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Court of Appeals
Division III
State of Washington
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No. 36816-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

VICTOR JAMES MATHIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The State did not prove Victor Mathis perjured himself. Specifically, the State failed to prove Mr. Mathis was convicted of armed robbery and burglary in Georgia, in contradiction of his testimony that he had never been convicted of a felony in Georgia. The State also incorrectly calculated Mr. Mathis' sentencing score and erroneously informed the court it was required to run the perjury sentence consecutive to a previous sentence for unlawful possession of a firearm.

The State presents no substantive response to the claims raised in Mr. Mathis' appeal. The State does not squarely address the sufficiency of the evidence or the resentencing issues, except to concede resentencing is warranted under RCW 9.94A.589(3). Because the State failed to meet its evidentiary burden at trial, this Court should reverse the conviction. In the alternative, this Court should remand for resentencing after addressing the issues related to the erroneously calculated offender score.

1. The fingerprint card was insufficient evidence Mr. Mathis was previously convicted of armed robbery and burglary in Georgia.

The crime of perjury requires a heightened burden of proof. *State v. Olson*, 92 Wn.2d 134, 135, 594 P.2d 1337 (1979). To prove the defendant has perjured themselves, the State must present two independent forms of evidence: (1) the testimony of a credible witness that directly

contradicts the defendant's oath and (2) a second direct witness *or* independent corroborative evidence. *Id.*

The court below found Mr. Mathis perjured himself under oath by testifying he had not been convicted of armed robbery and burglary in Georgia. CP 113 (Conclusion of Law 13). To satisfy the first element, the court relied on the testimony of a police officer that Mr. Mathis admitted he was convicted of armed robbery and burglary in Georgia. CP 112–113 (Conclusion of Law 10). To satisfy the second element, the court relied on testimony of a fingerprint expert that Mr. Mathis' fingerprints matched those of a fingerprint card from the Georgia Department of Corrections, although the card was labeled with different name, "Victor Lewis James." CP 109 (Finding of Fact 18), 113 (Conclusion of Law 11); Exhibit 2 (fingerprint card).

However, the fingerprint card was not independent corroborative evidence of the officer's testimony that Mr. Mathis was convicted of armed robbery and burglary in Georgia. The fingerprint card contains no evidence of a conviction for either armed robbery or burglary. Exhibit 2. Although the card indicates a "CHARGE" of "ARMED ROB*," it does not state the person fingerprinted was actually convicted of any crime, and does not mention burglary at all. Exhibit 2.

The expert's testimony merely matched Mr. Mathis' fingerprints to those found on the fingerprint card.¹ Accordingly, the fingerprint card, coupled with the expert's testimony, does not corroborate the police officer's testimony that Mr. Mathis admitted to being convicted of armed robbery and burglary in Georgia. CP 113 (Conclusion of Law 11). The court's finding to the contrary is therefore unsupported by the evidence. CP 113 (concluding the expert's testimony "was independent testimony that corroborated the testimony of Sergeant Hunziker and clearly contradicted the testimony of Mathis provided under oath that he was not the Victor Lewis James that that was *convicted of those offenses in Georgia.*") (emphasis added).

The State does not squarely address the argument the fingerprint card is insufficient evidence of any conviction. Instead, the State asserts, without explanation, that "this fingerprint evidence conclusively matches the defendant's fingerprints with those of the defendant, using an alias, *when convicted of the Georgia crimes.*" Brief of Respondent at 7. The State also asserts the fingerprint card is "a certified copy from the Georgia Department of Corrections." *Id.* The State provides no analysis as to why a "certified copy" cures the fundamental evidentiary defect in its case: that

¹ The fingerprint expert did not testify regarding Exhibit 2, only Exhibit 2-A, which was not admitted at trial. RP 90. However, Exhibit 2 and 2-A appear to be identical. The superior court clerk confirmed that the exhibits on file appear to be same document.

the fingerprint card is not proof Mr. Mathis was convicted of armed robbery and burglary in Georgia.

The State focuses instead on the credibility of the State's witnesses and the "four hundred years of scientific analysis" backing the fingerprint testimony. Brief of Respondent at 5–7. This is either an attempt to distract from the issue on appeal or a misunderstanding of Mr. Mathis' argument. Mr. Mathis does not assert the witnesses were incredible or the fingerprint testimony was unreliable. His argument is State failed to meet its burden because it did not provide independent corroborative evidence of Mr. Mathis' alleged Georgia convictions. *Olson*, 92 Wn.2d at 135.

The State failed to meet its heightened burden of proof that Mr. Mathis perjured himself. Reversal of the conviction is required.

2. The fingerprint card was improperly admitted as an exception to hearsay.

The fingerprint card admitted as Exhibit 2 was improperly admitted as an exception to hearsay as "judgment of a previous conviction." ER 803(a)(22); RP 93–95. However, the fingerprint card did not fit within the confines of this exception, as it was not "[e]vidence of a final judgment, entered after a trial or upon a plea of guilt." ER 803(a)(22).

The State does not present any substantive argument why the fingerprint card qualifies as a “judgment of a previous conviction” under ER 803(a)(22). The State instead simply parrots the trial court’s reasoning in admitting the document, without further analysis.² Brief of Respondent at 8–9. Mr. Mathis has already devoted significant space in his opening brief to explaining the flaws in the court’s analysis in admitting Exhibit 2. Brief of Appellant 13–16. This Court should hold the exhibit was improperly admitted as an exception to hearsay.

For the first time on appeal, the State asserts “the fingerprint card is also admissible pursuant to ER 803(a)(8) as a public record and report.” Brief of Respondent at 9–11. However, on appeal, a party may not argue different grounds for the admissibility of evidence than the grounds argued to the trial court. *See State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983). Accordingly, this Court should decline to address this argument.

3. This Court should accept the State’s concession that resentencing is required, but still address the questions of law presented by Mr. Mathis’ appeal.

Mr. Mathis previously received 102-month concurrent sentences for the possession of firearms convictions. *State v. Mathis*, No. 36296-5-III, 2019 WL 3934651 at *2 (Aug. 20, 2019) (unpublished). At sentencing

² The trial court’s reasoning, despite its explicit references to “Exhibit 2,” seems to be referring to a lengthier document than the exhibit on file. RP 94–95. Again, the superior court clerk confirmed that Exhibit 2 is the exhibit on file. *See* n.1.

on the perjury conviction, the State alleged Mr. Mathis's prior history yielded a score of "nine" based on its faulty comparability analysis of several decades-old Georgia convictions. RP 115; CP 41–105; Brief of Appellant at 26–36. The court adopted the State's erroneous calculation, failed to conduct a wash-out analysis, and then, for reasons that are unclear, added an unsupported conviction to Mr. Mathis' criminal history. CP 3; Brief of Appellant at 22–26.

Based on the incorrectly calculated offender score, the court sentenced Mr. Mathis to 84 months. CP 5. Then, based on the State's representation that the sentence could not be run concurrently with Mr. Mathis' firearm possession sentence except as an exceptional sentence, the court ordered the sentence be served consecutively to Mr. Mathis' 102-month sentence. RP 119–121; CP 5.

The State correctly concedes resentencing is required as the court below erroneously believed it had to run Mr. Mathis' perjury conviction consecutive to his firearm convictions unless it gave an exceptional sentence. Brief of Respondent at 11–12; *see also* Brief of Appellant at 16–18. The sentence imposed by the court contravened RCW 9.94A.589(3), which presumes that crimes committed while the person is not serving a sentence for a felony must run concurrently with any sentence imposed subsequent to the crime committed. Although the court

has the discretion to order a consecutive sentence, the court here mistakenly believed it was required to do so to give a standard range sentence. *See id.*; RP 121. Because the statute presumes the perjury sentence must run concurrent with Mr. Mathis' firearms sentence, resentencing is required. *See State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (reversal is required if the sentencing court misapplies the law).

The State does not substantively address the other sentencing issues Mr. Mathis raised in his opening brief pertaining to his score. The State instead implies any challenge to the score was waived by stipulation. Brief of Respondent at 12–14. However, on appeal, Mr. Mathis challenged his score on the basis of legal error as well as ineffective assistance of counsel, issues which cannot be waived by stipulation. *See* Brief of Appellant at 21; *In re Goodwin*, 146 Wn.2d 861, 873–74, 50 P.3d 618 (2002) (“in general a defendant cannot waive a challenge to a miscalculated offender score” because “a defendant cannot agree to punishment in excess of that which the Legislature has established.”); *State v. Hernandez*, 172 Wn. App. 537, 545, 290 P.3d 1052 (2012) (challenges to sentencing brought within the context of an ineffective assistance of counsel claim are preserved for appellate review).

In the alternative, the State urges this Court to decline to address the issues presented because “this matter can best be addressed at the anticipated resentencing.” Brief of Respondent at 14. The State argues permitting the court below to assess the comparability of Mr. Mathis’ prior convictions in the first instance “would provide both parties a fair opportunity to advocate their positions at the same time and in the same forum.” *Id.*

The State’s argument ignores the fact that the court below already ruled Mr. Mathis’ score was a “nine” based on its own comparability analysis:

Alright, with regards to this matter I do find that the offender score of nine is appropriate based upon the stipulation of the parties *and also* with regards to viewing Mr. Mathis criminal history, both for these offenses from the unlawful possession of firearm case in 18-1-17-20 points as well as the offenses out of Georgia being comparable offenses *after doing both a legal and factual analysis of those offenses. I do find that they are comparable offenses* for making an offender score of nine in this case, standard range seventy-two to ninety-six months.

See RP 120 (emphasis added). The State’s position below was also fully briefed in its sentencing memorandum and supported by extensive exhibits. CP 41–106. The State has thus had a fair opportunity advocate for its position and the court below has had its opportunity to rule. This Court is now the correct forum to resolve the questions of law presented on appeal.

B. CONCLUSION

For the reasons stated above, this Court should reverse the perjury conviction. In the alternative, this Court should remand for a new sentencing hearing.

DATED this 17th day of August, 2020.

Respectfully submitted,

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WASHINGTON APPELLATE PROJECT

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