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NO. 68907-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
Napoleon Hayes, Jr.,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BETH M. ANDRUS, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Prior concurrent offenses are only considered to involve the same criminal conduct if two or more offenses require the same criminal intent, are committed at the same time and place, and involve the same victim. Did the trial court error by including a half point in the Appellant's offender score when the prior juvenile convictions were for possessing stolen property and forgery?

2. An error in determining a defendant's offender score is harmless where the standard range is not affected. Should the Appellant's sentence be reversed and the case returned for resentencing when his standard range will remain the same?

B. STATEMENT OF THE CASE

Pursuant to a negotiated plea agreement, the Appellant entered pleas of guilty to three counts of Robbery in the First Degree in violation of RCW 9A.56.190 and 9A.56.200. CP 59-86; RP (5/11/12) 5-29. The parties agreed that although the State calculated the offender score as a 12, the Appellant was free to argue against the calculated offender score. CP 79; RP (5/11/12) 9, 13-14. At the sentencing hearing, the Appellant claimed that he should have an offender score of 6, arguing that a number of his prior convictions washed out and that two of the current robberies should be considered the same criminal conduct because they were part of

a robbery crime spree. CP 87-95; RP (6/11/12) 13-14. The State argued that the Appellant's offender score was a 12. In support of its argument, the State filed a sentencing memorandum that included certified copies of the Appellant's judgment and sentences for his prior convictions. CP 109-221; RP (6/11/12) 5-10, 13-14. The trial court reviewed the briefs, heard the arguments of counsel and considered the certified documents relating to the Appellant's prior convictions. The court found that the Appellant had an offender score of 12. CP 96-105; (6/1/12) 14-17. As counsel for the appellant began to make a sentencing argument, he briefly noted that the Appellant wanted him to put on the record that the Appellant believed the 1992 juvenile convictions for forgery and possession of stolen property "merge as they are in the same criminal action." [sic] RP (6/11/12) 20. Counsel for the Appellant did not include this argument in his sentencing memorandum, nor did he explain or make an argument regarding the 1992 juvenile convictions to the court. The trial court did not modify its earlier findings and sentenced the Appellant to a standard range sentence. CP 96-105; RP (6/11/12) 23-26. In making its decision, the court had reviewed a certified copy of the 1992 Information and judgment and sentence. CP 191-197.¹ The court also

¹ The court did not specifically state that it was finding that the offenses were not part of the same criminal conduct. Instead, the court simply kept the offender score as a 12 and sentenced the defendant to a standard range sentence.

explained why it was following the State's recommended sentence. RP (6/11/12) 23-26. The Appellant filed a timely appeal of his sentence. CP 107-108. The Appellant's sole issue on appeal is a claim that his sentence should be reversed and he should be resentenced because his offender score should be 11.5 instead of 12.² Brief of Appellant 1.

C. ARGUMENT

1. THE COURT PROPERLY FOUND THAT THE APPELLANT'S OFFENDER SCORE WAS A 12

The Appellant argues that the trial court erred by failing to resolve a scoring dispute and finding the Appellant's offender score to be a 12.

The Appellant is incorrect. The trial court considered the briefs and arguments of both counsel, as well as the certified copies of the charging document and judgment and sentence for the convictions in question.

Sentencing court's calculations of offender score are reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The State bears the burden to prove a defendant's criminal history by a preponderance of the evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007).

Here, the Appellant contested his offender score, thus requiring the State to prove the Appellant's criminal history by a preponderance of the

² Specifically, the Appellant is arguing the court failed to resolve the scoring issue.

evidence. The State responded by filing a sentencing brief and certified copies of court documents establishing each of the Appellant's prior convictions. The State also filed certified copies of misdemeanor convictions necessary to prove that the Appellant's prior felonies did not wash out. Among those documents were the Information and judgment and sentence for the 1992 juvenile forgery and possession of stolen property convictions that are the sole issue on appeal. CP 191-197. The Information contains the statutory elements of each charge and the statutory citations. There was sufficient evidence for the court to resolve the Appellant's "same criminal action" [sic] claim.

Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). RCW 9.94A.525 provides in part:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate

offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations;

The Appellant appears to claim that there was no evidentiary hearing held to address the Appellant’s same criminal action [sic] claim. To the contrary, the majority of the sentencing hearing was used to address the offender score issues. While the court did not specifically ask for separate argument, its decision was clear when it left the offender score as a 12.³ The court had access to the available documents that listed the crimes charged and their specific elements. There was sufficient evidence for the court to find by a preponderance of the evidence that the Appellant’s offender score was a 12.

2. EVEN IF THE COURT ERRED AND THE APPELLANT'S OFFENDER SCORE WAS AN 11.5, THE ERROR WAS HARMLESS

Even if the Appellant is correct and the court erred in failing to resolve the scoring dispute when it found that the Appellant had an offender score of 12, the error is harmless and remand is unnecessary.

³ Counsel for Appellant made no argument and appeared not to endorse his client’s assertion. RP (6/11/12) 20.

A correct offender score must be calculated before a sentence is imposed. State v. Tili, at 358. However, remand is typically unnecessary where it is apparent that the sentencing court would simply impose the same sentence again. Id. An error in determining a defendant's offender score is harmless where the standard range is not affected by the error. State v. Argo, 81 Wn.App. 552, 569, 915 P.2d 1103 (1996).

Here, the error would simply result in a half point reduction in the Appellant's offender score. An offender score of 11.5 would still be 2.5 points above the maximum of 9 points. The Appellant's standard sentencing range would be unaffected.

Moreover, after the sentencing court noted that it was intimately familiar with the facts of the individual robberies, it specifically listed a number of reasons why it was following the State's recommendation. RP (6/11/12) 23-25. The reasons included the defendant's violent criminal history, the violent nature of the current offenses, and the fact that the Appellant pointed a loaded firearm at the tellers and cashiers during the robberies. RP (6/11/12) 24. Nowhere does the court note its reliance on a .5 point, ten year old juvenile forgery conviction in arriving at its decision. Given the facts of this case, it is clear that the court would simply impose the same sentence if remanded.

D. CONCLUSION

For the reasons argued above, the Appellant's arguments should be denied.

DATED this 19th day of February, 2013.

RESPECTFULLY submitted,

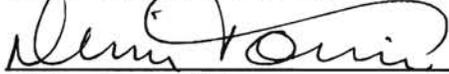
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. NAPOLEON HAYES, JR., Cause No. 68907-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Divina Tomasini
Done in Kent, Washington

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Date

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