

NO. 89900-2

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

IGNACIO COBOS,

PETITIONER.

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SUPREME COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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PROSECUTING ATTORNEY

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Deputy Prosecuting Attorney
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 ORIGINAL

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I. ASSIGNMENT OF ERROR

Did the Court of Appeals err in ruling that RCW 9.94A.530(2) would allow the State to introduce evidence during a sentencing hearing on remand?

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Does RCW 9.94A.530(2) control this case?
2. Does case law allow the State to introduce evidence regarding sentencing on remand?
3. Do the general principles on remand allow the State to introduce evidence on remand?

III. STATEMENT OF THE CASE (Adopted from the Court of Appeals)

After Ignacio Cobos was convicted of Delivery of Methamphetamine, Possession of Methamphetamine, and Voyeurism on December 16, 2011, the court scheduled sentencing hearings for January 18, and January 31, 2012. Both hearing dates were postponed, and the first sentencing hearing was held on February 7, 2012.

At the February 7, 2012, hearing, Mr. Cobos moved to represent himself. After he orally introduced the motion, but before it was ruled upon and granted, the State and Mr. Cobos' attorney agreed

upon an offender score of nine. Afterward, the sentencing court granted Mr. Cobos' motion to represent himself, and at his request, continued the sentencing hearing one week to February 14, 2012.

At the February 14, 2012, hearing, Mr. Cobos objected for the first time to his offender score in the presentence report. CrR 7.1(c) requires a party challenging a presentence report to notify opposing counsel at least three days before the sentencing hearing. When questioned why he objected, Mr. Cobos replied that he must verify whether convictions included in his score were reversed on appeal. At this February 14, 2012, hearing, the court also expressed some concern over a discrepancy between the presentence investigation report (PSI) and the Interstate Identification Index (Triple I). The PSI omitted one conviction contained in the Triple I.

During the February 14th hearing, the State alertly offered to obtain certified records of Mr. Cobos' judgment and sentences if the court briefly continued the sentencing hearing. Mr. Cobos objected to a postponement, claiming a right to a "speedy sentencing." Verbatim Report of Proceedings (February 14, 2012) at 20. RCW 9.94A.500(1) requires that sentencing occur within 40 days of a defendant's conviction, but a court may extend that time period for good cause shown or on its own motion. And, when a defendant

objects to facts material to their offender score, a sentencing court must hold an evidentiary hearing. RCW 9.94A.530(2). (*N.B.* it appears that February 14th would have been day 39.)

During the February 14th sentencing hearing, the court gave Mr. Cobos two options: (1) continue the sentencing hearing for one week so that the State could obtain certified records of his prior convictions, or (2) proceed with the sentencing hearing with the court relying on the sentencing score his former attorney and the State had agreed to at the February 7, 2012, hearing. Mr. Cobos rejected both options, and the court proceeded with sentencing. Relying on Mr. Cobos' former attorney's representation that an offender score of nine was accurate, the court sentenced Mr. Cobos to 120 months.

Division 3 ruling

Upon review, Division III held that it was inappropriate for the trial court to hold Mr. Cobos to his former attorney's stipulation as to his offender score. *State v. Cobos*, 178 Wn.App. 692, 699, 315 P.3d 600 (2013). The State has not cross petitioned for review on this point. Division III then remanded for a new sentencing hearing, permitting new evidence to be introduced pursuant to RCW 9.94A.530(2). *Id.* at 700.

IV. ARGUMENT

The issue is whether the State may introduce new evidence at the new sentencing hearing on remand. The parties below, and appellant in his petition for review, argued whether *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002), or *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007), along with other cases, applied to this case. However, that issue is moot, because RCW 9.94A.530(2), states in part “[o]n remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.” This section was added as part of Laws of 2008, ch. 231 § 4, and postdates *Bergstrom*, *Lopez*, and other case law on point.

Appellant has not challenged this statute, either below, or in his petition for review. “Statutes are presumed to be constitutional and the party challenging a statute’s constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt.” *In re Det. of Danforth*, 173 Wn.2d 59, 69, 264 P.3d 783 (2011). As Mr. Cobos has not even challenged the statute, he has not met this burden and the statute controls.

Bergstrom controls

Assuming, *arguendo*, that RCW 9.94A.530(2) did not resolve this case, then case law dictates that the State be permitted to place evidence in the record where it was denied that opportunity through the defendant's actions. This case law was described in the State's Brief to the Court of Appeals.

Remand should place the parties where they would be, absent the error.

The objective of a remand is to, as near as possible, place the parties in a position they would be in absent the error. Here the trial judge indicated he would make one of two choices; continue to give the State time to file the necessary evidence or sentence Mr. Cobos according to his stipulation. Mr. Cobos objected to both, so the judge chose the latter. According to Division III, and not challenged by the State, that was error. It was well within the court's discretion to allow the continuance when the defendant affirmatively stipulated, did not object three days prior as required by CrR 7.1(c), and withdrew his stipulation at the last second. See RCW 9.94A.500(1). The trial court stated it would have granted the continuance had it not held Mr. Cobos to his stipulation. Therefore, it is appropriate to put the parties in the place they would be absent

the error, with the State permitted to introduce its evidence at the new sentencing hearing, just as if the court had continued the sentencing hearing.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the ruling of the Court of Appeals and remand the case for a sentencing proceeding where each side may introduce new evidence.

DATED THIS 27th day of June, 2014.

Respectfully submitted:
D. ANGUS LEE, WSBA #36473
Grant County Prosecuting Attorney



Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

THE SUPREME COURT OF THE STATE OF WASHINGTON

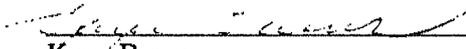
STATE OF WASHINGTON,)	
)	
Respondent.)	No. 89900-2
)	
v.)	
)	
IGNACIO COBOS,)	DECLARATION OF MAILING
)	
Petitioner.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Petitioner containing a copy of the Supplemental Brief of Respondent in the above-entitled matter.

Ignacio Cobos - #920217
Coyote Ridge Correction Center
PO Box 769
Connell WA 99326

Dated: June 27, 2014



Kaye Burns

Declaration of Mailing.

OFFICE RECEPTIONIST, CLERK

To: Kaye Burns
Subject: RE: State of Washington v. Ignacio Cobos - Supreme Court No. 899002

Rec'd 6/27/2014

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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To: OFFICE RECEPTIONIST, CLERK
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Attached is a Supplemental Brief of Respondent for filing in the above matter. A copy has been served on Mr. Cobos as indicated in the Declaration of Mailing attached to the Supplemental Brief. Thank you for your consideration.

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