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No. 34027-5-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JEFFERSON COUNTY

STATE OF WASHINGTON,

Respondent,

vs.

Ryan D. Anderson,

Appellant.

Jefferson County Superior Court

Cause No. 04-1-00071-3

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Anderson was denied his constitutional right to a jury trial.
2. Mr. Anderson was denied his constitutional right to confront witnesses.
3. Mr. Anderson was denied his constitutional right to testify.
4. Mr. Anderson was denied his constitutional right to present a defense.
5. The trial court erred by convicting Mr. Anderson following a bench trial based on documentary evidence without a valid waiver.
6. The trial court erred by enforcing the unenforceable drug court contract signed by Mr. Anderson.
7. The trial court erred by failing to properly determine Mr. Anderson's criminal history.
8. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence, which reads as follows:

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J	TYPE OF CRIME
Theft 1 st	9/28/01	Jefferson	9/2/01	A	NVF
Poss. Of Stolen Prop. (a truck)	8/20/04	Benewah, ID	5/23/04	A	NVF

Supp. CP.

9. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence, which reads as follows:

COUNT NO.	OFFENDER SCORE	SERIOUS -NESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
2	6	II	22-29	-	22-29	10 yrs
3	6	II	22-29	-	22-29	10 yrs
4	6	II	22-29	-	22-29	10 yrs

5	6	I	14-18	Same Crim. Conduct Ct 2	14-18	5 yrs
6	7	IV	43-57	N/A	43-57	10 yrs
7	7	III	33-43	N/A		10 yrs
8	7	I	Same Conduct Count 2	N/A		5 yrs

Supp. CP.

10. The trial court violated Mr. Anderson's constitutional right to a jury trial by finding that he had criminal history without submitting the issue to a jury or obtaining a waiver of the right to a jury trial.

11. The trial court erred by using a preponderance of the evidence standard in determining that Mr. Anderson had criminal history.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Ryan Anderson was charged with seven felonies and a misdemeanor. He petitioned to enter drug court, and signed a drug court contract, which purported to include a waiver of his trial rights.

There is no record of any colloquy between Mr. Anderson and the Judge reviewing the waiver of trial rights. Mr. Anderson was not advised that he had the right to participate in jury selection, that he was entitled to a jury of twelve and had the rights to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and to a unanimous verdict.

The contract contained a provision allowing a person to opt out of drug court within the first two weeks, but did not explain the mechanism for opting out.

1. Was Mr. Anderson's waiver of his right to a jury trial invalid under the state constitution? Assignments of Error Nos. 1, 2, 3, 4, 5, 6.

2. Were the waivers contained in the drug court contract unenforceable because the contract did not outline the mechanism for opting out of drug court? Assignments of Error Nos. 1, 2, 3, 4, 5, 6.

Following a bench trial, Mr. Anderson was convicted of six felonies and one misdemeanor. At sentencing, the prosecutor alleged that he had a prior felony theft and a prior out-of-state possession of stolen property conviction. Mr. Anderson contested the prosecutor's statement of criminal history, but the state did not introduce any evidence to prove the alleged prior convictions and did not introduce any evidence to establish the classification of the alleged out-of-state conviction.

The sentencing court (apparently using a preponderance standard) found that Mr. Anderson had two prior felony convictions, and orally determined that Mr. Anderson had an offender score of five (for counts II-V and count VIII) and an offender score of seven (for counts VI-VII, which were burglaries). Although the offender scores written on the judgment and sentence are illegible, the sentence ranges computed indicate that Mr. Anderson was sentenced on each count with an offender score of seven.

3. Must the judgment and sentence be vacated because the trial court failed to properly determine Mr. Anderson's criminal history and offender score? Assignments of Error Nos. 7, 8, 9.
4. Is the trial court's finding that Mr. Anderson had two prior felony convictions based on insufficient evidence? Assignments of Error Nos. 7, 8, 9.
5. Did the trial court erroneously include an alleged out-of-state conviction in Mr. Anderson's offender score without determining that the conviction was equivalent to a Washington felony? Assignments of Error Nos. 7, 8, 9.
6. Must the state be held to the existing record on remand for determination of Mr. Anderson's criminal history and offender score? Assignments of Error Nos. 7, 8, 9.

7. Did the trial court's finding that Mr. Anderson had criminal history violate his constitutional right to a jury determination of all facts used to increase his sentence? Assignments of Error Nos. 1, 8, 9, 10, 11.

8. Did the trial court's decision finding criminal history by a preponderance of the evidence violate Mr. Anderson's constitutional right to proof beyond a reasonable doubt of all facts used to increase his sentence? Assignments of Error Nos. 1, 8, 9, 10, 11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Ryan D. Anderson was charged in Superior Court in Jefferson County with Possession of Stolen Property Third Degree, Possession of Stolen Property First Degree, Identity Theft Second Degree (two counts), Unlawful Possession of Payment Instruments, Residential Burglary, Burglary Second Degree, and Taking a Motor Vehicle Without Permission Second Degree. CP 1-4.

Mr. Anderson entered Drug Court, signing an agreement that included the following provisions:

17. That if the defendant chooses to leave the Program within the first two weeks after signing the Drug Court Contract, withdrawal will be allowed, this contract will be declared null and void, and the defendant will assume prosecution under the pending charge(s) as if this contract had never been agreed to. The defendant agrees that this ability to withdraw from the terms of this contract will cease after the period of two weeks following the effective date of this contract and thereafter the defendant shall remain in the Program until graduation unless his/her participation is terminated by the Court. The defendant further agrees that the ability to withdraw from the terms of this contract will cease within the first two weeks, if he/she has committed a willful violation of this contract for which, in the judgment of the Court, he/she may be terminated from the program.

....

19. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending

charge(s). The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charges(s).

....

Defendant acknowledges an understanding of, and agrees to waive the following rights:

1. The right to a speedy trial;
2. The right to a public trial by an impartial jury in the county where the crime is alleged to have been committed;
3. The right to hear and question any witness testifying against the defendant;
4. The right at trial to have witnesses testify for the defense, and for such witnesses to be made to appear at no expense to the defendant; and
5. The right to testify at trial.

My attorney has explained to me, and we have fully discussed all of the above paragraphs. I understand them all and wish to enter into this Drug Court Contract. I have no further questions to ask the Judge.

Drug Court Contract, Supp. CP.

There is no indication that the trial judge reviewed any of these terms with Mr. Anderson on the record. RP 21-36. He was later terminated from the Drug Court program. RP 45-59; Supp. CP.

At a bench trial, the court dismissed Count V (Unlawful Possession of Payment Instruments), and Mr. Anderson was convicted of the remaining charges based on the trial judge's review of the police reports. RP 68-72.

At sentencing, his attorney contested his criminal history and the calculation of his offender score. RP 72-84. Mr. Anderson did not admit or acknowledge any prior felonies and objected to the prosecutor's

allegations regarding his criminal history. RP 72-94. The state did not submit any evidence regarding Mr. Anderson's alleged prior felony theft conviction. RP 71-94. Although the prosecutor referred to a certified copy of a prior Idaho conviction, no certified copy was marked or admitted into evidence; nor was any evidence produced to classify the alleged foreign conviction. RP 85, 71-94. The judgment and sentence included a finding that Mr. Anderson had two prior felony convictions, including an out-of state conviction. CP 5-16.

This timely appeal followed. CP 17-18.

ARGUMENT

I. THE PROSECUTION DID NOT ESTABLISH A VALID WAIVER OF MR. ANDERSON'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE STATE CONSTITUTION.

The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury

trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400 at 418 n. 24, 108 S.Ct. 646 (1988). In the absence of a valid waiver of the federal right, a criminal defendant’s conviction following a bench trial must be reversed. *Treat, supra*.

Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...”

As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87 at 97, 653 P.2d 618 (1982). Because the right is broader and more highly valued under the state constitution, a waiver of the state constitutional right must be examined more carefully than a waiver of the corresponding federal right.

- A. A waiver of the state constitutional right to a jury trial is valid only if the record establishes that the accused was fully aware of the rights being waived.

The validity of a waiver under the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Under a *Gunwall* analysis, waiver of the

state constitutional right to a jury trial is valid only if the record shows that the defendant is fully aware of the meaning of the state constitutional right. This includes (among other things) an understanding of the right to participate in the selection of jurors, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.

The language of the State Constitution. The first *Gunwall* factor requires examination of the text of the State Constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the Court has noted that the language of the provision requires strict attention to the rights of individuals. In *Sofie v. Fibreboard Corp.*, the Supreme Court clarified the meaning of the term “inviolate:”

The term “inviolate” connotes deserving of the highest protection. [Webster’s Dictionary] defines “inviolate” as “free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact . . .” Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

In addition, Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” Again, the direct and mandatory language (“shall have the right”) implies a high level of protection. The existence of a separate section specifically referencing criminal prosecutions further emphasizes the importance of the right to a jury trial in criminal cases.

Thus, the language of Article I, Section 21 and Article I, Section 22 favors the independent application of the State Constitution advocated in this case, and suggests that any waiver must be stringently examined.

Significant differences in the texts of parallel provisions of the Federal and State Constitutions. The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and State Constitutions. The Federal Sixth Amendment and Wash. Const. Article I, Section 22 are similar in that both grant the “right to . . . an impartial jury.”

But Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982) found the difference between the two constitutions significant, and determined that the State Constitution provides broader protection.

The court held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the Federal Constitution. *Pasco v. Mace*, at 99-100.

Thus, differences in the language between the state and Federal Constitutions also favor an independent application of the State Constitution in this case. Waiver of the state constitutional right to a jury trial requires more than a waiver of the corresponding federal right.

State Constitutional history, state common law history, and pre-existing state law. Under the third and fourth *Gunwall* factors this Court must look to state common law history, State Constitutional history, and other pre-existing state law.

Prior to the adoption of the State Constitution in 1889, the U.S. Supreme Court had ruled that (even in a civil case) “every reasonable presumption should be indulged against [a] waiver” of the fundamental right to a jury trial. *Hodges v. Easton*, 106 U.S. 408 at 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882). Indeed, during the decade prior to the adoption of the State Constitution it was believed that a defendant *could not* waive the right to a jury trial: “This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous.” *U.S. v. Taylor*, 11 F. 470 at

471 (C.C.Kan. 1882). *See also U.S. v. Smith*, 17 F. 510 (C.C.Mass. 1883): “The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...” *U.S. v. Smith at* 512. These authorities suggest that the drafters of the Constitution would have been loathe to permit a casual waiver of this important right. Even by 1900 there was still disagreement on whether or not a defendant could waive her or his right to a jury trial. *State v. Ellis*, 22 Wn. 129, 60 P. 136 (1900).

Gunwall factors 3 and 4 thus favor an independent application of Article I, Sections 21 and 22.

Differences in structure between the Federal and State Constitutions. In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power.” *State v. Young*, at 180.

Matters of particular state interest or local concern. The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The protection afforded a criminal defendant

contemplating a waiver of rights guaranteed by Wash. Const. Article I, Section 21 and 22 is a matter of State concern; there is no need for national uniformity on the issue. *See State v. Smith*, 150 Wash.2d 135 at 152, 75 P.3d 934 at 941 (2003). *Gunwall* factor number six thus also points to an independent application of the State Constitutional provision in this case.

Conclusion. All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution in this case. Each factor establishes that our state constitution provides greater protection to criminal defendants than does the Federal Constitution. To sustain a waiver, a reviewing court must find in the record proof that the defendant fully understood the right under the state constitution—including the right (along with counsel) to participate in selecting jurors, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.

B. Mr. Anderson's waiver of his state constitutional right to a jury trial was invalid because the record does not establish that he was fully aware of the rights he was waiving.

In this case, Mr. Anderson signed a written waiver, contained in the drug court contract; there is no record of any colloquy with the trial court judge prior to acceptance of the waiver. Supp. CP; RP 21-36.

This record does not establish that Mr. Anderson fully understood the state constitutional right to a jury trial; there is nothing to show that he was aware that he could participate in selection of the jury, that he had the right to a jury of twelve, that the jurors would be required to presume him innocent unless proven guilty beyond a reasonable doubt, or that a guilty verdict required a unanimous jury. RP 21-36.

Since the record does not establish that Mr. Anderson was fully aware of his right to a jury trial under the state constitution, the waiver cannot be sustained on appeal. The conviction must be reversed and the case remanded for a new trial.

II. THE PROVISIONAL WAIVERS SIGNED BY MR. ANDERSON WERE UNENFORCEABLE BECAUSE THE CONTRACT CONTAINING THE WAIVERS DID NOT OUTLINE THE PROCEDURE FOR OPTING OUT OF DRUG COURT.

The Jefferson County drug court contract includes an opt-out provision: under Paragraph 17, a defendant could choose to leave the program within two weeks of the effective date of the contract. When a defendant exercises that choice, the contract is “null and void,” and prosecution resumes “as if [the] contract had never been agreed to.” Supp. CP. The contract does not outline a procedure for opting out. Supp. CP.

Waiver of a fundamental constitutional right must be the intentional relinquishment or abandonment of a known right or privilege.

Johnson v. Zerbst, 304 U.S. 458 at 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Such a waiver must be made knowingly, voluntarily, and intelligently. *State v. Thomas*, 128 Wn.2d 553 at 558, 910 P.2d 475 (1996). Courts indulge every reasonable presumption against waiver. *Johnson v. Zerbst*, at 464.

Because the drug court contract provides an unconditional right to withdraw from the program within the initial two-week period, an accused who signs the contract has an expectation that he will be able to change his mind without penalty. Included in this expectation is the understanding that the full panoply of trial rights will be restored. The waivers contained in the contract are thus provisional.

But the contract does not provide guidance as to how an accused is to exercise the right to withdraw. Supp. CP. The absence of guidance on this point is fatal because a participant is provided no mechanism to withdraw the provisional waiver contained in the contract; under these circumstances, it cannot be said that the waivers were made knowingly, intelligently, and voluntarily.

For this reason, any waivers made by Mr. Anderson were invalid when made. His conviction, achieved without benefit of a jury trial, must be vacated and the case remanded to the superior court. *Johnson v. Zerbst*; *State v. Thomas, supra*.

III. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. ANDERSON'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f 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..." RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and "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(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

Under RAW 9.94A.525(3): "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." Where the state alleges a defendant's criminal history contains out-of-state felony convictions, the state bears the burden of proving the existence and comparability of those convictions. *Ford*, at 480. An out-of-state conviction may not be used to

increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wn. App. 165 at 168, 868 P.2d 179 (1994).

To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wn.2d 588 at 606, 952 P.2d 167 (1998). “If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, 137 Wn.2d at 479 (citing *Morely*, at 606). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wn.2d 121 at 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wn.App. 374 at 378, 909 P.2d 309 (1996)).

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999). The appellate court reviews the calculation of an offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004). Where a

defendant objects to a prior conviction, the prosecution is held to the existing record upon remand. *Ford, supra*.

Mr. Anderson did not admit or acknowledge any prior felonies; in fact, he objected to the prosecutor's allegations regarding his criminal history. RP 72-94. The state did not submit any evidence regarding Mr. Anderson's alleged prior felony theft conviction. RP 71-94. Although the prosecutor referred to a certified copy of a prior Idaho conviction, no certified copy was marked or admitted into evidence; nor was any evidence produced to classify the alleged foreign conviction. RP 85, 71-94.

Despite the absence of any evidence, the judgment and sentence included a finding that Mr. Anderson had two prior felony convictions, including an out-of-state conviction. CP 6. There is no indication in the record of how the court arrived at this finding. RP 71-94.

A trial court's findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004). Because the state produced no evidence establishing these convictions, and because Mr. Anderson never admitted or acknowledged them, the court's finding is unsupported and must be stricken. *Shields, supra*. The sentence must be vacated, and the case remanded for resentencing. At the

resentencing hearing, the prosecution must be held to the existing record.

Ford, supra.

IV. THE TRIAL COURT VIOLATED MR. ANDERSON'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER *BLAKELY* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS.

The Sixth Amendment requires any fact used to enhance a sentence to be proved beyond a reasonable doubt to a jury. *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), *citing Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The *Blakely* court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. *See, e.g., State v. Mounts*, 130 Wn. App. 219 at n. 10, 122 P.3d 745 (2005), *quoting* Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented from *Almendarez-Torres*, and Justice Thomas, who authored a concurring

opinion urging a broader rule in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.¹

Here, Mr. Anderson's prior convictions were not submitted to the jury.² Instead, the trial court, using a preponderance standard, found that Mr. Anderson had eight prior felonies.³ CP 6. This violated Mr. Anderson's constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper. The aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

CONCLUSION

For the foregoing reasons, the judgment and sentence must be vacated, and the case remanded for a jury trial. In the alternative, Mr. Anderson's sentence must be vacated and the case remanded to the

¹ Division I has continued to rely on *Almendarez-Torres*, despite its apparent lack of support in the high court. See, e.g. *State v. Rivers*, 130 Wash .App. 689, 128 P.3d 608 (2005).

² Nor is there any indication in the record that he knowingly, intelligently and voluntarily waived his right to a jury determination of his prior convictions. RP (10-20-06) 1-109; RP (10-21-06) 1-36.

³ This finding is contested in the previous section of this brief.

superior court for a new sentencing hearing, at which the prosecuting attorney must be held to the existing record.

Respectfully submitted on May 23, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Ryan D. Anderson, DOC# 826077
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

And to the office of the Jefferson County Prosecuting
Attorney,

And that I sent the original and one copy to the Court of
Appeals, Division II, for filing;

All postage prepaid, on May 23, 2006.

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

Signed at Olympia, Washington, on May 23, 2006.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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