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NO. 55374-7-1

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

STATE OF WASHINGTON,
Respondent,
v.
GORDON BERGSTROM,
Appellant.

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JAMES R. HARRIS
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

THE TRIAL COURT MISCALCULATED MR.
BERGSTROM'S OFFENDER SCORE, REQUIRING
REMAND FOR RESENTENCING

1. Mr. Bergstrom was not barred from personally
challenging the same course of criminal conduct determination
below. An appellant can waive his right to raise on appeal an
erroneous offender score based on a determination whether his
crimes constituted the same course of criminal conduct, if he fails
to raise the issue before the sentencing court. *State v. Nitsch*, 100
Wn. App. 512, 523, 997 P.2d 1000 (2000). In *Nitsch*, the
defendant affirmatively stated his standard range was correct at
sentencing. 100 Wn. App. at 522. In contrast, at sentencing in the
instant case, Mr. Bergstrom stated on the record that some of his
prior convictions constituted the same course of criminal conduct.
11/17/04RP at 4.

The State's argument this case is somehow similar to *Nitsch*
is meritless. The State concedes that in *Nitsch* no party challenged
the offender score, but instead argues Mr. Bergstrom's challenge
was not effectively and timely raised. BOR at 5. But Mr. Bergstrom
challenged his offender score at sentencing before the trial court
imposed sentencing. The State's argument this case is "much like

the one decided in *Nitsch* is flawed.

"[A] defendant has a *constitutional* right to at least broadly control his own defense." *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983). "Hybrid representation" encompasses a situation where both defendant and attorney actively participate in presentation and shared duties of managing defense. *State v. Buelna*, 83 Wn.App. 658, 661, 922 P.2d 1371 (1996). Whether to allow hybrid representation is within sound discretion of trial court. *State v. Harris*, 48 Wn.App. 279, 283, 738 P.2d 1059 (1987); *see also, State v. Carr*, 13 Wn.App. 704, 711, 537 P.2d 844 (1975) ("If a criminal defendant is represented by counsel and counsel is afforded a full opportunity to argue to the jury, then whether the defendant will be permitted to make separate, pro se closing argument is a matter within the discretion of the trial court).

The State argues on appeal as it did below "[a] defendant represented by counsel has no right to 'hybrid representation – where the defendant and his attorney essentially serve as co-counsel." Brief of Respondent at 4. Accordingly, the State claims that means a defendant must either proceed pro se or be represented by counsel. BOR at 4-5, citing *State v. Bebb*, 108 Wn.2d 515, 524-25, 740 P.2d 829 (1987); *State v. Blanchey*, 75

Wn.2d 926, 938, 454 P.2d 841 (1969).

But the State misunderstands the law and the holdings in these two cases. While a defendant may not have a right or an entitlement to hybrid representation, that does not mean a defendant cannot have hybrid representation. In fact, a court has the discretion to grant or deny hybrid representation, which case law bears out.

In *Bebb*, the defendant moved to proceed pro se, and the trial court appointed standby counsel. 108 Wn.2d at 518. Following his conviction, Mr. Bebb argued the trial court infringed upon his constitutional right to self-representation. 108 Wn.2d at 521. Specifically, Bebb argued the trial court's rulings regarding standby attorney-client privilege infringed upon and compelled him to relinquish his right to representation. *Id.* at 524. The Supreme Court's holding in *Bebb* was the trial court's did not interfere with standby counsel's legitimate functions, as he was able to provide Bebb with law books and other materials need to present a defense. *Id.* at 526.

It is true that in *dicta*, the *Bebb* Court found there is no Sixth Amendment right to "hybrid representation." 108 Wn.2d at 524. But, the *Bebb* Court did not rule hybrid representation could not

exist. In essence, this is the State's claim. The State's argument below was that Mr. Bergstrom was forced to choose between being represented by counsel or self representation. 11/17/04RP at 8.

Similarly, *State v. Blanche*y, does not assist the State's argument on appeal. In *Blanche*y, the defendant filed a motion to set aside the information and a motion for legal documents prior to his trial, which were neither entered nor ruled upon in superior court. 75 Wn.2d at 938. The *Blanche*y Court did not rule a defendant could not file pro se motions that could be ruled upon. In fact, the Supreme Court even noted, "[i]t would certainly be unfortunate if, as defendant claims, these motions were filed and ignored by the court." *Id.* The holding of *Blanche*y is as follows, "Although the trial court should make every effort to hear such motions, defendant was deprived of no constitutional right by the court's failure to hear a pro se motion when defendant was adequately represented by counsel." *Id.* Accordingly, while a defendant has no constitutional right to hybrid representation, unless the trial court exercises its discretion and denies a defendant's personal objection or challenge raised in superior court, the trial court should, as it did in this case, make every effort to hear and rule on matters brought before the court personally by

a defendant.

Neither *Bebb* nor *Blanchey* hold Mr. Bergstrom was barred from personally challenging the State's offender score calculation. Mr. Bergstrom argued at his sentencing that under the SRA, the court was required to count multiple prior convictions served concurrently as one offense when calculating an offender score. 11/17/04RP at 5-6. Mr. Bergstrom argued his 1990 forgery convictions from cause number 89-1-06176-3 constituted the same course of criminal conduct. 11/17/04RP at 6. He also argued his three forgery convictions from cause number 94-1-04110-6 constituted the same course of criminal conduct. 11/17/04RP at 5. Mr. Bergstrom properly challenged the State's offender score calculation of "11," arguing his correct offender score would be a "7." *Id.*

The sentencing court exercised its discretion and allowed Mr. Bergstrom to personally challenge the calculation of his offender score. Nowhere in the record did the sentencing court rule Mr. Bergstrom could not personally challenge the State's offender score calculation and did not rule he was forbidden to have hybrid representation. Instead, the trial court did what the *Blanchey* Court advised it to do – "make every effort to hear such

motions.” 75 Wn.2d at 938. The trial court listened attentively to Mr. Bergstrom’s challenge and ruled on Bergstrom’s challenge to the State’s calculation of his offender score.

While the State stated on the record after-the-fact that it should have objected to Mr. Bergstrom personally challenging his offender score, his objection was 1) untimely, and 2) not ruled upon. The trial court obviously disagreed with the deputy prosecutor’s argument that Mr. Bergstrom could not raise the issue personally. Instead, the court ruled on the matter, stating Mr. Bergstrom had failed to present sufficient evidence. *Id.* at 9.

2. On remand, the State is precluded from presenting evidence it had the opportunity to prove at the initial sentencing. At the initial sentencing, the deputy prosecutor sought to count each prior conviction separately to reach an offender score tally of 11. Mr. Bergstrom challenged the State’s calculation based on prior convictions that were the same course of criminal conduct. The State incorrectly argued Mr. Bergstrom failed to disprove the calculation of his offender score.

The State concedes finally on appeal, “[a]t a sentencing hearing where a defendant disputes material facts related to his criminal history, the State bears the burden of proving that criminal

history." BOR at 6, citing *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). The State had a contrary opinion below, arguing Mr. Bergstrom had the burden of proving his prior convictions constituted the same course of criminal conduct. 11/17/04RP at 7. The deputy prosecutor also argued below that because the prior sentencing court did not find the offenses constituted the same course of criminal conduct, the current sentencing court should follow the presumption in the absence of any evidence to the contrary. *Id.* The State's argument below was that Mr. Bergstrom had the burden of producing such evidence. 11/17/04RP at 9.

The State also finally understands now on appeal, that when a defendant challenges the calculation of his offender score and the State fails to present evidence establishing the offender score, the contested information cannot be considered by the sentencing court. BOR at 7, citing *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Of course, the State's position at the initial sentencing was that should Mr. Bergstrom want to argue his prior convictions were the same course of criminal conduct, Mr. Bergstrom must provide proof of that assertion. 11/17/04RP at 9. The State was put on notice, but failed to present proof, as it now

concedes it must at the sentencing hearing, or the contested information may not be used at sentencing. *Ford*, 137 Wn.2d at 481.

With the State's misguidance below, the sentencing court ruled against Mr. Bergstrom, holding there was no evidence presented to make a finding of same course of criminal conduct. 11/17/04RP at 9. The sentencing court ruled Mr. Bergstrom had the burden to prove his prior convictions constituted the same course of criminal conduct. *Id.* Absent a showing the prior sentencing judge made a same course of criminal conduct finding and without any evidence presented to prove the prior convictions arose from the same course of criminal conduct, the sentencing court concluded it could not decide in Mr. Bergstrom's favor. 11/17/04RP at 9-10.

The State failed to understand the law until this appeal, which is as follows, "Where the State offers no evidence in support of its position, it is impermissible to place the burden of refutation on the defendant. *Ford*, 137 Wn.2d at 480 (citing *United States v. Weston*, 448 F.2d 626, 634 (9th Cir.1971), *cert. denied*, 404 U.S. 1061 (1972)). "The SRA (Sentencing Reform Act) expressly places this burden on the State because it is 'inconsistent with the

principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” *Ford*, 137 Wn.2d at 480 (quoting *In re Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

The State now claims on appeal, that despite its glaring misunderstanding of the law below and its misguidance to the trial court below that ruled Mr. Bergstrom failed to present sufficient evidence, contrary to the clear holding of *Ford*, it should have another change on remand to prove the prior convictions did not constitute the same course of criminal conduct. BOR at 7-8. The State must be forbidden from reshaping the record, twisting its repeated mistakes below into an argument that Mr. Bergstrom who properly challenged his offender score below somehow sandbagged the court so that he could “reap the unjustified benefit addressed in *Ford*.” BOR at 8.

The only failure in this case was the State’s laziness at the initial sentencing to have the required evidence to prove the existence of Mr. Bergstrom’s offender score. *Ford*, 137 Wn.2d at 482 (“The State does not meet its burden through bare assertions, unsupported by evidence.”). If the State wants to use prior convictions to give a defendant a high offender score, it has the

duty and burden to prove the existence of the prior convictions and how it reach its calculation. Mr. Bergstrom placed the State on notice that it incorrectly calculated his offender score. The State did not attempt to prove the prior convictions were not the same course of criminal conduct, but instead tried to impermissibly shift the burden to Mr. Bergstrom. *Ford*, 137 Wn.2d at 480. This Court must remand with instructions not to use the contested points in calculation of Mr. Bergstrom's offender score.

This Court should follow the *Lopez* Court. In *State v. Lopez*, the prosecution asked the court to impose a life sentence without the possibility of parole under the Persistent Offender Accountability Act (POAA), but failed to provide evidence of Lopez's prior convictions. 147 Wn.2d 515, 518, 55 P.3d 609 (2002). Lopez objected, and when asked to respond, the prosecution replied it did not have the judgment and sentences. *Id.* Rather than order the State to obtain copies of the judgments and sentences, the judge proceeded with sentencing and imposed a life sentence without the possibility of parole. *Id.*

The Court of Appeals overturned the persistent offender finding, and remanded for sentencing before a different judge on the existing record. 147 Wn.2d at 519. The State petitioned the

Supreme Court for discretionary review “on the sole issue of whether the Court of Appeals erred when it remanded for sentencing without providing the state an opportunity to present evidence of Lopez's prior convictions on remand.” *Id.*

The Supreme Court found the State alleged prior convictions but failed to provide any supporting evidence. *Id.* at 520.

Accordingly, “the sentencing court erred when it considered these unproved convictions.” *Id.* The State argued it should be entitled to submit evidence of Lopez's prior convictions on remand because Lopez did not provide a specific objection. *Id.* The State makes this identical argument on appeal here.

The *Lopez* Court concluded remand without the prior convictions was proper because allowing the State to have a second opportunity to prove its allegations after the defendant objected at the first sentencing would send the wrong message to the trial courts, defendants and the public. 147 Wn.2d at 523. Mr. Bergstrom requests this Court follow Supreme Court precedent and hold the State to its obligation of presenting evidence when challenged at the initial sentencing and when it fails to do so bar the State from fulfilling its obligation at resentencing.

B. CONCLUSION.

Because Mr. Bergstrom's offender score was erroneously calculated, this Court should remand the matter for a new sentencing hearing with instructions to reduce Mr. Bergstrom's offender score with instructions the prior convictions from cause number 94-1-04110-6 constituted the same course of criminal conduct and count as one point and the prior convictions from cause number 89-1-06176-3 constituted the same course of criminal conduct and count as one point.

DATED this 19th day of August, 2005.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 55374-7-1
)	
GORDON BERGSTROM,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 19TH DAY OF AUGUST, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF AUGUST, 2005.

x _____ 