

NO. 38828-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LANG HUNTER,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable D. Gary Steiner

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to properly classify appellant's out-of-state convictions by comparing the elements of appellant's out-of-state offenses with the elements of potentially comparable Washington crimes.

2. The trial court erred in imposing an exceptional sentence based on the aggravating factor of multiple current offenses which results in some crimes going unpunished without properly classifying appellant's out-of-state convictions to determine appellant's offender score.

3. The trial court erred in entering findings of fact II and III and conclusions of law I in its findings of fact and conclusions of law for an exceptional sentence. CP 69-71.

Issue Pertaining to Assignments of Error

Is a remand for resentencing required where the trial court failed to properly classify appellant's out-of-state offenses by comparing the elements of his Oregon offenses to potentially comparable Washington crimes as required under the Sentencing Reform Act?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On January 31, 2007, the State charged appellant, Derrick Lang Hunter, with one count of attempted kidnapping in the first degree and one count of failure to register as a sex offender. CP 1-2. The State amended the information on September 4, 2007, adding four counts of communication with a minor for immoral purposes, one count of assault in the second degree, and another count of kidnapping in the first degree. CP 3-7. On June 24, 2008 and July 7, 2008, the court granted defense counsel's motions to dismiss the charges of kidnapping in the first degree as charged in count one and count eight. 4RP 14, 7RP 190.

Following a 3.6 hearing and bench trial before the Honorable D. Gary Steiner, on July 28, 2008, the court found Hunter guilty of four counts of communication with a minor for immoral purposes and failure to register as a sex offender but not guilty of assault in the second degree. 12RP 590-91; Supp CP ____ (Findings and Conclusions for Bench Trial, 03/27/09; Findings and Conclusions for CrR 3.6 hearing, 03/27/09). On October 31, 2008, defense counsel moved for an arrest of judgment which

¹ There are 15 volumes of verbatim report of proceedings: 1RP - 01/03/07; 2RP - 09/04/07; 3RP - 06/18/08; 4RP - 06/24/08; 5RP - 06/25/08; 6RP - 06/30/08; 7RP - 07/07/08; 8RP - 07/08/08; 9RP - 07/10/08; 10RP - 07/14/08; 11RP - 07/15/08, 07/16/08, 07/23/08; 12RP - 07/28/08; 13RP - 10/31/08; 14RP - 01/23/09; 15RP - 03/27/09.

the court denied. 13RP 3-19. At sentencing on January 23, 2009, the court imposed an exceptional sentence of 120 months confinement and community custody based on the aggravating factor of “multiple current offenses which results in some crimes going unpunished.” 14RP 35-38; CP 69-71, 78-79.

2. Substantive Facts

a. Trial

D.L. testified that in May 2006, when she was fifteen years old and a student at Clover Park High School, her mother dropped her off at the Tacoma Mall to go shopping with her friend, Jasmine. 10RP 274. While D.L. was waiting to meet Jasmine, a black male approached her and asked her if she had done any modeling. When she said “no,” he told her that he had his own studio and “that he had women modeling for him wearing clothes like Baby Phat and other name brands.” 10RP 276. He said that she would get paid for modeling and the starting pay was \$500.00. 10RP 276. The man asked her “what clothes sizes do I wear; bra, underwear; have I ever had sex,” and asked her to twirl in a circle. 10RP 277. D.L. replied that she wanted to talk to her mother about the modeling opportunity but he told her not to tell anybody. 10RP 278. He asked her for a phone number and she gave him a cell phone number but did not tell him that it was her mother’s number. 10RP 299. Jasmine arrived while

the man had walked away for a moment. The man returned and started asking Jasmine the same type of questions. 10RP 279. They walked away from him because D.L. “had a feeling that he was not really a modeling agent.” 10RP 279-80. As they were walking away, they turned around and he appeared to be walking in their direction but then he disappeared. 10RP 280-81.

On January 25, 2007, D.L. provided a written statement to school administrators when the students were asked if any of them had been approached by a man posing as a modeling agent. 10RP 286-87, 292-94. In her statement, she indicated that the man told her that his models made thousands of dollars, that he could give her a ride to the studio located at his house, and because of the amount of money involved, “it is a very secret job and no one could know except me.” 10RP 289-90. D.L. acknowledged that she identified Hunter from a photo montage in February 2007 but she was not a hundred percent certain that it was him, and during a subsequent interview she stated that she was about fifty percent certain. 10RP 282-84, 290-92. D.L. identified Hunter in court and when asked if she was sure, she responded, “I feel comfortable saying that he is in here.” 10RP 281.

A.S. testified that when she was 15 years old and a student at Clover Park High School, she and her friends would typically meet after

school and walk to the Pierce County Library located across the street. 10RP 305-09. On January 16, 2007, while A.S. was at the library doing research on a computer, a black male sat down next to her. She noticed him looking at her and then he asked her if she ever modeled before. 10RP 310-14. The man said he was a modeling agent and asked her if she would like to see pictures on his website and go out to his car where he had more pictures. When A.S. refused, he asked her for her phone number and she gave him a false number. 10RP 315. He told her that she would be paid \$500.00 for an interview, \$5000.00 for a photo shoot, and get to travel but because she was 15, “your mom needs to sign you up.” 10RP 315. The man said she “had nice hips and nice thighs” and asked her to stand up so he could look at her figure. 10RP 315-16. A.S. refused because she felt uncomfortable and when he asked her if she needed a ride home she said “no” and moved to another computer. 10RP 315-16. The conversation lasted about “two minutes or so. Not really long.” 10RP 317.

A.S. was not concerned because she thought “this was a stranger that really wasn’t going to do anything.” 10RP 322. A.S. did not report the incident to anyone until January 26, 2007, when the students at school were asked if they had any information about a man trying to recruit models. She and other students provided a written statement to school administrators. 10RP 320-22. A.S. identified Hunter from a photo

montage on February 6, 2007 and during her testimony in court. 10RP 318-19.

M.O. testified that when she was 15 years old and a student at Clover Park High School, she and her friends were at the library across the street on November 8, 2006. 10RP 370-73, 379. A black male approached her and asked her if she liked Baby Phat clothing and showed her “a piece of paper, something about modeling.” 10RP 374-76. When her friends left, he showed her a folder with pictures of females and some of them were in lingerie. 10RP 376-78. The man asked her if she was a virgin and she said, “yes.” 10RP 378. He said “to lose my virginity would make my hips right” and “if you stick the penis in the vagina like halfway, or just the tip of it, then you won’t get pregnant.” 10RP 378-79. M.O. was not afraid or feel that the man was asking her to have sex with him. 10RP 393-94.

Although M.O. felt uncomfortable, when he asked her for her phone numbers, she gave him her cell and home phone numbers. 10RP 379. The man wanted to meet with her the next day to help her get into the modeling business. M.O. agreed and suggested that he write a note for her to be excused from class so he wrote a note and signed her father’s name. 10RP 380-81. The man left and called her later and cancelled the meeting. 10RP 381-84, 395. M.O.’s friend reported the incident to the

police who came to her home and spoke with her and her father. 10RP 384-85. She also met with the police again at school. 10RP 388-90. M.O. identified Hunter from a photo montage and in court. 10RP 390-92.

S.P. testified that when she was 16 and attending Clover Park High School in the fall of 2006, she met two friends after school and was approached by a black male when they were walking down the sidewalk near K-Mart. 11RP 406-09, 412-13. The man said that he was advertising a catalog he was putting together and asked them if they wanted to pose for the catalog at his studio. He asked them if they “ever had sex,” “kissed a girl,” their “bra size,” and if they “would pose in undergarments.” 11RP 410-11. He asked them to bend over and twirl around and asked them for their phone numbers but they refused and walked away. 11RP 410, 413-14.

S.P. did not report the incident until police came to the school to talk to students and she provided a handwritten statement. 11RP 418-21, 432. S.P. acknowledged that she wrote in her statement that she was walking with one friend, not two. 11RP 427-28. When she gave the police her statement she “didn’t really think it was that big of a deal.” S.P. could not identify the man in a photo montage or in court. 11RP 424-25.

Althea Faison testified that she resides at 4703 101st Street SW in Lakewood, Washington. 11RP 435. Hunter lived with her when he was



dating her daughter. 11RP 437. In February 2007, police arrested Hunter and served a search warrant on her home. 11RP 437-38. Faison showed where she lived on a map of Lakewood and indicated the location of Clover Park High School and the K-Mart two blocks from her house. 11RP 439-41.

Detective Curtis Wright testified that he is assigned to the sex offender registration unit of the Pierce County Sheriff's Department. 11RP 445. The Sheriff's Department maintains a paper file and an electronic file of all individuals registered as sex offenders in Pierce County. 11RP 445-46. According to Wright, he checked the "SOR database, which is the computer system" and conducted a "hand check" of the paper files and did not find Hunter registered as a sex offender. 11RP 447-48.

Without objection, the court admitted into evidence certified copies of pleadings pertaining to Hunter's 1990 Oregon offense and documents from the Oregon Department of Corrections pertaining to Hunter's obligation to register as a sex offender. 10RP 401-02.

b. Sentencing

The State asked the court to impose an exceptional sentence of 252 months in confinement. 14RP 3-4. Defense counsel asked for a sentence of 60 months in confinement, arguing that Hunter's Oregon sexual abuse

offenses were not comparable to the Washington crimes at the time of the commission of the Oregon offenses. 14RP 16-18, 22-23. The State contended that the Oregon offenses were comparable to Washington crimes, “I think I briefed it fairly extensively. I’m fairly certain the Court has had an opportunity to read it.” 14RP 25. Stating that it read the State’s brief, the court agreed with the State, “I think the prosecutor is right. I think there is a basis for an exceptional sentence.” 14RP 25, 36. The court imposed an exceptional sentence of 120 months and asked the parties to prepare the papers because “I have at least eight other cases waiting. I have to leave for Remann Hall at five minutes to 12.” 14RP 36.

C. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO PROPERLY CLASSIFY HUNTER’S OUT-OF-STATE OFFENSES BY COMPARING THE ELEMENTS OF HIS OREGON OFFENSES WITH THE ELEMENTS OF POTENTIALLY COMPARABLE WASHINGTON CRIMES.

A remand for resentencing is required because the trial court failed to properly classify Hunter’s out-of-state offenses by comparing the elements of his Oregon offenses with the elements of potentially comparable Washington crimes as required under the Sentencing Reform Act of 1981 (SRA).

The SRA creates a grid of standard sentencing ranges factored by a defendant’s “offender score” and the “seriousness level” of the current

offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The offender score measures the defendant's criminal history and is calculated by totaling the defendant's prior felony convictions and certain juvenile offenses. Id. at 683. Except in the case of felony traffic offenses, prior misdemeanors are not included in the offender score. Id. Where a defendant's criminal history includes out-of-state convictions, the SRA requires the convictions to be classified "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3).

To properly classify an out-of-state conviction, the trial court must compare the elements of the out-of-state offense with the elements of the potentially comparable Washington crime. State v. Morley, 134 Wn.2d 588, 605, 952 P.2d 167 (1998). More specifically, the elements of the out-of-state crime must be compared to the elements of the Washington criminal statutes in effect when the out-of-state crime was committed. Id. at 606. If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign conviction counts as a strike in the defendant's Washington offender score. This is known as legal comparability. In re Personal Restraint of Crawford, 150 Wn. App. 787, 794, 209 P.3d 507 (2009)(citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005)).

In cases where the elements of the Washington crime and foreign crime are not identical, or if the foreign statute is broader than the Washington definition of the comparable crime, sentencing courts may look to the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. Crawford, 150 Wn. App. at 794 (citing Morley, 134 Wn. 2d at 606). However, the elements of the charged crime remain the cornerstone of the comparison and “[f]acts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.” Id. The facts underlying the foreign conviction must have been admitted or stipulated to or proved to the finder of fact in the foreign jurisdiction beyond a reasonable doubt. State v. Farnsworth, 133 Wn. App. 1, 18, 130 P.3d 389 (2006). “Where the foreign statute is broader than Washington’s, [the factual] examination may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.” Crawford, 150 Wn. App. at 794 (citing Lavery, 154 Wn.2d at 257). This is known as factual comparability. Id. (citing Lavery, 154 Wn.2d at 255).

The State must prove by a preponderance of the evidence both the existence of the prior conviction and its classification. State v. Ford, 137

Wn.2d 472, 479-80, 973 P.2d 452 (1999). The State, not the defendant, has “the ultimate burden of ensuring the record supports the existence and classification of out-of-state convictions.” Id. at 480.

Here, the record substantiates that the trial court failed to properly classify Hunter’s Oregon offenses at the time of sentencing. Following argument from defense counsel and the State, the court imposed an exceptional sentence of 120 months based on an offender score of 25 without a comparability analysis as required under the SRA. Ford, 137 Wn.2d at 483 (“classification is a mandatory step in the sentencing process under the SRA”). In its haste to conclude sentencing, the court summarily agreed with the State:

I think the prosecutor is right. I think there is a basis for an exceptional sentence. I think twice the 60 months is a reasonable sentence in this matter for the reasons advanced by the prosecutor, and I don’t wish to articulate them again. The motions of the defense are denied. I agree with the prosecutor’s perception of the law in this case.

If you would prepare the papers accordingly, I’ll sign them.

Now, the difficulty is I have at least eight other cases waiting. I have to leave for Remann Hall at five minutes to 12. I’m wondering if counsel could extend the courtesy of preparing the sentencing papers at the side and handing them up. He should be advised of his rights on appeal very carefully because he’s indicated he wishes to appeal.

14RP 36.

When defense counsel informed the court that Hunter wanted to finish reading the judgment and sentence before he signed it, the court replied, “He can take his time and review them subject to the officer having to transport him, rather than all of us just sitting here waiting for him to read it.” 14RP 38. Importantly, Hunter did not sign the judgment and sentence noting that he “hasn’t refused to sign these documents but was rushed out of the courtroom and wasn’t given an opportunity to read these documents.” CP 83-84.

Although the court stated that it read the State’s sentencing brief filed on October 3, 2008, which contained copies of Oregon indictments and judgments, the court neglected to properly classify the out-of-state convictions at the time of sentencing on January 23, 2009. By imposing an exceptional sentence without any comparability analysis, the court violated the fundamental principles of due process.² As the State Supreme

² 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. Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interest of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions. ABA

Court emphasized, sentencing is a critical step in our criminal justice system. “The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. Determinations regarding the severity of criminal sanctions are not to be rendered in a cursory fashion.” 137 Ford, Wn.2d at 484.

The court’s failure to methodically classify Hunter’s out-of-state convictions for offender score purposes before imposing sentence as required under the SRA constitutes reversible error.

D. CONCLUSION

For the reasons stated, this Court should reverse and remand for proper sentencing.

DATED this 7th day of October, 2009.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Derrick Hunter

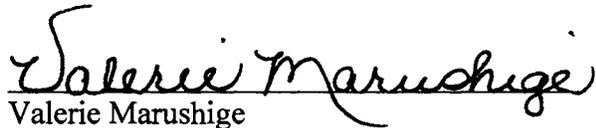
Standards for Criminal Justice: Sentencing std. 18-5.17, at 206
(3d ed. 1994).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Derrick Hunter, DOC # 320996, Airway Heights Corrections Center, KB-64-BL, P.O. Box 1838, Airway Heights, Washington 99001.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of October, 2009 in Kent, Washington.



Valerie Marushige
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