 75149-2

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September 6, 2016
Court of Appeals
Division I
State of Washington
No. 75149-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MANUEL RAMIREZ,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENT OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 2

The trial court miscalculated Mr. Ramirez's offender score 2

1. A sentencing court must base its offender score calculation on the criminal history it determines exists at the time of sentencing 2

2. The trial court's findings do not support the offender score 4

F. CONCLUSION 8

TABLE OF AUTHORITIES

Washington Supreme Court

In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002) 3
Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986) 4
State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986) 2
State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 4
State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 3, 4
State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 4
State v. Moeurn, 170 Wn.2d 169, 240 P.3d 1158 (2010) 3

Washington Court of Appeals

State v. Cass, 62 Wn. App. 793, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992) 4
State v. Ramirez, 190 Wn. App. 731, 359 P.3d 929 (2015) 1, 2, 5

Statutes

RCW 9.94A.030 3
RCW 9.94A.525 ..... passim

A. INTRODUCTION

Manuel Ramirez was sentenced in July 2014 based on an offender score of 7. Mr. Ramirez appealed arguing the trial court's finding of his criminal history did not support a score of 7. The State agreed. In a published opinion, this Court addressed the inadequacy of the trial court's findings and remanded for resentencing. *State v. Ramirez,* 190 Wn. App. 731, 359 P.3d 929 (2015).

On remand, the trial court entered additional findings and again calculated Mr. Ramirez's offender score as 7. However, the deficiencies that existed in the original findings remain in the amended findings. This Court should again reverse Mr. Ramirez's sentence.

B. ASSIGNMENT OF ERROR

The trial court miscalculated Manuel Ramirez's offender score.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. In calculating any offender score a sentencing court undertakes a three step analysis: (1) identify the criminal history; (2) exclude any offense which has washed out; and (3) apply the scoring rules of RCW 9.94A.525 to the identified criminal history. Where the provisions of RCW 9.94A.525 when applied to the criminal history

which the trial court found yields an offender score of 3, did the court err in calculating the score as 7.

D. STATEMENT OF THE CASE

> [T]he King County Superior Court entered an order prohibiting Ramirez from coming within 1,000 feet of his mother or her residence. Two months later, . . . two King County Sheriff's deputies saw Ramirez standing in the road at the end of his mother's driveway, which was "well within" 1,000 feet of her house.

Ramirez, 190 Wn. App. at 733.

Following his conviction, at sentencing, the court determined Mr. Ramirez's criminal history included four offenses. CP 8, 13.

This Court reversed the sentence, concluding the criminal history did not establish a score of 7. CP 734-35.

On remand, the court amended its criminal history finding to include three additional offenses. CP 30.

E. ARGUMENT

The trial court miscalculated Mr. Ramirez's offender score.

1. A sentencing court must base its offender score calculation on the criminal history it determines exists at the time of sentencing.

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing

court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In broad terms, when a court undertakes to calculate an offender score under RCW 9.94A.525 it takes "three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) "count" the prior convictions that remain in order to arrive at an offender score." *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). With respect to the first step, RCW 9.94A.500(1) requires in relevant part

> If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

"Criminal history"

> means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration . . . .

RCW 9.94A.030(11).

"Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction." *State v.*

Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Instead, due process requires the State bear the "ultimate burden of ensuring the record" supports the individual's criminal history and offender score. *Ford*, 137 Wn.2d at 480-81.

2. The trial court's findings do not support the offender score.

The Supreme Court has said "[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992)).

The original judgment and sentence from the prior sentencing contains a section entitled "II. FINDINGS." CP 7. Within this section, is paragraph 2.3 entitled "Criminal History," which references Appendix B, which contains the court's finding of criminal history. CP 8. "Appendix B" in turn provides:

The defendant has the following criminal history used in calculating the offender score . . .

Crime	***Sentencing Date***	***Adult or Juv. Crime***	***. . . . . .***
Protection order viol-prev co	*12/07/2012*	*AF*	*. . .*
Firearm Possession unl-2	*12/28/2007*	*AF*	*. . .*
Protection order violation felony	*12/28/2007*	*AF*	*. . .*
Taking Vehicle W/O Permission	*3/13/1996*	*JF*	*. . .*

CP 13.

On appeal, Mr. Ramirez argued that criminal history did not yield an offender score of "7". Specifically, he argued the 1996 juvenile offense could not be included in his offender score as it had "washed out" under RCW 9.94.525(3). Further, Mr. Ramirez argued each of the protection order violations counted as a single point rather than two points each under RCW 9.94A.525(21) because: (1) the 2007 offense occurred prior to August 1, 2011; and (2) the trial court did not find the 2012 offense had been "pled and proven" to involve domestic violence. Thus he argued his offender score could be no higher than "3." This Court agreed.

This Court found the trial court's criminal history finding did not support a score of "7." *Ramirez*, 190 Wn. App. at 734. Indeed, the State conceded that point. As this Court noted, "[s]ignificantly, the State

agrees that the criminal history as listed in appendix B does not support the offender score." *Id*.

On remand the trial court found:

The defendant has the following criminal history used in calculating the offender score . . .

Crime	***Sentencing Date***	***Adult or Juv. Crime***	***. . . . . .***
fvnco	*12-07-2012*	*AF*	*. . .*
upfa 2	*12-28-2007*	*AF*	*. . .*
fvnco	*12-28-2007*	*AF*	*. . .*
Taking Vehicle W/O Permission	*3-13-1996*	*JF*	*. . .*
Crime	***Deposition*** *[sic]* ***Date***	***Adult or Juv. Crime***	***. . . . . .***
mvnco		*AM*	
2 cts aslt 4 dv		*AM*	

CP 30. Just as before, the trial court's criminal history finding supports only an offender score of "3."

As in the first appeal, nothing in the trial court's finding permits inclusion of the prior juvenile offense (a Class C felony) as there is no criminal history in the 11 years intervening between that offense and the first adult offense. RCW 9.94A.525(2)(c). Moreover, even if included in the offender score, the offense contributes ½ point. CW 9.94A.525(7). That ½ point is rounded to zero. RCW 9.94A.525 ("The offender score is the sum of points accrued under this section rounded down to the nearest whole number.")

Because the current offense includes a domestic violence allegation, RCW 9.94A.525(21)(c) permits inclusion of certain misdemeanors, but only if the trial court finds "domestic violence . . . was plead [pleaded] and proven after August 1, 2011." (Brackets in original). As is clear, the trial court's criminal history findings with respect to the three misdemeanor offenses do not include a date of charge or conviction. Thus, in the absence of a finding that they involve domestic violence allegations "plead [pleaded] and proven after August 1, 2011" none of the misdemeanors contribute to Mr. Ramirez's offender score.

Because the current offense includes a domestic violence allegation, RCW 9.94A.525(21)(a) directs the sentencing court should count as two points any prior felony if the trial court finds "domestic violence . . . was plead [pleaded] and proven after August 1, 2011." (Brackets in original). In his prior appeal, Mr. Ramirez argued that in the absence of a finding that domestic violence was pleaded and proven with respect to the 2012 "fvnco" (presumably felony violation of a no contact order) it could not be subject to the multiplier of RCW 9.94A.525(21)(a). The State conceded the prior criminal history findings did not find the prior offense was alleged and proved to

involve domestic violence. After remand and resentencing, the trial court did not make any additional findings that the 2012 offense involved a domestic violence allegation. Thus, that offense still scores as only 1 point. RCW 9.94A.525(7)(21).

Because the 2007 "fvnco" occurred prior to August 1, 2011, it too scores as 1 point. RCW 9.94A.525(7)(21).

Finally, the 2007 "upfa" (presumably unlawful possession of a firearm) scores as 1. RCW 9.94.525(7).

This Court's opinion in the prior appeal provided the trial court and State a roadmap to the deficiencies in the findings. Yet on remand the trial court did not fill those gaps. Thus, as following the first sentencing hearing, the trial court's amended criminal history finding establishes only an offender score of 3 not 7.

F. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Ramirez's sentence.

Respectfully submitted this 6th day of September, 2016.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 75149-2-I
v.	)	
	)	
MANUEL RAMIREZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF SEPTEMBER, 2016, 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:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] MANUEL RAMIREZ 2406 N ST NE, APT 8 AUBURN, WA 98002	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF SEPTEMBER, 2016.

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