

CASE NO. 30658-5-III

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION III

FILED

FEB 19 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

IGNACIO COBOS,

Appellant.

AMENDED APPELLANT'S BRIEF

Ignacio Cobos # 920217
Appellant, **In Propria Persona**
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA. 99326

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I. Introduction

Ignacio Cobos, the appellant, **In Propria Persona**, was found guilty by a jury and sentenced to a total term of 120 months. Appellant timely appealed.

Appellant also filed a motion for Accelerated Review of Sentence, and said motion was granted.

Commissioner's ruling was clarified on Commissioner's own motion, and directed the appellant to add any and all other issues to the issue of the sentence on his appellant's brief.

Appellant files his brief, arguing the sole sentence issue.

II. Assignment of Error

1. The trial court erred in sentencing appellant with an offender score of nine (9) without first specifying the convictions it found to exist and without any preponderance of the evidence on appellant's prior convictions.

Issues Pertaining to Assignments of Error

1. Did the trial court ERRED in sentencing appellant with an offender score of nine (9) without first specifying the convictions it found to exist and without any preponderance of the evidence on appellant's prior convictions?

III. Statement of the Case

On or about August 19, 2011, appellant was arrested and thereafter charged in the Grant County Superior Court.

On or about the 16th day of December, 2011, appellant was found guilty by a jury.

On February 14, 2012, appellant appeared before the court for sentencing. Verbatim report of Proceedings for February 14, 2012 (herein and after as VRP)

At sentencing the court informed the appellant: “Well Mr. Cobos, the first order of business is the – the sentencing. And the prosecution has indicated to me they’re willing – they’re – they’re ready to proceed. Are you ready to proceed on the sentencing?” VRP 4

Appellant informed the court that: “Oh, I wanted to look at the Judgment and Sentence. But I do ask because I haven’t received a copy of that to review that. I prepared the defendant’s objection to the calculation of the offender score, so . . .” VRP 4-5

And informed the court that he wanted to file it with the court: “I have it that I will like to submit to this Court.” And the Court stated: “And I – I would – I’d like to see it.” “And could – could – could you hand it up to me?” VRP 5

And the court further stated: “. . . The defendant’s objection is simply – he – he simply objects to the calculation of the offender score. Mr. Cobos, I think the first order of business on the sentencing is to simply determine what your offender score is. So let me begin by asking you if – I’d just like to read to you the criminal history which is set forth in the Proposed Judgment and Sentence. I’m just going to ask you if you agree with it. If you do not agree with it, I’m just – I would just like you to tell me in what respect you disagree. Okay?” VRP 6-7

The court recited appellant’s criminal history on the proposed judgment and sentence and the appellant objected and did not agreed to any criminal history. VRP 7-10

And the court asked the State: “Ms. Highland, do you want to be heard as to criminal history?” VRP 10, lines 18-19

And Ms. Highland stated: “Well, Your Honor, I am looking at the defendant’s Triple I, which does contain all of those charges and convictions as articulated by the

Court. It's my understanding that the information from the Triple I comes from the booking. They have to include his – the defendant's fingerprints and the defendant's identification. So I -- I – I have a good faith belief that the criminal history that we've recited according to that is correct." VRP 10-11

And the Court asked Ms. Highland: "Well, let me ask you: "Do – do you think the record is sufficient to proceed?" And Ms. Highland responded: "I do, your Honor." VRP 11

The court further stated: "Okay. If Mr. – Mr. Cobos does not agree to this, do we need – you do not believe we need to produce copies of the J&S's?" And Ms. Highland responded: "Well, if the Court wants to continue this over to this fall, I'll get the copies of the J&S's" And the court stated: "I don't want to do that." VRP 11, lines 10-22

The court presented its concern about the lack of appellant's prior criminal conviction out of Franklin County in 2009 on appellant's PSI report. VRP 12

The Court recited criminal rule (CrR) 7.1: "The report of the Presentence Investigation shall contain the defendant's criminal history as defined by the statute." VRP 13

And stated: "Okay. So the reason this – that I'm – I just want to be very careful about this is that – that without the – without the last conviction, the '09 conviction, the last felony would have been in December of '05." And presented it's concern that without the '09 conviction the washout provisions would be applicable. VRP 14

And the State through Ms. Highland suggested: "Your Honor, I suggest that we continue this for two weeks. We'll get certified copies of every single Judgment and Sentence of Mr. Cobos's." VRP 14, lines 22-26

APPELLANT'S BRIEF

And stated: “. . . I understand the Court’s concern. But it’s clear that Mr. Cobos’s criminal history, I believe, is – is at a 9. But I – we do want to make sure. We want to do this right, so . . .” VRP 15, lines 13-17

And the Court again presented it’s concern on the ’09 conviction: “I would just be a little bit more comfortable if the ’09 – the ’09 conviction had – was appearing in the PSI. And that’s the one I’m primarily concerned about.” VRP 15, lines 19-22

The Court was inclined to continue the matter to the 28th and the State asked for one week, and they agreed to continue the case to the 22nd of February, 2012. VRP 16-17

And appellant objected to the continuance: “Your Honor, I’m going to object to that continuance.” VRP 18, lines 4-5

And stated: “I just want to make sure that it’s an objection concerning the continuance, you know. Because prior, you know, to this hearing, you know, we – it should have been plenty of time for the prosecutor to work on my offender score.” VRP 18, lines 17-24

And the court proceeded with sentencing: “So I am prepared to proceed today. We will certainly proceed today, Mr. Cobos. But if we do, I am going to – I am going to proceed under the understanding that the criminal history set forth in the Judgment & Sentence is accurate.” VRP 23, lines 12-17

And the Court sentenced the appellant as follows: Count 1, to 120 months; Count 3, to 24 months; and Count 4, to 57 months. And ordered that all counts to run concurrent with a total of 120.” VRP 40-41

Appellant timely appealed, and moved this court to accelerate review and the court granted the motion. Appellant is filing this Brief on the Sentence.

APPELLANT’S BRIEF

IV. Argument

1. Did the trial court ERRED in sentencing appellant with an offender score of nine (9) without first specifying the convictions it found to exist and without any preponderance of evidence on appellant's prior convictions?

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing within forty days following conviction. RCW 9.94A.500(1)

In the present case, the appellant was found guilty by a jury on the 16th day of December, 2011, and the sentencing hearing was held, after a few continuances¹ over the appellant's timely objection, on the 14th day of February, 2012. See Verbatim Report of Proceedings (VRP); Exhibit "A"

RCW 9.94A.500(1) states in pertinent part:

“. . . If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court **shall** specify the convictions it has found to exist. All of this information **shall**² be part of the record.”

In the present case, at sentencing, on the 14th day of February, 2012, the Court informed the appellant: “Well Mr. Cobos, the first order of business is the – the sentencing. And the prosecution has indicated to me they're willing – **they're ready to proceed.**” VRP 4

The appellant informed the Court: “I prepared the defendant's objection to the calculation of the offender score.” VRP 4-5

And the Court stated: “Mr. Cobos, I think the first order of business on the sentencing is to simply **determine** what your offender score is. So let me begin by asking you if – I'd just like

¹ After the guilty verdict the court originally scheduled the sentencing hearing for January 18, 2012. The hearing was continued by the court and on one (1) occasion the court cancelled the hearing without any approve of the parties.

² RAP 1.2(b) defines shall as: “The word “shall” is used when referring to an act that is to be done by an entity other than the appellate court, a party or counsel for a party.

to read to you the criminal history which is set forth in the Proposed Judgment and Sentence. I'm just going to ask you if you agree with it. If you do not agree with it, I'm just – I would like you to tell me in what respect you disagree. Okay?" VRP 6-7

The Court recited appellant's criminal history on the proposed judgment and sentence and appellant objected and **did not** agree to any of the criminal history recited by the Court. VRP 7-10

And the Court asked the State: "Ms. Highland, do you want to be heard as to criminal history?" VRP 10, lines 18-19 And Ms. Highland responded: "Well, Your Honor, I am looking at the defendant's Triple I, which does contain all of those charges and convictions as articulated by the court. It's my understanding that the information from Triple I comes from the booking. They have to include his – the defendant's fingerprints and the defendant's identifications. So I – I – I have a good faith belief that the criminal history that we've recited according to that is correct." VRP 10-11

And the sentencing Court asked the State, Ms. Highland: "Well, let me ask you: 'Do you think the record is sufficient to proceed?'" Ms. Highland responded: "I do, your Honor." VRP 11

And the sentencing Court further stated: "If Mr. Cobos **does not** agree to this, do we need – you do not believe we need to produce copies of the J&S's?" To which the State, through Ms. Highland responded: "Well, if the Court wants to continue this over to this fall, **I'll get the copies of the J&S's**" VRP 11

The Court concluded: "I don't want to do that." VRP 11 And the Court sentenced the appellant, therefore, the sentencing court **ERRED** in sentencing the appellant with an offender score of nine (9) without satisfying itself by a preponderance of the evidence on appellant's criminal history and without specifying the convictions it found to exist, on the record.

Pursuant to RCW 9.94A.500(1), if the court was satisfied, by the preponderance of the evidence that the appellant had a criminal history, the court had the obligation to specify, on the record, the convictions it has found to exist. The court failed to do so, and therefore, the court ERRED in sentencing appellant with an offender score of nine (9) without satisfying itself by the preponderance of the evidence that the appellant had a criminal history, by the State's "failure" to prove appellant's prior convictions, by the preponderance of the evidence, a burden of proof that was triggered by appellant's objection to the calculation of the offender score, and disagreement with the criminal history in the State's proposed judgment and sentence.

In the present case, the Court stated: "I'd just like to read to you (appellant) the criminal history which is set forth in the Proposed Judgment and Sentence. I'm just going to ask you if you agree with it. If you do not agree with it, I'm just – I would like you to tell me in what respect you disagree. Okay?" VRP 6-7

The Court recited appellant's criminal history on the State's proposed judgment and sentence, and appellant objected and **did not** agree to any of the criminal history recited by the Court from the State's proposed judgment and sentence. VRP 7-10

And the State was heard as to the criminal history: "Well, Your Honor, I am looking at the defendant's Triple I, which does contain all of those charges and convictions as articulated by the Court. It's my understanding that the information from Triple I comes from the booking. They have to include his – the defendant's fingerprints and the defendant's identification. So I – I – I have a good faith belief that the criminal history that we've recited according to that is correct." VRP 10-11

And the Court presented its concerns to the State: "Well, let me ask you: '**Do you think the record is sufficient to proceed?**'" To which the State responded: "**I do your Honor.**"

And the Court continued to present its concerns to the State: “If Mr. Cobos **does not** agree to this, do we need – you do not believe we need to produce copies of the J&S’s?” To which the State responded: “Well, if the Court wants to continue this over to this fall, **I’ll get the copies of the J&S’s.**” VRP 11

Therefore, it is crystal clear that the sentencing court ERRED in sentencing appellant with an offender score of nine (9) without satisfying itself by the preponderance of the evidence that the appellant had a criminal history, due to the State’s **“failure”** to prove appellant’s prior convictions, by the preponderance of the evidence, a burden of proof that was **triggered** by the appellant’s objection to the calculation of his offender score, and disagreement with the criminal history, and objection to said criminal history, in the State’s proposed judgment and sentence.

The sentencing Court, with the Court’s understanding that the criminal history set forth in the State’s proposed judgment and sentence was accurate (“I am going to proceed under the understanding that the criminal history set forth in the Judgment and Sentence is accurate.” VRP 23, lines 12-17), sentenced the appellant as follows:

Count No.:	Offender Score:	Seriousness Level:	Standard Range:	SENTENCE:
1	9	II	60 -- 120	120 Months
3	9	I	12+ -- 24	24 Months
4	9	II	43 -- 57	57 Months

All counts to be served concurrent with a total of 120 months.

It shall be noted that, “It is the State’s obligation to ‘**assure**’ that the record before the sentencing Court supports the criminal history.” State v. Ford, 137 Wn. 2d 452, 480 (1999); State v. Mendoza, 165 Wn. 2d 913 (2009); In re Pers. Restraint Petition of Adolph, 170 Wn. 2d.

And appellant's timely and specific written and oral objections to the calculation of his offender score, as well as appellant's disagreement and objection to the State's criminal history set forth in the State's proposed judgment and sentence triggered the State's "burden of proof" of proving appellant's criminal history, by the preponderance of the evidence. State v. Lopez, 107 Wn. App. 270 (2001); State v. Lopez, 137 Wn. 2d 515 (2002); State v. Mendoza, 165 Wn. 2d 913 (2009); State v. Hunley, 161 Wn. App. 919 (2011)

It is constitutional to use a preponderance standard to determine the existence of prior crimes in order to determine the length of a sentence under the SRA (chapter 9.94A. RCW). State v. Thorne, 129 Wn. 2d 736 (1996)

This requirement, that the existence of prior convictions be proved by a preponderance of the evidence does not violate due process. State v. Ammons, 105 Wn. 2d 175, cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986); State v. Randle, 47 Wn. App. 232 (1987), rev. denied, 110 Wn. 2d 1008 (1988)

In State v. Cabrera, 73 Wn. App. 165 (1994) the Court held that: "In establishing defendant's criminal history for sentencing purposes, the state must prove by a preponderance of the evidence that a prior conviction exists."

In the present case, the State attempted to prove appellant's prior convictions by good faith and the recitation by the court of appellant's criminal history:

THE COURT: Ms. Highland, do you want to be heard as to criminal history?
MS. HIGHLAND: Well, Your Honor, I am looking at the defendant's Triple I, which does contain all of those charges and convictions as articulated by the Court. It is my understanding that the information from the Triple I comes from the booking. They have to include his – the defendant's fingerprints and the defendant's identification. So I – I – I have good faith that the criminal history that we've recited according to that is correct.
VRP 10-11

And when the court presented its concern on the State's 'obligation' in producing copies of the Judgment and Sentences, the State responded:

THE COURT: Okay. If Mr. – Mr. Cobos does not agree to this, do we need – you do not believe we need to produce copies of the J&S's?

MS. HIGHLAND: Well, if the Court wants to continue this over to this fall, I'll get the copies of the J&S's VRP 11, lines 10-22

And the State felt comfortable with the record before the sentencing Court:

THE COURT: Well let me ask you: Do you think the record is sufficient to proceed?

MS. HIGHLAND: I do your Honor. VRP 11

Therefore, it is crystal clear that the State **"failed"** to prove appellant's prior convictions, by the preponderance of the evidence, and therefore, the appellant **must be** re-sentenced as follows:

Count No. :	Offender Score:	Seriousness Level	Standard Range:
1	2	II	12+ to 24 months
3	2	I	6 to 6 months
4	2	II	3 to 9 months

with the record as existed at the sentencing hearing on the 14th day of February, 2012; with an offender score of two (2) based on the three (3) current convictions.

In State v. Labarbera, 128 Wn. App. 343 (2005), the State provided the court with certified copies of judgments and sentences showing defendant's convictions for second and third-degree assault in Washington, and the State provided a copy of defendant's presentence investigation report and a copy of his criminal history to prove his additional Washington convictions for possession with intent to deliver and first-degree possession of a firearm. And the Court held that: "This was adequate to establish the existence of defendant's prior convictions by a preponderance of the evidence."

In State v. Hunley, 161 Wn. App. 919 (2011), at the sentencing hearing the sentencing court relied on a statement by the prosecutor to establish the defendant's criminal history for purposes of calculating the defendant's offender score. And the Appellate Court held that: "State failed to prove the defendant's history of criminal convictions for sentencing purposes as is constitutionally required." And reversed the case for resentencing.

In State v. Lopez, 107 Wn. App. 270 (2001), this Honorable Court vacated Lopez' life-long persistent offender sentence because the State **failed** to establish the necessary predicate con

victions with satisfactory evidence.

In State v. Lopez, 137 Wn. 2d 515 (2002), our Supreme Court held that: “The State must prove a defendant’s criminal history by a preponderance of the evidence.” And that: “The best evidence of a prior conviction is a certified copy of the judgment. RCW 9.94A.500(1) (“ . . . Court Clerks shall provide without charge, certified copies of documents relating to criminal convictions requested by the prosecuting attorney.”)

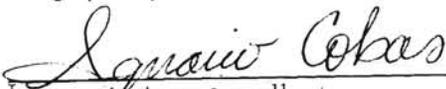
In the present case, in response to appellant’s motion to accelerate review of sentence under RAP 18.15, the State crystal clear acknowledged the State’s “failure” to prove appellant’s prior convictions, by the preponderance of the evidence: “. . . It was not until the continued sentencing date of February 14, 2012, that Mr. Cobos objected to his offender score. As the appellant additionally objected to any continuance of his sentencing date **to allow the State to obtain certified copies of the appellant’s prior convictions**, the Court relied upon the prior acknowledgement and the State’s representation based upon the appellant’s Washington State Criminal History Record, and proceeded to sentencing at that time.” Response to motion to accelerate at 4; See Exhibit “C”

V. Conclusion

Based on the facts stated herein, the appellant prays to this Honorable Court to reverse the sentence, and remand for resentencing with the record as existed at the sentencing hearing. With only the three (3) current offenses.

DATED THIS 12th day of February, 2013.

Respectfully submitted,



Ignacio Cobos, Appellant,
In Propria Persona

EXHIBIT "A"

PC
FILED

FEB 06 2012

KIMBERLY A. ALLEN
GRANT COUNTY CLERK



07-475115

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,
Plaintiff,

vs.

IGNACIO COBOS,
Defendant.

) NO. 11-1-00445-0

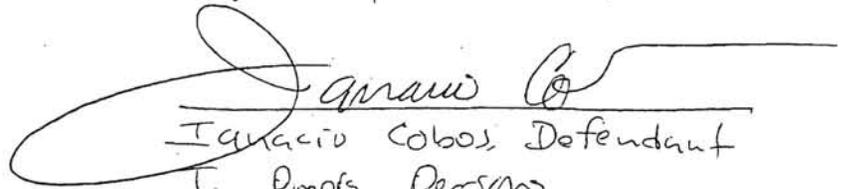
) DEFENDANT'S OBJECTION TO
) CONTINUANCE OF SENTENCING
) HEARING

COMES NOW Ignacio Cobos, the defendant, In Propria Persona, and hereby OBJECTS to the continuance of the sentencing hearing properly noted (continued to) January 31, 2012, WITHOUT the defendant's "WAIVER" to speedy sentencing.

This objection is made pursuant to RCW 9A.94A, and Superior Court Criminal Rules and supported by the 1st and 14th Amendments of the United States Constitution and records herein.

DATED THIS 2nd day of February, 2012.

Respectfully submitted,



Ignacio Cobos, Defendant
In Propria Persona

EXHIBIT "B"



07-463922

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,)	NO. 11-1-00445-0
Plaintiff,)	
vs.)	DEFENDANT'S OBJECTION TO
IGNACIO COBOS,)	CALCULATION OF HIS OFFENDER
Defendant.)	SCORE

COMES NOW Ignacio Cobos, the defendant, In Propria Persona, and hereby OBJECTS to the calculation of his offender score.

This OBJECTION is made pursuant to RCW 9A.94A.525, and supported by the 1st and 14th Amendments and record herein.

DATED THIS 14th day of February, 2012

Respectfully submitted

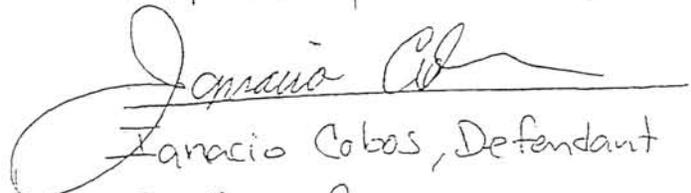

 Ignacio Cobos, Defendant
 In Propria Persona

EXHIBIT "C"

affirmatively acknowledged appellant's offender score, proceeded at that time to sentencing. *Id.*

V. ARGUMENT

Appellant, Ignacio Cobos, fails to provide a sufficient record to this Court upon which to base his objection to his offender score, or to accelerate review. Additionally, contrary to the appellant's representations, the clerk's minutes from February 7, 2012, indicate that there was an affirmative acknowledgement by appellant's then counsel that the appellant's offender score was a nine. It was not until the continued sentencing date of February 14, 2012 that Mr. Cobos objected to his offender score. As the appellant additionally objected to any continuance of his sentencing date to allow the State to obtain certified copies of the appellant's prior convictions, the Court relied upon the prior acknowledgment and the State's representation based upon the appellant's Washington State Criminal History Record, and proceeded to sentencing at that time

The State is unable to effectively respond to Mr. Cobos' arguments due to the incomplete record presently before this Court. The State respectfully requests Mr. Cobos' motion for

Case No. 30658-5-III

DECLARATION OF SERVICE

IN ACCORDANCE WITH 28 USC § 1746, I declare that on this date, I mailed the following documents:

- A. Amended Appellant's Brief;
- B. Declaration of Service; and
- C. Cover letter

directed to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar St.
Spokane, WA. 99201

and served a copy to:

D. Angus Lee
Grant County Prosecutor
P.O. Box 37
Ephrata, WA. 98823

Peat Eriksen
Personal Representative
9532 SW O RD
Royal City, WA. near 99357

DATED THIS 12th day of February, 2013.



Ignacio Cobos