SUPREME COURT NO. 90773-1
COA NO. 44911-1-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GENARO VILLANUEVA,

Petitioner.

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

The Honorable Michael H. Evans, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Genaro Villanueva asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Villanueva requests review of the decision in State v. Genaro Brandon Villanueva, Court of Appeals No. 44911-1-II (slip op. filed Aug. 19, 2014), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether due process prohibits the State from introducing additional evidence to prove criminal history on remand after the State was unable to prove criminal history at the original sentencing hearing despite defense objection?

D. STATEMENT OF THE CASE

A jury found Villanueva guilty of second degree burglary, second degree theft, and forgery. CP 37-39. Villanueva's prior convictions included a 2000 Texas conviction for burglary of a habitation, a 1999 New Mexico conviction for taking a motor vehicle, a 1996 New Mexico conviction for attempted larceny, a 2004 Washington conviction for first degree burglary, and a 2004 Washington conviction for second degree theft. CP 44.

Villanueva challenged his offender score at sentencing, with the State arguing prior out of state offenses were comparable. 1RP[1] 265-66; 2RP 11. The trial court found the 2000 Texas burglary conviction comparable to Washington's residential burglary, the 1999 New Mexico taking a motor vehicle conviction comparable to Washington's second degree taking a motor vehicle without permission, and the 1996 New Mexico attempted larceny conviction comparable to Washington's attempted first degree theft. 1RP 275-77.

Villanueva further argued his class C felonies should wash out pursuant to RCW 9.94A.525(2)(c). 1RP 284-85. The trial court rejected this argument, concluding the five year period for determining when a class C conviction washes out does not begin until after a defendant has finished serving his community custody time and, therefore, Villanueva's convictions did not wash out because he did not finish serving community custody until 2009. 1RP 286-87. The trial court included the Texas conviction and the prior class C felony convictions in Villanueva's offender score and sentenced Villanueva to a standard range sentence. CP 48; 1RP 273, 277.

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[1] The verbatim report of proceedings is referenced as follows: 1RP - two consecutively paginated volumes consisting of 4/9/13, 4/10/13, 4/11/13 and 5/16/13; 2RP - 5/2/13.

On appeal, Villanueva argued the trial court erred by including his Texas conviction for burglary of a habitation under V.T.C.A., Penal Code § 30.02 because the State did not prove it was legally or factually comparable to residential burglary. Amended Brief of Appellant (BOA) at 9-17. In response, the State conceded it did not prove the comparability of the Texas conviction. Brief of Respondent (BOR) at 7-8. The Court of Appeals accepted the State's concession on this point. Slip op. at 4.

Villanueva also argued the trial court erred in including the prior class C felonies in his offender score because they washed out. BOA at 2-8.[2] The Court of Appeals held the trial court erred in ruling the five-year wash out period began to run upon release from community custody obligations rather than release from confinement. Slip op. at 3. It pointed out Villanueva may have been confined for a period of time in 2009, which would prevent the convictions from washing out,[3] but that "the

[2] The Court of Appeals mistakenly characterized Villanueva's argument as only challenging whether the New Mexico convictions, comparable to Washington class C felonies, washed out. Slip op. at 1. Villanueva's briefing made it clear he also challenged whether the Washington offense of second degree theft, another class C felony, washed out. BOA at 4-5, 8.

[3] During sentencing, defense counsel stated: "What I did, your Honor, is I called Shelton and they indicated he was released from Clallam 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 on that. 1RP 284. Defense counsel also stated: "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.

record is not sufficient to determine when Villanueva's last date of release from confinement was." Slip op. at 3-4.

Villanueva requested 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. BOA at 21. The State asked for another chance to prove the criminal history. BOR at 6-8. Villanueva argued the State, as a matter of due process, should not get a second chance to prove his criminal history on remand because the State could not prove that history over defense objection at the original sentencing hearing. Reply Brief at 4-7.

The Court of Appeals acknowledged "[t]he record is not sufficient for us to determine whether the New Mexico convictions washed out or whether the Texas conviction is factually comparable to a Washington offense." Slip op. at 1. The Court of Appeals nonetheless gave the State a second bite of the apple, directing the trial court to conduct an evidentiary hearing to determine which of the prior convictions were properly included in the offender score. Slip op. at 4-5. Villanueva seeks review of that decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

WHETHER DUE PROCESS PROHIBITS THE STATE FROM PRESENTING ADDITIONAL EVIDENCE TO PROVE CRIMINAL HISTORY ON REMAND IS A SIGNIFICANT ISSUE OF CONSTITUTIONAL LAW AS WELL AS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

At sentencing, Villanueva objected to his offender score on wash out and comparability grounds. Despite this objection, the State was unable to prove his criminal history. The Court of Appeals acknowledged as much in recognizing the record is insufficient to show the factual comparability of the Texas burglary conviction and that the prior class C felonies did not wash out. That is another way of saying the State was unable to prove Villanueva's criminal history by a preponderance of the evidence at sentencing, despite Villanueva's challenge to his offender score. 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). "Absent a sufficient record, the sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." Ford, 137 Wn.2d at 480-81.

The issue is what happens next. The Court of Appeals decision gives the State another opportunity to prove what it could not prove before on remand, even though the defense objected to criminal history the first

time around. Whether the State is able to do this consistent with due process is a question already pending before this Court in State v. Jones (No. 89302-1)[3] and State v. Cobos (No. 89900-2).[4] The Supreme Court's decision to take review in Jones and Cobos demonstrates the issue raises a question of significant constitutional law or is of substantial public interest. Review is therefore warranted in Villanueva's case under RAP 13.4(b)(3) and (4).

For years, the rule laid down by the Supreme Court is that when a defendant specifically objects to criminal history at sentencing and the State is unable to prove it, the State is held to the record as it existed at the original sentencing hearing and does not get a second opportunity to meet its burden of proof following remand. Ford, 137 Wn.2d at 485; State v.

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[3] The "Supreme Court Issues" page describes the issue in Jones as follows: "Whether on review of a resentencing in which the trial court prohibited the State from presenting additional proof of the defendant's criminal history, the Court of Appeals could apply a 2008 statute intended to overcome decisions of the Washington Supreme Court holding the State to the proof presented at the original sentencing. *See* Laws of 2008, ch. 231." http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2014Sep#P245_24547) (last accessed September 10, 2014).

[4] The issue in Cobos is described as follows: " Whether on remand for resentencing, the Court of Appeals properly directed the trial court to apply a 2008 statute that allows both the State and the defendant to supplement the defendant's criminal history record and was enacted to overcome Washington Supreme Court decisions holding the State to the proof of criminal history presented at the original sentencing. *See* Laws of 2008, ch. 231." Id.

McCorkle, 137 Wn.2d 490, 495-97, 973 P.2d 461 (1999); State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002); In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005). Under that rule, Villanueva must be resentenced with a reduced offender score and the State does not get a second opportunity to meet its burden of proof.

In response to the Supreme Court's "no second chance" rule, the legislature amended the Sentencing Reform Act to allow the State to get a second chance. Laws of 2008, ch. 231, § 1; 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.").

The legislature, however, cannot violate constitutional rights through its enactments. State v. Hunley, 175 Wn.2d 901, 914, 287 P.3d 584 (2012); 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)). 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. U.S. Const. amend XIV; Wash. Const. art. I § 3.

Again, due process requires the State to prove facts at sentencing by a preponderance of the evidence. Ford, 137 Wn.2d at 481-82. 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)). "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.'" Hunley, 175 Wn.2d at 910 (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

Villanueva objected at sentencing 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. To allow the State another

attempt to prove what it failed to prove before undermines the due process principles underlying our system of justice.

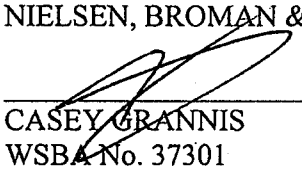
F. CONCLUSION

For the reasons stated above, Villanueva requests that this Court grant review.

DATED this 16th day of September 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GENARO BRANDON VILLANUEVA, Appellant.	No. 44911-1-II UNPUBLISHED OPINION

BJORGEN, A.C.J.—A jury found Genaro Villanueva guilty of second degree burglary, second degree theft, and forgery. He appeals his sentence, arguing that the trial court erred by including in his offender score (1) two New Mexico convictions that should have washed out, and (2) a Texas conviction that was not comparable to a Washington offense. The State concedes that the trial court erred in concluding that the Texas conviction is legally comparable to the Washington offense, and we accept that concession. We hold also that the record is insufficient for us to determine whether the Texas conviction is factually comparable to the Washington offense and whether the New Mexico convictions washed out. Therefore, we remand to the trial court for resentencing. Villanueva also filed a Statement of Additional Grounds (SAG) challenging his convictions.[1] We reject Villanueva's SAG claims and affirm his convictions.[2]

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[1] RAP 10.10.

[2] A commissioner of this court initially considered Villanueva's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

FACTS

On April 11, 2013, a jury found Villanueva guilty of second degree burglary, second degree theft, and forgery. Villanueva's prior convictions included a 2000 Texas conviction for burglary of a habitation, a 1999 New Mexico conviction for taking a motor vehicle, a 1996 New Mexico conviction for attempted larceny, a 2004 Washington conviction for first degree burglary, and a 2004 Washington conviction for second degree theft.

At sentencing, Villanueva challenged his offender score. The trial court found the 1999 New Mexico taking a motor vehicle conviction comparable to Washington's second degree taking a motor vehicle without permission,[3] the 1996 New Mexico attempted larceny conviction comparable to Washington's attempted first degree theft,[4] and the 2000 Texas burglary conviction comparable to Washington's residential burglary.[5] Villanueva argued that because the New Mexico convictions were comparable to Washington class C felonies, they should wash out pursuant to RCW 9.94A.525(2)(c). The trial court rejected this argument, concluding that the five year period for determining when a conviction washes out does not begin until after a defendant has finished serving his community custody time and, therefore, Villanueva's convictions did not wash out because he did not finish serving community custody until 2009. The trial court included the Texas conviction and both New Mexico convictions in Villanueva's offender score and sentenced Villanueva to a standard range sentence. Villanueva appeals.

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[3] RCW 9A.56.075.

[4] RCW 9A.56.030, RCW 9A.28.020.

[5] RCW 9A.52.025.

ANALYSIS

A. Offender Score

Villanueva challenges his offender score on two grounds. First, he alleges that the trial court improperly counted his prior New Mexico convictions because they had washed out. Second, he alleges that the trial court improperly counted the prior Texas conviction because it is not legally comparable to residential burglary. The State concedes that the trial court erred by concluding the Texas conviction is legally comparable to residential burglary.

The record is not sufficient for us to determine whether the New Mexico convictions washed out or whether the Texas conviction is factually comparable to a Washington offense. Therefore, we remand to the trial court to calculate Villanueva's accurate offender score and resentence Villanueva accordingly.

Under RCW 9.94A.525(2)(c):

> class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) 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.

This statute clearly begins the five-year period upon release from confinement. Therefore, the trial court erred in beginning this period when Villanueva was released from community custody.

The record, however, indicates that Villanueva may have been confined for a period of time in 2009, which would prevent the convictions from washing out.[6] Because the record is not

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[6] During sentencing defense counsel stated:

> What I did, your Honor, is I called Shelton and they indicated he was released from Clallam 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 on that.

sufficient to determine when Villanueva's last date of release from confinement was, on remand the trial court should determine the last date of actual confinement and count Villanueva's New Mexico convictions, if appropriate. *See* 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).

Villanueva also argues that the trial court erred by including his Texas conviction for burglary of a habitation under V.T.C.A., Penal Code §30.02 because the conviction is not legally comparable to residential burglary. The State concedes that the convictions are not legally comparable. We accept the State's concession.

"Out-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). To determine legal comparability, we determine whether the elements of the foreign offense are substantially similar to the Washington offense's elements. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The Texas burglary statute's definition of habitation includes a vehicle. V.T.C.A., Penal Code § 30.01(1). In contrast, the applicable Washington residential burglary statute specifically excludes vehicles. Former RCW 9A.52.025(1) (1989). Accordingly, the State correctly concedes that Villanueva's prior Texas conviction for burglary of a habitation is not legally comparable to Washington's residential burglary statute.

Report of Proceedings (RP) at 284. Defense counsel stated also:

> 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 . . .

RP (May 2, 2013) at 7.

If a foreign statute is not legally comparable to a Washington offense, the court must determine whether the offenses are factually comparable—whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415. The State also properly points out that the record is insufficient to determine whether Villanueva's prior Texas conviction is factually comparable to Washington's residential burglary. Therefore, remand for a resentencing hearing is appropriate.

In sum, on remand for resentencing the trial court shall determine, consistently with this opinion, which of Villanueva's prior convictions are properly included in his offender score. The court shall hold any evidentiary hearing needed to make that determination.

B. SAG

Villanueva raises two issues in his SAG. First, he states that one of the witnesses was under the influence of heroin while he testified at trial. However, Villanueva fails to identify any legal error resulting from this assertion. At best, Villanueva's claim can be read as challenging the credibility of the witness's testimony. Credibility determinations, however, are left to the jurors who personally observe the witnesses and will not be reviewed by our court. *State v. Carter*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Second, Villanueva asserts that he received ineffective assistance of counsel because his attorney refused to listen to his requests regarding objections and questions during cross-examination. This claim rests on facts outside the record, and we do not address claims based on facts outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Villanueva's SAG claims lack merit and we affirm his convictions. We remand for

resentencing as directed in this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Hunt, J.
HUNT, J.

Maxa, J.
MAXA, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 44911-1-II
	)	
GENARO VILLANUEVA,	)	
	)	
Petitioner.	)	

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 16TH DAY OF SEPTEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 16TH DAY OF SEPTEMBER, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 16, 2014 - 1:26 PM

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