

SUPREME COURT NO. 89900-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

IGNACIO COBOS,

Petitioner.

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Received *lc*  
Washington State Supreme Court

JUL 09 2014 *br*

Ronald R. Carpenter  
Clerk

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SUPPLEMENTAL BRIEF OF PETITIONER

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

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**A. ISSUE**

Ignacio Cobos, the petitioner, appeared before the court for sentencing. At sentencing, petitioner "timely" and "specifically" objected to the calculation of his offender score. The sentencing court did not conducted an evidentiary hearing, and sentenced petitioner relying on the offender score his former attorney and the State agreed at a previous hearing. On remand, should the State be held to the existing record?

**B. STATEMENT OF THE CASE**

After petitioner was convicted, by a jury, the trial court set the sentencing hearing for January 18, 2012. On January 12, 2012, petitioner filed a motion for self-representation. On January 18, 2012, the sentencing court continued sentencing to January 31, 2012. On January 31, 2012, the court, on its own motion, cancelled the sentencing hearing. On February 6, 2012, petitioner filed a Defendant's Objection to Continuance.

On February 7, 2012, petitioner appeared before the court for sentencing. Petitioner's attorney informed the sentencing court that petitioner wished to represent himself for sentencing. At this hearing, petitioner's attorney and the State agreed to an offen-

der score of nine (9). Arguments took place on petitioner's motion for self-representation, and the sentencing court granted petitioner's motion, and an oral request for a one-week continuance.

On February 14, 2012, petitioner, as the master of his legal strategy, filed a written objection to his offender score, and orally objected to every prior conviction. RP 4-10; State v. Cobos, \_\_\_ Wn.App \_\_\_ (2013)(Cobos objected to every prior conviction) See Published Opinion at 7

During the Valentine's Day sentencing hearing, the sentencing court asked the State: "Ms. Highland, do you want to be heard as to criminal history?" The State 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 included his -- the defendant's fingerprints and the defendant's identification. So I -- I -- have a good faith belief that the criminal history that we've recited according to that is correct. RP 10-11

And the sentencing court asked the respondent if the record was sufficient to proceed, and respondent answered:

THE COURT: Well, let me ask you: Do you think the record is sufficient to proceed?  
MS. HIGHLAND: I do, Your Honor, RP 11

And the Court continued to address the respondent

concerning the necessity to prove, by the preponderance of the evidence, petitioner's prior convictions:

THE COURT: Okay. 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? MS. HIGHLAND: Well, if the Court wants to continue this over to this fall, I'll get the copies of the J&S's, RP 11

Petitioner objected to a postponement, on the grounds of his right to "speedy sentencing." RP 20 And the Court addressed the petitioner:

THE COURT: Okay. Mr. Cobos, I need a "yes" or "no" from you. And let me -- let me explain to you where I am at this point. At the point that you were -- that -- that Ms. Rosborough represented to the Court that she -- that she agreed with the standard range in the criminal history, which is set forth in the Judgment & Sentence, she was representing you. She was your attorney. Now, under those circumstances it seems to me that really we're waling the extra mile for you here. . . . I don't think it's fair to have required the prosecutor to have produced, under these circumstances, the -- the certified Judgment & Sentence. 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 original history set forth in the Judgment & Sentence is ACCURATE. RP 22-23

Petitioner, voiced his opinion:

My opinion is that I don't agree to that calculation of the offender score. So whatever she says, I just want to make sure that it's an objection that I put in for the calculation of offender score. And if the Court wants to continue the sentencing that's up to the Court. But I just want to note an objection. RP 23-24

And the court stated:

. . . if you want to continue this for a couple -- of for a week so that counsel can bring you the certified Judgment & Sentence. But if you proc-- if you intent to proceed today -- And I will proceed today if it's your desire. -- I'm going to rely, as Ms. Highland has, on the representation of your counsel last week. RP 25-26

THE COURT: Okay. So I just need to hear from you. I -- I just need you to make a decision. If you want to continue this for a week, we will do so. And the prosecutor has offered to produce the Judgment & Sentence. If you do not, WE'LL PROCEED ON THE RECORD that we've got.

THE PETITIONER: Your Honor, the only thing I can say is that I submitted my objection to the offender score and I am objecting to any continuance. RP 27

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The petitioner was sentence with an offender score of nine (9).

On or about March 12, 2013, respondent filed a motion to supplement the record, asking the Court of Appeals, to allow the State to introduce certified judgment and sentences of petitioner's prior convictions. Arguments took place, telephonically, on April 24, 2013. On April 25, 2013, the Honorable Court Commissioner Monica Wasson issued a Commissioner's Ruling denying the State's motion to add the certified copies of petitioner's prior convictions.

Petitioner timely appealed, and the Court of Appeals, Division III, remanded for resentencing and allowed both the State and petitioner to supplement

the record.

Petitioner timely petitioned for discretionary review. And on April 30, 2014, this Court granted petition for review, and directed the parties to file a supplemental brief within 30 days.

On May 30, 2014, respondent moved the Court to extend the time, and time was extended to June 30, 2014.

C. ARGUMENT

Should the State be held to the existing record or be given a "second bite of the apple?"

In the present case, it is crystal clear that the petitioner objected to every single prior conviction. It is further, crystal clear, that because petitioner's prior convictions controlled his offender score, petitioner's objections were material. Furthermore, it is crystal clear, that the sentencing court relied on the material facts to which petitioner objected when the court determined petitioner's sentence. Published Opinion at 7

RCW 9.94A.530(2) clearly states in pertinent part:

. . . Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. . . .

In the present case, the appellate court held that: "When a convicted defendant disputes facts mate-

rial to his sentencing, 'the court must either not consider the fact or grant an evidentiary hearing on the point.'" (citing RCW 9.94A.530(2); accord State v. Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456 (2005))

And acknowledged that the petitioner: "Cobos also shows the facts to which he objected were material. Cobos objected to every prior conviction. Because the prior convictions control his offender score, his objections are material." Published Opinion at 7

Therefore, the sentencing court erred in considering unproven prior convictions in the calculation of petitioner's offender score, and therefore, the respondent does not gets a "second bite of the apple." State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) And therefore, this Court shall reverse the court of appeals decision as to given the respondent a "second bite of the apple."

In the present case, the Court of Appeals held that the sentencing court erred when it failed to hold an evidentiary hearing:

"In short, the sentencing court erred when it failed to hold an evidentiary hearing and instead relied on material facts to which Cobos objected." Published Opinion at 8

RCW 9.94A.530(2) crystal clear states, in pertinent part that: ". . . Where the defndant disputes material facts, the court must either not consider the

fact OR grant an evidentiary hearing on the point.  
. . ." In the present case, it is crystal clear that  
the sentencing court relied on material facts to which  
petitioner objected when the sentencing court determined  
petitioner's sentence:

The sentencing court relied on the material  
facts to which Cobos objected when determi-  
ning his sentence. Published Opinion at 7

Therefore, it is crystal clear that the sentencing  
court erred in considering the material facts that  
petitioner disputed, and therefore, the State shall  
be held to the existing record. And not given a "second  
bite of the apple.

In the present case, the State, represented by  
a well-experienced deputy prosecutor should have known  
that the State had the responsibility to prove, by  
the preponderance of the evidence, petitioner's prior  
convictions. The State, at the Valentine's Day senten-  
cing hearing agreed that the record before the senten-  
cing court was sufficient to proceed to sentence the  
petitioner:

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

MS. HIGHLAND: I do, Your Honor. RP 11

THE COURT: Okay, If Mr. -- Cobos does not  
agree to this, do we need -- you do not be-  
lieve 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. RP 11

Therefore, the State shall be held to the existing  
record, and this Honorable Court shall reverse the  
Court of Appeals decision giving the State a "second  
bite of the apple." State v. Lopez, 147 Wn.2d 515,  
55 P.3d 609 (2002)

In State v. Lopez, after the Court of Appeals,  
Division III, remanded for resentencing on the existing  
record, the State petitioned for discretionary review  
on the "sole" issue of whether the Court of Appeals,  
Division III erred when it remanded for resentencing  
without providing the State an opportunity to present  
evidence of Lopez's prior convictions on remand, and  
this Court held that: "Where the defendant raises a  
specific objection and 'the disputed issues have been  
fully argued to the sentencing court, we hold the  
State to the existing record, excise the  
unlawful portion of the sentence, and remand for resen-  
tencing without allowing further evidence to be  
adduced.'" (citing State v. Ford, 137 Wn.2d 472, 485  
(1999))

The present case is "identical" to Lopez case,  
with the exception that petitioner represented himself,  
and Lopez had an attorney, however, petitioner timely  
and specifically objected to the calculation of his

offender score, and in Lopez, his attorney objected, and therefore, the present case is different from State v. Bergstrom, 162 Wn.2d 87 (2007), because in Bergstrom, Mr. Bergstrom made a pro se objection and he was represented by counsel, however, in State v. Bergstrom, this Court provided three approaches to analyze the issue in question herein:

First, if the State alleges the existence of prior convictions at sentencing and the defendant fails to specifically object, before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

Second, if the defendant does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant's prior convictions, then the State may not present new evidence at resentencing. After the defense specifically objects, putting the sentencing court on notice that the State must present evidence, the State is held to the initial record on remand.

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

Therefore, following this excellent guidance by this Court, the second approach (if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant's prior convictions, then the State may not present new evidence) should be applicable

to the instant case. The second approach, crystal clear requires an objection from the defense. In the present case, the petitioner, *In Propria Persona*, objected. Therefore, the State may not present new evidence at resentencing, and this Court shall reverse the Court of Appeals decision giving the State a "second bite of the apple."

And add a fourth approach to cover a situation when the defendant is representing himself:

Fourth, if a self-represented defendant does specifically objects during the sentencing hearing but the State fails to produce any evidence of the self-represented defendant's priors convictions, then the State may not present new evidence at resentencing.

Otherwise, the second approach will prejudice the petitioner because petitioner choose to exercise his Constitutional right to represent himself.

Pursuant to RCW 9.94A.500(1), the sentencing court is required to make a final decision as to defendant's criminal history, according to the convictions that were proven, by the preponderance of the evidence, and specify, on the record, the convictions it found to exist.

In the present case, the sentencing court did not made a final decision as to petitioner's criminal history. The court simply relied on petitioner's ex-counsel agreement with the State as to an offender

score of nine, and ignored petitioner's timely and specific objection, instead of holding an evidentiary hearing, therefore, petitioner's due process was violated, as constitutional due process requires the State to meet its burden of proof, at sentencing. State v. Lopez, 107 Wn.App 270 (2001)

The sentencing court had the power and authority to hold an evidentiary hearing and/or continue the sentencing hearing, and it choose to sentenced the petitioner considering the disputed material facts:

THE COURT: Okay. Mr. Cobos, I need a "yes" or "no" from you. And let me -- let me explain to you where I am at this point. At the point that you were -- that -- that Ms. Rosborough represented to the Court that she -- that she agreed with the standard range in the criminal history, which is set forth in the Judgment & Sentence, she was representing you. She was your attorney. Now, under those circumstances it seems to me that really we're walking the extra mile for you here. . . . I don't think it's fair to have required the prosecutor to have produced, under these circumstances, the -- the certified Judgment & Sentence. So I am prepared to proceed today. We will certainly proceed today, Mr. Cobos. But is we do, I am going to -- I am going to proceed under the understanding that the criminal history set forth in the Judgment & Sentence if ACCURATE. RP 22-23

THE COURT: Okay. So I just need to hear from you. I -- I just need you to make a decision. If you want to continue this for a week, we will do so. And the prosecutor has offered to produce the Judgment & Sentence. If you do not, WE'LL PROCEED ON THE RECORD that we've got. RP 27

The trial court must conduct a sentencing hearing before imposing a sentence on convicted defendant. State v. Cobos, \_\_\_ Wn.App (2013)(citing RCW 9.94A.530 (2); State v. Hunley, 175 Wn.2d 901, 908, 287 P.3d 584 (2012)) At the sentencing hearing, the State bears the burden to prove the existence of prior convictions by a preponderance of the evidence. Id. (citing State v. Mendoza, 165 Wn.2d at 920) At the sentencing hearing, the State holds the obligation to assure that the record before the sentencing court supports the criminal determination. Id. (citing State v. Ford, 137 Wn.2d at 480) And the best evidence of a prior conviction is a certified copy of the judgment. Id. (citing State v. Lopez, 147 Wn.2d at 519)

In the present case, the State's bare assertions, supported by the so-called Triple I document, which was not introduced as evidence, does NOT satisfy the State's burden to prove petitioner's prior convictions. Therefore, the State shall be held to

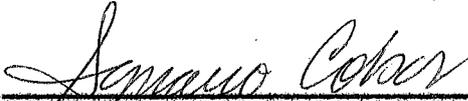
D. CONCLUSION

The State conceded that the petitioner objected to his offender score (Published Opinion at 2). The Court of Appeals held that the sentencing court erred when it failed to hold an evidentiary hearing and instead relied on material facts to which petitioner

objected. (Published Opinion at 8) RCW 9.94A.530(2) states in pertinent part that: "When the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point." Therefore, based on the foregoing, this Court shall reverse the Court of Appeals, Division III decision allowing the State to supplement the record, and remand for resentencing without giving the State a "second bite of the apple." To glorify this Court's prior decisions.

DATED THIS 27th day of June, 2014.

Respectfully submitted,

  
\_\_\_\_\_  
Ignacio Cobos, Petitioner  
In Propria Persona

Case No. 89900-2

Declaration of Service by Mail

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

- A. Petitioner's Supplemental Brief;
- B. Declaration of Service by Mail; and
- C. Cover Letter

directed to:

Ronald R. Carpenter  
Supreme Court Clerk  
P.O. Box 40929  
Olympia, WA. 98504

and served a copy to:

Carole L. Highland  
Deputy Prosecutor Attorney  
P.O. Box 37  
Ephrata, WA. 98823

DATED THIS 27th day of June, 2014.

  
\_\_\_\_\_  
Ignacio Cobos