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SUPREME COURT
STATE OF WASHINGTON

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YRONALD R. CARPENTER

No. 80553-9

CLERK
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

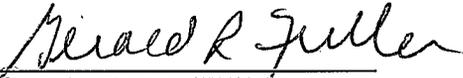
DAVID M. HENDERSON
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

THE HONORABLE DAVID FOSCUE, JUDGE

H. STEWARD MENEFFEE
Prosecuting Attorney
for Grays Harbor County

BY:


GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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STATEMENT OF THE CASE

The facts are undisputed. The defendant was convicted following jury trial. The State of Washington submitted a written Statement of Prosecuting Attorney to the court at sentencing. That document listed the defendant's two prior convictions from Grays Harbor County Superior Court that had been entered approximately one year prior. No challenge was made to the listing of the criminal history. That criminal history was included in the calculation of the defendant's offender score.

ISSUE PRESENTED

The trial court properly included information from the Statement of Prosecuting Attorney when sentencing the defendant.

The decision of the Court of Appeals in this matter is the result of a basic misunderstanding of what information the sentencing judge is entitled to consider. RCW 9.94A.500 specifically sets forth the information which the sentencing court is entitled to consider:

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

This language should be read expansively. The Court of Appeals refused to consider the Statement of Prosecuting Attorney to be a "presentence report." It limited the meaning of "presentence report" to those that may have been prepared by the Department of Corrections. The

Court of Appeals apparently relied on State v. Mendoza, Court of Appeals 34698-2 decided 07/17/07, although no reference was made to it in the written decision. This was incorrect.

There was a time when presentence reports were mandated for almost every criminal sentencing. See former CrR 7.2 (1984):

(a) When Made. The court shall order the Department of Social and Health Services, Division of Institutions, to make a presentence investigation and report to the court before the imposition of sentence or the granting of probation, except that the court may dispense with a presentence report if:

- (1) the maximum penalty is one year or less;
- (2) the defendant has two or more prior felony convictions;
- (3) the defendant refuses to be interviewed by the probation department or requests that disposition be made without a presentence report;
- (4) it is impractical to verify the background of the defendant;
- (5) the court finds in writing, with reasons stated, that the report would be of no practical use.

(b) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

Currently, reports from the Department of Corrections at sentencing are the exception rather than the rule. The trial court, prior to sentencing, may order the Department of Corrections to complete a risk assessment or presentence report CrR 7.1(a). A chemical dependency

screening report is required, unless waived, when the defendant has been convicted of a Violation of the Uniform Controlled Substances Act. A presentence report is mandatory when the defendant has been convicted of a felony sex offense. In certain cases involving mentally ill offenders the court is required to order a presentence report before imposing sentence. RCW 9.94A.500.

In short, a “presentence report” from the Department of Corrections will almost never be prepared in a case such as this. The court receives its information regarding the defendant’s criminal history from the parties, specifically, from information provided from the prosecuting attorney based on information it has gathered from databases available to the courts and law enforcement including the Judicial Information System as well as statewide and national criminal databases (WACIC, NCIC).

The language of RCW 9.94A.500 regarding “presentence reports” has a wider meaning than simply a report prepared by the Department of Corrections. A presentence report includes the information provided by the parties and may include a victim impact statement. These documents are not prepared by the Department of Corrections, but may properly be considered by the court at sentencing. RCW 9.94A.500 calls for the consideration of “presentence reports” and “criminal history”. This should not be read to require that the criminal history available to the court be limited to information contained in a Department of Corrections presentence report or to certified copies of Judgments.

As noted by Judge Quinn-Brintnall in her dissent it has long been the practice, and the responsibility, of the prosecuting attorney to provide information to the court at sentencing regarding the defendant's criminal history. The Department of Corrections is called upon to prepare presentence reports only in certain specific articulable circumstances such as mentally ill defendants and defendants convicted of felony sexual offense. When a presentence report from the Department of Corrections is not ordered, one might ask how the court is to obtain this history if not from the parties.

It may be that it would be helpful for the trial court to have a copy of the prior Judgment and Sentence. On the other hand, when the convictions are a year old and occurred in the same court, why is it inappropriate for the court to consider information about the convictions presented in the Statement of Prosecuting Attorney?

In the case at hand, no objection was made to the listing of the defendant's criminal history. The reason must be apparent. Counsel for the defendant was provided with a copy of the Statement of Prosecuting Attorney and had the opportunity to speak with his client to confirm that there was no dispute about the defendant's prior criminal history. The defendant did not object. As such, he acknowledged the existence of the criminal history. The court was entitled to rely upon the information provided by the State concerning the existence of the criminal history. RCW 9.94A.530(2).

Accordingly, this court must reverse the decision of the Court of Appeals and reinstate the sentence imposed by the court.

DATED this _____ day of May, 2008.

Respectfully Submitted,

By: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/jfa