

66562-6

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NO. 66562-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SEAN BAGLEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN RIETSCHEL

BRIEF OF RESPONDENT

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DIVISION I
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A. ISSUE

Did Appellant waive the right to challenge the calculation of his offender score when he acknowledged his offender score as part of the plea agreement that he entered with the State?

B. STATEMENT OF THE CASE

The State charged Appellant with one count of possession of a stolen motor vehicle, which he committed on August 23, 2010.

CP 1. Appellant pled guilty as charged pursuant to a plea agreement with the State. CP 6-17, 22. As part of the defendant's plea agreement, the State also agreed to dismiss King County Cause Number 10-1-08166-2 SEA and not to file any further property or drug charges under Auburn Police Number 10-09926.

CP 22; 12/2/10 RP 6.

The plea agreement stated that as part of his plea, Appellant agreed to the State's calculation of his offender score. CP 22. In relevant part, the plea agreement stated as follows:

(a) The defendant agrees to this Plea Agreement and the attached sentencing guideline scoring form(s) (Appendix A), offender score and the attached Prosecutor's Understanding of Defendant's Criminal History (Appendix B) are accurate and complete...

CP 22.

The scoring form, listed as Appendix A, and the prosecutor's understanding of the Appellant's criminal history, listed as Appendix B, were attached to the plea agreement. CP 22-25. Appendix A provided that the defendant had one felony car theft conviction as defined by RCW 9.94A.525(19) which scored as three points. CP 23. Appendix A also provided that the defendant had one "other" adult felony conviction which scored as one point and two "other" juvenile felony convictions which together totaled one point. CP 23. Based on these convictions, Appendix A provided that the defendant had an offender score of 5 and that his standard sentencing range was 14-18 months. CP 23.

Appendix B mirrored the information above. Appendix B listed the following adult convictions: King County Cause Number 05-1-07796-1, possession of stolen property 1st which scored as three points, King County Cause Number 03-1-03340-1, burglary in the second degree, which scored as one point. The form also listed King County Cause Number 96-8-02853-1, taking motor vehicle, which scored as a half point, and King County Cause Number 96-8-01298-1, which scored as a half point.

Appellant pled guilty on December 2, 2010. CP 6-17. At the change of plea hearing, the prosecutor reviewed the plea form with

the defendant on the record. 12/2/10 RP 1-13. The prosecutor told the defendant that his standard range was 14 to 18 months based on the crime that was charged and the defendant's criminal history. 12/2/10 RP 5. The defendant replied that he understood. 12/2/10 RP 5. The prosecutor told the defendant that the State's recommendation included the State's agreement to dismiss another King County Superior Court cause number and the State's agreement not to file any further property or drug charges on the underlying police case number. 12/2/10 RP 6. The defendant answered that he understood. 12/2/10 RP 6.

Then the plea judge asked, "This is based on an offender score of 5?" 12/2/10 RP 6. Appellant's attorney said, "That's correct, Your Honor." 12/2/10 RP 6. The plea judge then followed up and asked if it was agreed that 5 was the proper offender score. 12/2/10 RP 6. Appellant's attorney replied, "Yes." 12/2/10 RP 6.

On December 17, 2010, the defendant was sentenced based on the agreed offender score of 5. RP 37-44.

C. ARGUMENT

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. In re Personal

Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (citing State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

In Ford, the Supreme Court held that under the SRA, a defendant's acknowledgement of the existence and comparability of his or her out of state convictions "allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing." Ford, at 482-83 (citations omitted, emphasis in original). Thus, when a defendant stipulates to his offender score to gain the benefit of a plea bargain he waives his right to appeal the calculation of his offender score. State v. Hickman, 112 Wn. App. 187, 191-92, 48 P.2d 383 (2002).

In Hickman, the State originally charged the defendant with unlawful possession of a controlled substance with the intent to deliver methamphetamine and marijuana. After the trial had begun, the defendant decided to plead guilty to two counts of possession of methamphetamine. Hickman, at 189. As part of his guilty plea, the defendant stipulated to an offender score of eight and to his prior convictions. At sentencing, the State told the Court that the defendant was stipulating to an offender score of eight. The defense told the court that the defendant agreed to an offender

score of eight as part of the plea offer but that the defendant thought that some of his current convictions may have been the same criminal conduct. The trial court sentenced the defendant and the defendant appealed the calculation of his offender score. The Appellate Court found that the record reflected that the defendant affirmatively stipulated to his offender score to gain the benefit of the plea bargain and thus waived the right to appeal the calculation of his offender score. Hickman, at 191.

In the present case, the defendant agreed to an offender score of 5 as part of the plea agreement that he entered with the State. As part of this plea, the defendant gained the benefit of the State agreeing to dismiss another cause number filed in Superior Court. He also gained the benefit of the State's agreement not to file any further property or drug charges under the police case number that formed the basis of the criminal charges. The plea agreement referenced two separate appendixes which stated that his 2006 conviction for possession of stolen property counted as three points towards his offender score. During the defendant's plea hearing, the defendant and his attorney acknowledged that the State's calculation of his offender score was correct. The defendant acknowledged his offender score as part of the plea

agreement that he entered with the State and he has waived the right to appeal the calculation of his offender score on appeal.

Appellant relies on State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999), and State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009). These cases are distinguishable because the defendants did not affirmatively agree to their offender score as part of a plea agreement.

In Mendoza, the defendant was found guilty at trial. There was no plea agreement between the defendant. At sentencing, the defendant did not object to the State's calculation of his criminal history nor did he affirmatively agree with the State's representations. Mendoza, at 917.

In Ford, the defendant did not agree with the prosecutor's calculation of his offender score at sentencing. The defendant in Ford pled to several felony charges. At sentencing, the State asserted that the defendant's offender score was 11. The defendant asserted that his offender score was 8. The defendant conceded that he pled guilty to the three out of state convictions and did not dispute their existence. The defendant alleged that they should not be counted as convictions because they resulted in

civil commitment only. The State argued that the offenses were convictions because the defendant pleaded guilty to them.

The Ford Court held that the defendant does not acknowledge the State's position regarding classification absent an affirmative agreement beyond failing to object. Ford, at 483, 973 P.2d 452. But the Ford Court also noted that a defendant could acknowledge such classification without need for further proof from the State by an affirmative agreement. Ford, at 483, 973 P.2d 452. In the present case, no further proof is needed because the defendant agreed to his offender score.

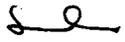
D. CONCLUSION

The defendant affirmatively agreed to an offender score of five as part of his plea agreement with the State. His motion to be resentenced should be denied.

DATED this 23 day of September, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

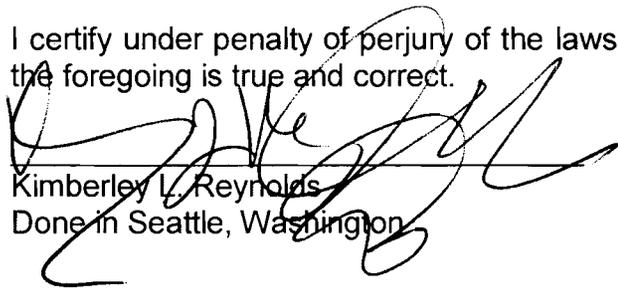
By: 

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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SEAN BAGLEY, Cause No. 66562-6-1, 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.



Kimberley L. Reynolds
Done in Seattle, Washington



Date