NO. 44911-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GENARO VILLANUEVA,

Appellant.

RESPONDENT'S BRIEF

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1. The court did not err when it counted prior class C felonies in Mr. Villanueva's offender score.

2. The court did err when, based on the evidence before it, it included a non-comparable out-of-state conviction in Mr. Villanueva's offender score.

3. The State does not address this assignment of error because it concedes the second assignment of error.

B. STATEMENT OF THE CASE

Following a jury trial, Genaro Villanueva was convicted of Burglary in the Second Degree, Theft in the Second Degree, and Forgery. CP 4-5, 37-39. Two separate sentencing hearings were held in which the parties argued about whether Mr. Villanueva's prior class C felony convictions washed and whether Mr. Villanueva's out-of-state convictions were comparable. 2RP 3-12; 1RP 263-297. Ultimately, the trial court found that Mr. Villanueva's prior class C felonies did not wash and that all of Mr. Villanueva's out-of-state convictions that the State argued should be included in Mr. Villanueva's offender score were comparable. 1RP 283-87. The court then imposed a standard range sentence of 62 months confinement and Mr. Villanueva timely appealed said sentence. CP 48, 56.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR WHEN IT COUNTED MR. VILLANUEVA'S PRIOR CLASS C FELONY CONVICTIONS IN HIS OFFENDER SCORE.

As a preliminary matter, when a party to an appeal is the respondent and seeks no affirmative relief that party is "entitled to argue any grounds supported by the record to sustain the trial court's order." *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d). Consequently, when the State prevails it needs not cross-appeal in order to present additional grounds for affirming the trial court's decision. *State v. McInally*, 125 Wn.App. 854, 863, 106 P.3d 794 (2005) ("The State is entitled to argue any grounds to affirm the court's decision that are supported by the record, and is not required to cross-appeal.").

Offender score calculations are reviewed do novo and, when there is not an agreement as to a defendant's offender score, the State must prove a defendant's criminal history by a preponderance of the evidence. *State v. Allen*, 150 Wn.App. 300, 314–15, 207 P.3d 483 (2009). Any factual determinations made by the trial court in determining whether a defendant's prior convictions were proven, however, are reviewed for an

abuse of discretion. *State v. Ortega*, 120 Wn.App. 165, 171, 84 P.3d 935 (2004) (citing *State v. Garza*, 150 Wn.2d 360, 366, 77 P.3d 347 (2003)). Under RCW 9.94A.525(2)(c):

> class C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

As explained by *State v. Ervin*, the statute can be broken down into two clauses: "a 'trigger' clause, which identifies the beginning of the five-year period, and a 'continuity/interruption' clause, which sets forth the substantive requirements an offender must satisfy during the five-year period." 169 Wn.2d 815, 821, 239 P.3d 354 (2010). When an offender does not meet the substantive requirements of the "continuity/interruption" clause the five-year clock is reset. *See generally Id.* Thus, confinement pursuant to felony probation violation interrupts the five consecutive years in the community and resets the trigger date. *State v. Blair*, 57 Wn.App. 512, 514-17, 789 P.2d 104 (1990); *Ervin*, 169 Wn.2d at 825.

Here, the State argued that Mr. Villanueva was last released from prison in 2009 and it appears that at the two sentencing hearings that were

conducted that Mr. Villanueva conceded that fact. CP 9, 63; 2RP 7, 10; 1RP 283-5. If Mr. Villanueva was released from prison at some point in 2009 than his class C felony convictions would not wash and should be counted as part of his offender score. Specifically, on May 2, 2013, the first sentencing hearing, Mr. Villanueva's trial counsel remarked: "Here's the situation, your Honor. 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, but if my client's release date was in 2006 or 2007 . . . [his class C felonies] would wash." 2RP 7. On May 16, 2013, the second sentencing hearing, Mr. Villanueva's trial counsel once again acknowledged that his client spent some time in confinement pursuant to a felony probation violation following his original release by stating: "What I did, your Honor, is I called Shelton and they indicated he was released from Clallum Bay on November 27, 2006, however, there was some DOC time, but I can't – I mean violation time, but I can't give your honor the specifics of that." 1RP 284.

Consequently, Mr. Villanueva seemed to have adopted, at the trial level, an argument that the five year period began following his original release from prison for his 2004 convictions for burglary and theft and that

his confinement as a result of DOC violations pursuant those convictions did not, by law, interrupt the five year period and result in a new trigger date. Said argument is incorrect under *Blair*. 57 Wn.App. at 514-17. The State, in response to that argument, appeared to claim that the trigger date was when Mr. Villanueva's term of community custody ended. 1RP 286. The court agreed with this contention and held that the convictions did not wash stating: "I think in my view of that statute is that release refers to the act of supervision of DOC." 1RP 287. As Mr. Villanueva accurately explains on appeal, the court misinterpreted RCW 9.94A.525(2)(c) because "[c]ommunity custody is plainly not confinement." *State v. Gartrell*, 138 Wn.App. 787, 790, 158 P3d 636 (2007); Br. of App. at 6-8.

Accordingly, each party advanced an argument that was incorrect as a matter of law. That said, the trial court's ultimate holding was correct. The class C felonies did not wash out and were properly included in Mr. Villanueva's offender score because his confinement in 2009 for a felony probation violation interrupted his five year period and his release from confinement following that felony probation violation was his new trigger date. Mr. Villanueva's acknowledgement of the felony probation violation resulting in "time" combined with information provided by the

State, most clearly in its Statement of Defendant's Criminal History, sufficiently support the court's holding that Mr. Villanueva's class C felonies did not wash. 2RP 7; 1RP 284; CP 7. Because the State is "entitled to argue any grounds supported by the record to sustain the trial court's order" this Court should affirm the trial court for the reasons above.

If this court disagrees with the State's position and holds that the class C felonies should wash based on the present record, the State respectfully requests a remand for resentencing in which the State may present additional evidence regarding Mr. Villanueva's felony probation violation history and other convictions that would prevent Mr. Villanueva's class C convictions from washing. The State should be allowed to present additional evidence at a resentencing pursuant to RCW 9.94A.530(2), RCW 9.94A.525(22), and *State v. Calhoun*, 163 Wn.App. 153, 257 P.3d 693 (2011). RCW 9.94A.530(2) and RCW 9.94A.525(22) act together to allow consideration at resentencing of "both prior convictions not otherwise admissible at the original sentencing hearing and prior convictions that could have been admitted at the original sentencing hearing but were omitted." *Calhoun*, 163 Wn.App. at 166;

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.") (emphasis added); 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.").

2. THE STATE CONCEDES THAT BASED ON THE EVIDENCE IN THE RECORD THAT THE STATE DID NOT PROVE THAT THE PRIOR TEXAS OFFENSE WAS COMPARABLE TO A WASHINGTON OFFENSE FOR THE PURPOSE OF COMPUTING THE OFFENDER SCORE

In computing a defendant's offender score, "[o]ut of state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). Essentially, the State must prove that the out-of-state conviction would be a felony under Washington law. State v. Arndt, __ Wn.App ___, No. 43717-1 at 3 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452(1999).

Here, Mr. Villanueva accurately states the law governing the comparability of out-of-state offenses and persuasively argues that, on the record before the trial court, Mr. Villanueva's Texas "burglary of a habitation" conviction is not comparable, legally or factually, to a Washington felony and, thus, should not have been included as part of his offender score. Br. of App. at 9-17. Consequently, the State concedes the issue and respectfully requests this court to remand for resentencing in which the State may present additional evidence regarding the factual comparability of Mr. Villanueva's "burglary of a habitation" conviction. As noted above, there is statutory authority and case law that supports allowing the State to present additional evidence at a resentencing.

D. CONCLUSION

For the reasons argued above, Mr. Villanueva's sentence should be affirmed to extent that his offender score was properly calculated to

include the class C felony convictions and remanded for resentencing to determine, if in fact, the Texas burglary offense is a comparable offense.

Respectfully submitted this 10 th day of March , 2014.

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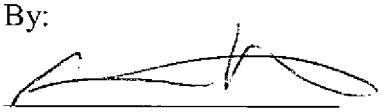
Prosecuting Attorney

By:



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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 11th, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 10, 2014 - 2:24 PM

Transmittal Letter

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