

66562-6

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No. 66562-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN T. BAGLEY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

THE COURT ERRED IN COUNTING MR. BAGLEY'S PRIOR
CONVICTION FOR FIRST DEGREE POSSESSION OF
STOLEN PROPERTY AS THREE POINTS IN HIS OFFENDER
SCORE, WHERE THE STATE DID NOT PROVE THE PRIOR
OFFENSE INVOLVED POSSESSION OF A STOLEN MOTOR
VEHICLE..... 2

1. When a person is convicted of the crime of possession of a
stolen motor vehicle, the court must count any prior adult
conviction for possession of stolen property as only one
point in the offender score, unless the State proves the prior
offense involved possession of a stolen motor vehicle 2

2. The trial court erred in counting Mr. Bagley's prior conviction
for first degree possession of stolen property as three points
in the offender score, where the State did not prove the prior
conviction involved possession of a stolen motor vehicle 4

3. Mr. Bagley did not waive his right to challenge his
miscalculated offender score by entering into a plea
agreement with the State 5

4. Mr. Bagley must be resentenced 9

E. CONCLUSION 10

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. amend. 14 3

Washington Supreme Court

In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456
(2005)..... 3, 5, 7

In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618
(2002)..... 5, 9

In re Pers. Restraint of West, 154 Wn.2d 204, 110 P.3d 1122
(2005)..... 9

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986) 3, 6

State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980)..... 9

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 3, 4, 5, 6, 7

State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002)..... 10

State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010) 9

State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113
(2009)..... 5, 6, 7, 8, 9, 10

State v. Mutch, No. 82029-5, 2011 WL 2276776 (Wash. June 9,
2011)..... 4

Statutes

Former RCW 9.94A.150 (2005)..... 4

Laws 2007, ch. 199, § 5 4

RCW 9.94A.030 3, 8

RCW 9.94A.525	3
RCW 9.94A.530	3, 7
RCW 9A.56.068	4

A. ASSIGNMENT OF ERROR

The trial court erred in counting Sean Bagley's prior conviction for first degree possession of stolen property as three points in his offender score.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When a person is convicted of the crime of possession of a stolen motor vehicle, the sentencing court must count each prior conviction for possession of a stolen motor vehicle as three points in the offender score. Otherwise, prior adult felony convictions for possession of stolen property count as only one point in the offender score. The State bears the burden to prove the nature of the prior offense. Did the trial court err in counting Mr. Bagley's prior conviction for first degree possession of stolen property as three points in his offender score, where the State did not prove the prior offense involved possession of a stolen motor vehicle?

C. STATEMENT OF THE CASE

The State charged Sean Bagley with one count of possession of a stolen motor vehicle, allegedly committed on August 23, 2010. CP 1. Mr. Bagley pled guilty as charged pursuant to a plea agreement with the State. CP 6-17, 22.

At sentencing, the State alleged Mr. Bagley had one prior adult felony conviction for possession of stolen property in the first degree. CP 24. The State asserted the prior conviction should count as three points in the offender score. CP 24; 12/17/10RP 2. But the State did not offer any evidence to show the prior offense involved possession of a stolen motor vehicle. CP 24; 12/17/10RP 2. Nonetheless, the court counted the prior offense as three points in the offender score. CP 28, 33.

D. ARGUMENT

THE COURT ERRED IN COUNTING MR. BAGLEY'S PRIOR CONVICTION FOR FIRST DEGREE POSSESSION OF STOLEN PROPERTY AS THREE POINTS IN HIS OFFENDER SCORE, WHERE THE STATE DID NOT PROVE THE PRIOR OFFENSE INVOLVED POSSESSION OF A STOLEN MOTOR VEHICLE

1. When a person is convicted of the crime of possession of a stolen motor vehicle, the court must count any prior adult conviction for possession of stolen property as only one point in the offender score, unless the State proves the prior offense involved possession of a stolen motor vehicle. In Washington, a sentencing court's calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score."

RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525.

Constitutional due process¹ requires the State prove the existence of prior convictions by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2). The State bears the burden of proving not only the existence of prior convictions, but also any facts necessary to determine whether the prior convictions should be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

When a person is convicted of the crime of possession of a stolen motor vehicle, each prior felony conviction for possession of a stolen motor vehicle, theft of a motor vehicle, or taking a motor vehicle without permission, counts as three points in the offender score. RCW 9.94A.525(20). Any other prior adult nonviolent felony conviction, including for the crime of first degree possession of stolen property, counts as only one point in the offender score. RCW 9.94A.525(7). Therefore, before the defendant's prior

¹ The Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

conviction for possession of stolen property may be counted as three points in the offender score, the State must prove it involved possession of a stolen motor vehicle. See Cadwallader, 155 Wn.2d at 876; Ford, 137 Wn.2d at 480.

This Court reviews the trial court's calculation of the offender score de novo. State v. Mutch, No. 82029-5, 2011 WL 2276776, at *2 (Wash. June 9, 2011).

2. The trial court erred in counting Mr. Bagley's prior conviction for first degree possession of stolen property as three points in the offender score, where the State did not prove the prior conviction involved possession of a stolen motor vehicle. The State alleged and the trial court found Mr. Bagley had a prior adult conviction from 2006 for first degree possession of stolen property. CP 24, 33. But the State presented no evidence to show, and the trial court made no finding, that the prior offense involved possession of a stolen motor vehicle.²

² At the time of the prior offense, "[a] person [was] guilty of possessing stolen property in the first degree if he or she possesse[d] stolen property other than a firearm . . . which exceed[ed] one thousand five hundred dollars in value." Former RCW 9.94A.150 (2005). Thus, the crime encompassed possession of a stolen motor vehicle if the vehicle exceeded one thousand five hundred dollars in value. Id. The specific crime of possession of a stolen motor vehicle was created in 2007. Laws 2007, ch. 199, § 5. Now, "[a] person is guilty of possession of a stolen motor vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068.

As stated, the State bears the burden to prove the facts necessary to determine that a prior offense should be included in the offender score. Cadwallader, 155 Wn.2d at 876; Ford, 137 Wn.2d at 480. Because the State did not prove Mr. Bagley's prior conviction for first degree possession of stolen property involved possession of a stolen motor vehicle, the trial court erred in counting the prior offense as three points in the offender score.

3. Mr. Bagley did not waive his right to challenge his miscalculated offender score by entering into a plea agreement with the State. "[I]n general a defendant cannot waive a challenge to a miscalculated offender score." In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Despite its general reluctance to address issues not preserved in the trial court, the Washington Supreme Court "allow[s] belated challenges to criminal history relied upon by a sentencing court." State v. Mendoza, 165 Wn.2d 913, 919-20, 920, 205 P.3d 113 (2009) (citing Ford, 137 Wn.2d at 477-78). The purpose is to preserve the sentencing laws and to bring sentences in conformity and compliance with existing sentencing statutes and avoid permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Mendoza, 165 Wn.2d at 920.

The Supreme Court has consistently held the Sentencing Reform Act (SRA) must be interpreted in accordance with principles of due process. Mendoza, 165 Wn.2d at 920; Ford, 137 Wn.2d at 482; Ammons, 105 Wn.2d at 186 (convicted defendant has liberty interest which minimal due process protects; use of evidentiary standard of preponderance of the evidence at sentencing satisfies minimal due process requirements). For a sentence to comport with due process, the facts relied upon by the trial court must have some evidentiary basis in the record. Mendoza, 165 Wn.2d at 926; Ford, 137 Wn.2d at 481-82. "It is the obligation of the State, not the defendant, to assure that the record before the sentencing court supports the criminal history determination." Mendoza, 165 Wn.2d at 926 (citing Ford, 137 Wn.2d at 480). The SRA expressly places this burden on 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." Ford, 137 Wn.2d at 480 (citation omitted). Where the State fails to meet its burden of proof, the defendant may challenge the offender score for the first time on appeal. Mendoza, 165 Wn.2d at 929; Ford, 137 Wn.2d at 484-85.

That is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence. Mendoza, 165 Wn.2d at 920; RCW 9.94A.530(2). But the mere failure to object to the prosecutor's assertions of criminal history does not constitute such an acknowledgement. Mendoza, 165 Wn.2d at 928. Instead, the Supreme Court has "emphasized the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id. (emphasis in Mendoza). As explained already, when a defendant is convicted of the crime of possession of a stolen motor vehicle, any prior conviction for possession of stolen property may not count as three points in the offender score unless the State proves the prior conviction involved possession of a stolen motor vehicle. See Cadwallader, 155 Wn.2d at 876; Ford, 137 Wn.2d at 480. Therefore, if the State never alleged that necessary fact, the defendant cannot be deemed to have acknowledged the fact. See Mendoza, 165 Wn.2d at 928.

Here, the trial court counted Mr. Bagley's prior conviction for first degree possession of stolen property as three points in the offender score. CP 28, 33. But the State presented no evidence to

show, and never alleged, that the prior conviction involved a stolen motor vehicle. CP 24. Therefore, Mr. Bagley cannot be deemed to have acknowledged that the prior conviction involved possession of a stolen motor vehicle.

In the plea agreement, Mr. Bagley agreed "[t]he prosecuting attorney's statement of my criminal history . . . is correct and complete." CP 8. But this is not the same as agreeing that the prior conviction for possession of stolen property involved a stolen motor vehicle. "Criminal history" is defined as "the list of a defendant's prior convictions." See RCW 9.94A.030(11); RCW 9.94A.525. Therefore, by agreeing with the prosecutor's statement of criminal history, Mr. Bagley was merely agreeing that he had a prior conviction for first degree possession of stolen property. Mendoza, 165 Wn.2d at 928. Because the State did not specifically allege the prior conviction involved possession of a stolen motor vehicle, Mr. Bagley cannot be deemed to have acknowledged that necessary fact. Id.

Nor is Mr. Bagley deemed to have affirmatively acknowledged that the prior conviction involved possession of a stolen motor vehicle by agreeing with the State's ultimate sentencing recommendation. A defendant's agreement with the

State's calculation of the offender score or standard sentence range is not equivalent to an agreement to the facts necessary to establish the offender score. Mendoza, 165 Wn.2d at 928; State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). Therefore, although Mr. Bagley agreed in the plea agreement with the State's calculation of the offender score and standard sentence range, he did not thereby affirmatively acknowledge that the prior conviction involved possession of a stolen motor vehicle. CP 22-23.

4. Mr. Bagley must be resentenced. When the State fails to meet its burden of proof at sentencing, the defendant must be resentenced. Mendoza, 165 Wn.2d at 930. Therefore, Mr. Bagley must be resentenced.

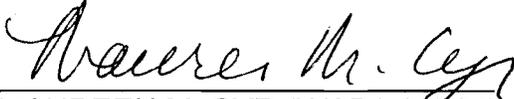
"[T]he imposition of an unauthorized sentence does not require vacation of the entire judgment or granting of a new trial. The error is grounds for reversing only the erroneous portion of the sentence imposed." In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)); see also Goodwin, 146 Wn.2d at 877. Therefore, Mr. Bagley need not withdraw his guilty plea but instead is entitled to correction of only the erroneous portion of his sentence.

Finally, if a defendant raised a specific objection at sentencing and the State failed to respond with evidence of the defendant's prior conviction, then the State is held on remand to the record as it existed at the sentencing hearing. Mendoza, 165 Wn.2d at 930 (citing State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002)). But where, as here, there was no objection at sentencing, the State is permitted to produce additional evidence on remand. Mendoza, 165 Wn.2d at 930 (citing Lopez, 147 Wn.2d at 520-21).

E. CONCLUSION

The trial court erred in counting Mr. Bagley's prior conviction for first degree possession of stolen property as three points in his offender score, where the State did not prove the prior offense involved possession of a stolen motor vehicle. Therefore, Mr. Bagley must be resentenced.

Respectfully submitted this 28th day of June 2011.


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DIVISION ONE**

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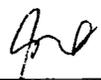
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JUNE, 2011.

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