COA NO. 44911-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GENARO VILLANUEVA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael H. Evans, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE OFFENDER SCORE ERRONEOUSLY INCLUDED WASHED OUT PRIOR CONVICTIONS.

Contrary to the State's assertion in its brief on appeal, defense counsel did not concede the fact that Villanueva was last released from prison in 2009. Brief of Respondent (BOR) at 3-4. Defense counsel notified the court that Villanueva was actually released from confinement in 2006. 1RP 283-84; 2RP 7. Counsel argued Villanueva's prior class C felonies should wash out because he did not commit another offense resulting in a conviction until committing the current offenses in 2013 — a period longer than five years. 1RP 285. In response, the State conceded at sentencing that Villanueva was actually released from the prison in 2006, but pointed out Villanueva was on community custody for three years until August 4, 2009. 1RP 286.

On appeal, the State concedes the three class C felonies at issue wash out if there is no intervening confinement after Villanueva's release from prison in 2006 because, contrary to the trial court's ruling, the five-year wash out period begins to run after release from confinement, not release from community custody obligations. BOR at 5.

The State nonetheless asks this Court to affirm on a different basis. The State argues the class C felonies did not wash out because Villanueva

was confined on DOC violations during the five-year washout period. BOR at 4-5. If the State proved that fact by a preponderance of the evidence, the State would be correct. But it did not sustain its burden of proof on the issue.

Due process requires the State to prove facts at sentencing by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 481-82; 973 P.2d 452 (1999). "The burden lies with the State because it is 'inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.'" State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012) (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

The State must provide sentencing information that has "'some minimal indicium of reliability beyond mere allegation.'" Ford, 137 Wn.2d at 481 (quoting United States v. Ibarra, 737 F.2d 825, 827 (9th Cir. 1984)). Bare assertions, unsupported by evidence, do not satisfy the State's burden. Hunley, 175 Wn.2d at 910. "A prosecutor's assertions are neither fact nor evidence, but merely argument." Ford, 137 Wn.2d at 483 n. 3. "There must be some *affirmative* acknowledgment of the facts and information alleged at sentencing in order to relieve the State of its evidentiary obligations." Hunley, 175 Wn.2d at 912.

The State produced zero evidence establishing Villanueva was confined on a DOC violation at some point after his 2006 release from prison. Defense counsel made two statements on the subject, but they do not amount to an affirmative acknowledgement of the fact. At the May 2 sentencing hearing, defense counsel remarked "I did call the prison and my client was actually released in 2006, however, it sounds like there was some DOC time in 2009. *I'm not exactly certain of that.*" 2RP 7 (emphasis added). Defense counsel made a similar remark at the May 16 hearing regarding "DOC time," referencing the same phone call to DOC without being able to give any "specifics." 1RP 284.

It was never explained what "DOC time" meant. Sanctions for violating a condition of community custody can fall short of actual confinement. For example, sanctions may include supervision enhanced through electronic monitoring. RCW 9.94B.040(3)(a)(i), (c); RCW 9.94A.737(3)(a). Such a sanction could reasonably be construed as "DOC time," but the offender is still in the community.

Even if counsel's vague reference to "DOC time" is construed to mean confinement time pursuant to a DOC violation, it cannot be concluded that counsel relieved the State of its burden of proof on the issue. Counsel, based on his phone call to DOC, was not certain that Villanueva actually did DOC time. 2RP 7. Counsel's equivocation does

not amount to an affirmative acknowledgment of the fact such as to relieve the State of its burden of proof.

2. THE STATE DID NOT PROVE THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE.

The State appropriately concedes that it did not, over defense objection, prove the legal or factual comparability of the prior Texas burglary conviction. BOR at 7-8.

3. AS A MATTER OF DUE PROCESS, THE STATE SHOULD NOT GET ANOTHER BITE OF THE APPLE.

Villanueva, in his opening brief, requested that this Court remand for resentencing based on a properly calculated offender score that does not include the prior class C felony convictions and the Texas burglary offense. Brief of Appellant at 21. Even though the State was unable to sustain its burden of proof on the offender score issues over defense objection, it contends it should be allowed another chance to prove what it couldn't prove before. BOR at 6-7, 8.

The State relies on fairly recent statutory authority for that proposition. BOR at 6-7 (citing RCW 9.94A.530(2) ("On 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."); RCW 9.94A.525(22) ("Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence."); State v. Calhoun, 163 Wn. App. 153, 161-67, 257 P.3d 693 (2011) (statutory amendments did not violate the saving statute or constitutional prohibition against ex post facto laws), review denied, 173 Wn.2d 1018, 272 P.3d 247 (2012)).

Whatever those statutes purport to allow, it is a violation of due process to give the State another chance to reprove criminal history when it couldn't do so before over defense objection. In Ford, the Supreme Court adopted the rule that where the State fails to carry its burden of proving criminal history after a specific objection, it will not be provided a further opportunity to do so. Ford, 137 Wn.2d at 485. Once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts unless and until it is overruled by the Supreme Court. State v. Gore, 101 Wn.2d 481, 487-88, 681 P.2d 227 (1984).

Furthermore, constitutional protections trump the statute. "'[I]t is emphatically the province and duty of the judicial department to say what the law is' . . . even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." In re Salary of Juvenile Dir., 87 Wn.2d 232,

241, 552 P.2d 163 (1976) (quoting United States v. Nixon, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). The legislature cannot abridge constitutional rights by its enactments. Seattle School District No. 1 of King County v. State, 90 Wn.2d 476, 503 n.7, 585 P.2d 71 (1978) (citing Marbury v. Madison, 5 U.S. 137, 163, 2 L. Ed. 60, 69 (1803)).

The Court in Ford was concerned with preserving the integrity and dignity of the sentencing process as a matter of due process generally. See Ford, 137 Wn.2d at 484 ("The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms. There is an important symbolic aspect to the requirement of due process."), quoting American Bar Ass'n, Standards for Criminal Justice: Sentencing std. 18-5.17, at 206 (3d ed. 1994)). Villanueva objected that the State's evidence was insufficient to prove his prior class C felonies had not washed out and that his Texas burglary conviction was comparable to a Washington felony. Under Ford, the State was obliged to come forward at that time with adequate proof. The State did not do so.

Again, it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." Ford, 137 Wn.2d at 480 (quoting Williams, 111 Wn.2d at 357). The State could not or chose not to prove Villanueva's criminal history after being put on notice by defense

objection that it had the obligation to do so. To allow the State another attempt to prove what it failed to prove before undermines the due process principles underlying our system of justice.

B. CONCLUSION

For the reasons set forth above and in the amended opening brief, Villanueva requests that this Court remand for resentencing based on a properly calculated offender score that does not include the prior class C felony convictions and the Texas burglary offense.

DATED this 10th day of April 2014

Respectfully Submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF APRIL, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GENARO VILLANUEVA
DOC NO. 874959
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF APRIL, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

April 10, 2014 - 1:47 PM

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