary, police contacted Barajas parked on private property and investigated because the owner had complained of

problems with trespassers. RP (Trial)¹ 27, 38-39. Barajas made what the officer characterized as “weird movements” with his hands and began to walk away, turning his back to the officer, so the officer drew his gun and told Barajas he would shoot him, handcuffed him, and patted him down. RP (Trial) 41-43. The officer arrested Barajas for trespassing and searched him incident to arrest. RP (Trial) 44-45. From Barajas’s right coin pocket in his pants, the officer removed a napkin that contained a book of matches, that contained a small quantity of methamphetamine. RP (Trial) 45.

A jury convicted Barajas of possessing a controlled substance but acquitted him of taking a motor vehicle without permission and hung on the charge of criminal trespass. CP 35-37, RP (Trial) 170. At sentencing, the court found Barajas’s offender score was 7 based upon certified copies of judgments and sentences handed up by the State.² CP 41, RP (Sentencing) 2. The prior history included in his score included a

¹ The Verbatim Reports of Proceeding herein consist of two volumes, non-consecutively paginated. One volume, reported by Nicole A. Bulldis, RPR, CCR, contains the trial proceedings occurring on March 28 and March 29, 2018. The second volume, reported by Joseph D. King, CCR, contains the sentencing hearing held on April 14, 2018. For clarity, this brief will refer to the volumes respectively as “RP (Trial) ___” and RP (Sentencing) ___.”

² The certified copies do not appear to be entered in the court record as they are not docketed in the court file, nor does the docket show a list of exhibits introduced at sentencing. Barajas did not object/except to the State’s representation as to his history. RP (Sentencing) 6. Thus, the information about Barajas’s prior history presented in this brief is based upon the judgment and sentence and the parties’ statements during the sentencing hearing.

conviction for attempting to elude a pursuing police vehicle for which Barajas was sentenced on February 19, 2002. His next felony conviction occurred on October 1, 2007. CP 41. The record does not reflect any misdemeanor convictions that might prevent washout.

Based on a brief colloquy in which defense counsel informed the court that Barajas had been unemployed for quite some time and asked for a waiver of discretionary legal financial obligations (“LFOs”), the court stated it would strike the discretionary costs. RP (Sentencing) 5-6, CP 42. However, it imposed a \$200 criminal filing fee as well as a \$100 DNA collection fee, even though the record reflected multiple prior felony convictions from Franklin and Benton counties that would have required DNA collection. CP 41, 43, RP (Sentencing) 6.

The court imposed a mid-term sentence of 14 months followed by 12 months of community custody. CP 46, RP (Sentencing) 7. Barajas now appeals and has been found indigent for that purpose. CP 53, 55.

V. ARGUMENT

On appeal, Barajas contends that two sentencing errors require correction.

1. The trial court miscalculated the offender score when it included a point for attempting to elude a pursuing police vehicle, a class C felony, when more than five years elapsed before Barajas's next felony conviction.

Offender score error may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). When a court imposes a sentence based on an improperly calculated offender score, it acts without statutory authority. *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

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). In determining whether the offender score is supported by the record, the reviewing court considers that “the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530.

The burden of providing sufficient evidence to support the offender score rests squarely on the State. In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court described the State's burden of proof to establish the offender score:

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.)

Thus, 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 are mere argument. *Hunley*, 175 Wn.2d at 911-12.

Moreover, 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. This is because the defendant has no burden of proof on the issue; as such, silence cannot operate as a waiver of the defendant's right to hold the State to its evidentiary burden.

Under RCW 9.94A.525(2)(c), Class C felonies are not included in the offender score if the defendant has spent five consecutive years in the community without committing a new crime since the last date of release from confinement or entry of judgment and sentence. The State bears the burden of proving sufficient criminal history or other facts to establish by

a preponderance of the evidence that an offense does not wash out. *See State v. Cross*, 156 Wn. App. 568, 586-89, 234 P.3d 288 (2010) (evaluating evidentiary sufficiency of DISCIS report to meet State's burden of proof that offense should not wash out).

Attempting to elude a pursuing police vehicle is a class C felony. RCW 46.61.024(1). More than five years elapsed between entry of judgment and sentence on the charge and Barajas's commission of a subsequent felony. CP 41 (2/19/02 date of sentence to 10/1/07 date of crime). The State presented no evidence in the record that Barajas was released from custody within the five-year period or that he committed intervening misdemeanors that would prevent the attempting to elude conviction from washing out. Accordingly, the State failed to prove that the attempting to elude conviction should be included in Barajas's offender score.

"[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (*quoting Goodwin*, 146 Wn.2d at 867-68). The remedy for the error is to vacate Barajas's sentence and resentence him using the correct offender score. *Wilson*, 170 Wn.2d at 691.

2. The \$200 criminal filing fee and the \$100 DNA collection fee should be stricken from the judgment and sentence due to Barajas's indigency and his prior felony convictions requiring DNA collection.

Effective June 7, 2018, by House Bill 1783, our Legislature amended several statutory provisions related to the imposition and collection of legal financial obligations. *See* Laws of 2018, ch. 269. Among its many amendments, House Bill 1783 amended the discretionary LFO statute, RCW 10.01.160(3), to prohibit trial courts from imposing discretionary costs on indigent defendants: “The court **shall not** order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 6(3) (emphasis added). House Bill 1783 also amended RCW 36.18.020(2)(h) to prohibit the imposition of a \$200 criminal filing fee on indigent defendants:

(2) Clerks of superior courts shall collect the following fees for their official services . . . (h) Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, **except this fee shall not be imposed on a defendant who is indigent** as defined in RCW 10.101.010(3) (a) through (c).

Laws of 2018, ch. 269, § 17 (emphasis added). Finally, House Bill 1783 amended RCW 43.43.7541 to make the DNA database fee no longer mandatory if a defendant's DNA has been collected because of a prior

conviction: “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars **unless the state has previously collected the offender’s DNA as a result of a prior conviction.**” Laws of 2018, ch. 269, § 18 (emphasis added).

Barajas was sentenced on April 24, 2018, before the effective date of the bill. CP 49. However, the Washington Supreme Court recently held the statutory amendments set forth in House Bill 1783 apply prospectively to cases on direct appeal at the time the amendment was enacted. *See State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (Sept. 20, 2018). In *Ramirez*, following his convictions in Superior Court, the court imposed \$2,900 in LFOs on the defendant, including a \$200 criminal filing fee and a DNA collection fee. *Ramirez*, 426 P.3d at 714. Following sentencing, the trial court issued an order of indigency. *Id.*

The *Ramrez* Court held that House Bill 1783 applies prospectively because the statutory amendments pertain to costs imposed following conviction, and cover cases pending on direct review and thus not final when the amendments were enacted. *Id.* The *Ramirez* Court concluded the defendant was entitled to benefit from the statutory changes in House Bill 1783. *Id.* Accordingly, the Court remanded the case for the trial

court to strike the \$200 criminal filing fee and the \$100 DNA collection fee from the judgment and sentence. *Id.*

Here, because Barajas's case was pending on appeal when the bill became effective, he is entitled to benefit from the statutory changes affecting LFOs. *See Ramirez*, 426 P.3d at 714. At the time of sentencing, the trial court apparently found Barajas indigent based upon an extended period of unemployment. RP (Sentencing) 5-6, CP 42. Extended unemployment necessarily indicates Barajas had no regular income, and therefore does not regularly earn at least 125% of the federal poverty level within the meaning of RCW 10.101.010(3)(c). Accordingly, the \$200 criminal filing fee should be stricken. RCW 36.18.020(2)(h).

Moreover, the judgment and sentence reflects that Barajas has been convicted of multiple felonies. CP 41. Conviction or adjudication as a juvenile for a felony offense has required DNA collection since 2002. *See* Laws of 2002, c. 289, § 2. Thus, it is virtually certain that Barajas's DNA has been collected before. Under amended RCW 43.43.7541, the \$100 DNA collection fee was not mandatory, and it should be stricken due to Barajas's indigency. RCW 10.01.160(3).

VI. CONCLUSION

For the foregoing reasons, Barajas respectfully requests that the court REMAND the case for resentencing with an offender score of “6” and STRIKE the \$200 criminal filing fee and \$100 DNA collection fee from the judgment and sentence.

RESPECTFULLY SUBMITTED this 6 day of December,
2018.

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CERTIFICATE 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:

Felipe Barajas, Jr.
700 Rd. 32, Trailer 111
Pasco, WA 99301

And, pursuant to prior agreement of the parties, by e-mail to the following:

Franklin County Prosecuting Attorney
Appeals@co.franklin.wa.us

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

Signed this 6 day of December, 2018 in Kennewick,
Washington.



Andrea Burkhart

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