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Division III
State of Washington
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No. 36331-7-III

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

STATE OF WASHINGTON,
Respondent,

v.

BRENDA RUTH THORNTON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 15-1-00024-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether or not the appellant's 2007 Clark County felony conviction washes out for the purpose of calculating the appellant's offender score.
2. Whether or not there is sufficient evidence on the record to rule the imposition of the \$100 DNA collection fee impermissible.

B. STATEMENT OF THE CASE

Ms. Thornton was charged with two counts of Bail Jumping. This matter proceeded to jury trial on August 22, 2018 in Klickitat County Superior Court. The jury found Ms. Thornton guilty of both counts.

Sentencing was held on September 17, 2018. Ms. Thornton's score was calculated as seven, and the Court orally made findings of fact based upon the State's sentencing memorandum and recitation of the appellant's criminal history. (VRP 133-134). Ms. Thornton's counsel did not contest the calculation of the offender score. (VRP 132).

Ms. Thornton was sentenced to 38 months. (VRP 133). She filed this timely appeal.

C. ARGUMENT

- i. The appellant's 2007 felony conviction does not washout and her offender score was correctly calculated in light of her overall criminal history.

Ms. Thornton asserts on appeal that her matter must be remanded to the trial court to determine if her offender score was incorrectly calculated in light of *State v. Schwartz*, 6 Wn.App.2d 151, 429 P.3d 1080

(Div.3, 2018). (BOA 4-7). She argues that on remand, under *Schwartz*, if her 2014 incarceration in her 2007 Clark County felony matter was for failure to pay legal financial obligations, the washout rules apply to her case and her offender score should be recalculated as one as opposed to the score of seven that was entered. *Id.*

The Washington State Supreme Court accepted review of *State v. Schwartz*, COA 35171-8-III, on March 6, 2019. In *Schwartz*, the appellant appealed the calculation of his offender score, contending that his score should have been four, as opposed to the score of six proposed by the State. The basis of his appeal was the interpretation of RCW 9.94A.525(2)(C)'s felony washout provision's "triggering period". Division III, in interpreting the language of the statute, remanded the matter for resentencing after holding that "the last date of release from confinement...pursuant to a felony conviction" does not include confinement imposed for a failure to make a payment towards LFOs. *Schwartz*, 429 P.3d at 1085. In its ruling, the Court expressly disagreed with *State v. Mehrabian*, 175 Wn.App. 678, 308 P.3d 660 (2013). *Schwartz* at 1082. *State v. Schwartz* is set for hearing on review on June 25, 2019 and the Supreme Court's ruling will be dispositive as to the issue of LFOs for the purpose of a felony washout.

Regardless, it is the State's position that the defendant's 2007 felony offense does not washout, and the defendant's offender score

calculation of seven is correct.

A sentencing court's calculation of an offender score is reviewed de novo. *State v. Crow*, COA 35316-8-III, 33 (Div.3, Apr. 9, 2019) citing *State v. Tewee*, 176 Wn.App. 964, 967, 309 P.3d 791 (2013). Erroneous sentences may be challenged for the first time on appeal in regard to sentencing decisions. *Id.* citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). To determine the proper offender score, due process permits the court to "rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." *Crow* at 34, citing *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence, and bare assertions, unsupported by evidence, do not satisfy the State's burden. *Id.*, citing *State v. Hunley*, 175 Wn.2d 910; see also *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999) (the State must introduce "evidence of some kind to support the alleged criminal history" at sentencing).

The remedy when an offender score is erroneous or a record of prior convictions has not been properly established is remand to the trial court for resentencing. See *State v. Crow*, COA 35316-8-III, 33 (Div. 3, Apr. 9, 2019) (defendant entitled to resentencing due to State's failure to present sufficient proof of crimes included in offender score calculation); *State v. Hunley*, 175 Wn.2d 901 at 916 (resentencing appropriate to

require the State to prove defendant's prior convictions unless affirmatively acknowledged); *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (erroneous calculation of offender score requires remand for resentencing unless the record clearly shows the trial court would have imposed the same sentence regardless of the error); *State v. Raines*, 83 Wn.App. 312, 315, 922 P.2d 100 (1996) (resentencing appropriate even though defendant had served entire modified sentence because modifications could cause a future sentencing court to impose additional demanding conditions of community placement or sway a court to impose the high end of the standard range).

In calculating the appellant's offender score, the State analyzed whether the appellant's prior felony offenses washed for the purpose of sentencing. The rules governing which prior convictions are included in a person's offender score are found in RCW 9.94A.525. These rules can be summarized, for the present circumstance and for the initial calculation of the offender score in the underlying matter, as follows; Prior Class C felony convictions are not included in the offender score if, since the last date of release from confinement pursuant to a felony conviction, if any, or since the entry of the judgment and sentence, the offender has spent five consecutive years in the community without having been convicted of *any* crime. RCW 9.94A.525(c) (emphasis added).

As applies to the defendant's 2007 Clark County felony

conviction, the State obtained information directly from the Clark County prosecutor's office regarding the appellant's 2014 incarceration for failing to pay legal financial obligations, which was included in the State's sentencing memorandum. (CP 59). The State also included on page five of the sentencing memorandum the appellant's convictions for Driving With a License Suspended in the Third Degree in Clark County, Washington, on March 19, 2007, March 31, 2011 and December 5, 2012. (CP 59). These convictions were reflected in the appellant's certified criminal history, a copy of which was provided to the appellant's trial counsel as part of discovery in the underlying matter.

The March 31, 2011 and December 5, 2012 convictions prevented the appellant's 2007 felony matter from washing for the purpose of calculation of her offender score. Because they did not contribute points to the appellant's offender score for the purpose of calculation, aforementioned misdemeanor convictions were not listed in Section 2.2 of the Judgment and Sentence. At sentencing, Ms. Thornton's trial counsel, while not stipulating to the offender score of seven, did not object to the calculation on any grounds, including that any of the felony offenses used to calculate the offender score had washed. The State has since obtained a certified copy of the electronic Court docket, which is the official record of the Court and shows the case history along with findings and judgments, in the appellant's 2011 Driving With a License Suspended in

the Third Degree matter, and a certified copy of the citation, Judgment and Sentence, Statement of Defendant on Plea of Guilty, and electronic Court docket in the appellant's 2012 Driving with a License Suspended in the Third Degree matter.

The 2007 Clark County felony matter does not wash and the defendant's offender score calculation of seven is correct. If any action is taken, it should be remanding the matter for resentencing to have the State lay a more detailed record as to the failure of the 2007 felony conviction to wash.

- ii. The appellant failed to lay a record at sentencing to establish DNA had previously been collected.

The appellant asserts that the DNA collection fee must be stricken from the judgment and sentence because it should be presumed that a DNA sample was collected from Ms. Thornton pursuant to her 2007 Clark County felony conviction. (BOA 8).

A party seeking review has the burden of perfecting the record so the reviewing court has all relevant evidence before it, and an insufficient record on appeal precludes review of the alleged errors. See *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994).

While it is uncontested that the appellant has a Washington State felony conviction from 2007, nothing on the record suggests that a sample was already collected and submitted to the Washington State Patrol Crime

Laboratory under her 2007 felony case number. At sentencing, the appellant's trial counsel provided no argument against the imposition of the DNA collection fee, nor did counsel lay a record to suggest DNA had already been collected. The appellant now asserts that because the 2007 felony conviction exists, it should be presumed that the appellant's DNA was collected. However, defendants do not always submit to DNA collection despite having been ordered to so. See *State v. Thornton*, 188 Wn.App. 371, 372, 353 P.3d 642 (2015) (defendant had not previously submitted DNA sample in connection with prior felony offense).

A party challenging imposition of a DNA fee on appeal must have laid a record sufficient to show imposition of the DNA fee was not appropriate. See *Thornton*, 188 Wn.App. 371 at 374 (defendant who provided no facts to support the argument on appeal suggesting a DNA sample had been collected under a prior felony case number was unable to show that collection of DNA and imposition of collection fee in subsequent felony was impermissible). See also *State v. Thibodeaux*, COA 35316-8-I, (Div.1, Nov. 26, 2018) (unpublished) (because existing record did not establish defendant's DNA had already been collected, defendant failed to demonstrate imposition of collection fee was impermissible). In the underlying case, when asked for a recitation of costs requested at sentencing, the State asked that the Court impose a \$100 DNA collection fee because there was uncertainty as to whether the defendant's DNA had

actually been collected pursuant to her 2007 felony conviction. (VRP 131). Following the State's recitation, the appellant's trial counsel did not offer proof of prior collection, nor was there an objection raised to the collection of the fee.

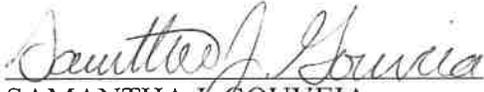
The record is insufficient to establish prior collection of DNA and the imposition of the \$100 DNA collection fee should stand.

D. CONCLUSION

The calculation of the defendant's offender score as seven, and the imposition of the \$100 DNA collection fee should be affirmed; however, this case should be remanded for resentencing to establish a record regarding the failure of the respondent's 2007 felony conviction to wash.

Respectfully submitted this 17th day of June, 2019.

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**COURT OF APPEALS OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON
Respondent,
vs.
BRENDA RUTH THORNTON,
Appellant

NO. 36331-7-III
Superior Court No. 15-1-00024-3
CERTIFICATE OF SERVICE

I, Samantha J. Gouveia, declare that on June 17, 2019, I emailed per agreement a copy of the Brief of Respondent to:

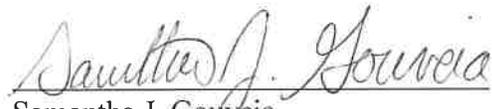
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of June, 2019.

KLICKITAT COUNTY
PROSECUTING ATTORNEY


Samantha J. Gouveia,
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KLICKITAT COUNTY PROSECUTING ATTORNEY

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Transmittal Information

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