

NO. 39621-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LYN FRAZIER,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
10 JUN 19 AM 11:51
JAMES L. HANCOCK

PM 1-12-10

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

The Honorable Frank E. Cuthberston, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

A. ASSIGNMENT OF ERROR..... 1

 ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 4

 THE SENTENCING COURT DENIED FRAZIER DUE PROCESS BY
 PERMITTING THE STATE TO PRESENT ADDITIONAL
 EVIDENCE OF THE CALIFORNIA CONVICTIONS AT
 RESENTENCING. 4

D. CONCLUSION 11

TABLE OF AUTHORITIES

Washington Cases

| | |
|--|--------------|
| <u>Landmark Dev., Inc. v. City of Roy</u> , 138 Wn.2d 561, 980 P.2d 1234 (1999)..... | 8 |
| <u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) | 4, 6, 10 |
| <u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)..... | 4, 5, 6, 9 |
| <u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009)..... | 4, 6, 10, 11 |
| <u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007)..... | 8, 9, 10 |
| <u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004)..... | 7 |
| <u>State v. Stately</u> , 152 Wn. App. 604, 216 P.3d 1102 (2009)..... | 8 |

Statutes

| | |
|----------------------------------|--------------------|
| Laws of 2008, ch. 231, § 1 | 7, 10 |
| Laws of 2008, ch. 231, § 4..... | 6 |
| Laws of 2008, ch. 231, § 5..... | 8 |
| RCW 10.01.040 | 7, 9 |
| RCW 9.94A.345..... | 6, 9 |
| RCW 9.94A.500..... | 7, 8 |
| RCW 9.94A.525..... | 7, 8 |
| RCW 9.94A.530..... | 3, 7, 8, 11 |
| RCW 9.94A.530(2)..... | 3, 6, 7, 9, 10, 11 |
| RCW 9.94A.537(1)..... | 8 |

A. ASSIGNMENT OF ERROR

The sentencing court denied appellant due process by allowing the State to present additional evidence of criminal history following remand for resentencing.

Issue pertaining to assignment of error

When appellant was sentenced in 2006, the State alleged that five prior convictions from California should be included in appellant's offender score. The State presented no documentation to support that allegation, and appellant objected that the California convictions washed out. On appeal, this Court reversed two of appellant's convictions and remanded for resentencing. Where the State had the opportunity to prove the California convictions at the initial sentencing hearing, was appellant denied due process when the lower court permitted the State to present additional evidence following remand?

B. STATEMENT OF THE CASE

In 2006, Zachary Frazier was convicted after jury trial of first degree robbery, two counts of second degree assault, first degree burglary, and third degree assault. CP 12. The State calculated his standard range using an offender score of 9, including in his criminal history three prior Washington convictions and five prior California convictions. CP 13. At sentencing, the State presented certified copies of the Washington

judgments and docket information from Tukwila Municipal Court, but no documentation was provided regarding the California convictions. CP 101, 110.

The defense acknowledged that there were three prior Washington convictions but objected to inclusion of the California convictions in Frazier's offender score, arguing that they washed out. CP 102-03. Defense counsel explained that due to the scoring of other current offenses, even without the California convictions, Frazier's offender score was a 9. Thus, the washout provisions did not affect Frazier's standard range. CP 103. Counsel specifically informed the court, however, that Frazier's position was that the California convictions washed. CP 103.

The court entered a finding that Frazier's offender score was 9. CP 103. It imposed a mid-range sentence on the robbery conviction and high end sentences on the other offenses. CP 16, 105. On appeal, this Court held that the second degree assault convictions merged with the robbery conviction and remanded for resentencing. CP 23-53. Resentencing hearings were held before the Honorable Frank E. Cuthbertson on July 1 and 31, 2009.

In preparation for resentencing, the State again presented the certified judgments from Frazier's prior Washington convictions and the municipal court docket information. Exhibits 1-5. In addition, the State

presented certified copies of criminal history documents from California. Exhibits 6-8. Although the State did not obtain certified copies of the judgments, it presented abstracts of judgment and a pen pack which included a chronology of Frazier's incarceration in California. RP¹ 18-19.

The defense objected to use of the California exhibits, arguing that since Frazier had challenged inclusion of the California convictions in his offender score at the original sentencing hearing, the State was precluded from presenting additional evidence on remand. RP 4, 8, 14. Counsel argued that the 2008 amendment to RCW 9.94A.530(2), which allows parties to present additional evidence on resentencing after remand, does not apply in Frazier's case, because it substantively changes the law in effect at the time Frazier's offenses were committed. RP 13-14. Relying on State v. Pillatos² and State v. Mendoza³, the court found that the 2008 amendment applied in this case and permitted the State to present additional evidence of the California convictions. RP 16.

Defense counsel then argued that materials submitted by the State were insufficient to prove the existence of the convictions or that they were comparable to Washington offenses. RP 16-17, 19. After reviewing

¹ RP refers to the Verbatim Report of Proceedings from the resentencing hearing from July 1 and 31, 2009.

² State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

³ State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).

the exhibits, the court found by a preponderance of the evidence that the convictions were proven. RP 20. The court also rejected counsel's argument that the California convictions washed, finding Frazier did not have a five-year crime-free period. RP 22. Calculating Frazier's offender score as 9, the court imposed the same sentences it had imposed in 2006. CP 59, 62. Frazier filed this timely appeal. CP 68.

C. ARGUMENT

THE SENTENCING COURT DENIED FRAZIER DUE PROCESS BY PERMITTING THE STATE TO PRESENT ADDITIONAL EVIDENCE OF THE CALIFORNIA CONVICTIONS AT RESENTENCING.

The Washington Supreme Court has held that that “[w]hen a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant’s prior convictions, then the State is held to the record as it existed at the sentencing hearing.” State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009); State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002). This rule stems from the State’s due process burden at sentencing to prove its assertions of criminal history and to ensure the record is sufficient to support its assertions. State v. Ford, 137 Wn.2d 472, 480-82, 485, 973 P.2d 452 (1999). The defense must make a specific objection in order to “offer the trial court the opportunity to correct the error.” Lopez, 147 Wn.2d at 521. Requiring a

specific objection also “provides the proper disincentive to criminal defendants who might otherwise purposefully fail to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case.” Ford, 137 Wn.2d at 486. But where the defendant raises a specific objection and the disputed issues have been fully argued to the sentencing court, principles of due process, fundamental fairness, and finality preclude the State from presenting additional evidence. Lopez, 147 Wn.2d at 520-21; Ford, 137 Wn.2d at 485.

In Lopez, the defense objected to imposition of a life sentence without proof of prior convictions. The State responded that the objection should have been brought up earlier, and the court proceeded with sentencing without further evidence from the State. Lopez, 147 Wn.2d at 521. The Supreme Court held that the defense objection was sufficient to notify the court of its obligation to demand evidence of the prior convictions from the State. Lopez, 147 Wn.2d at 521. The disputed issues were therefore fully argued to the sentencing court, and the State was held to the existing record on remand. Lopez, 147 Wn.2d at 520-21.

Here, as in Lopez, counsel’s objection was sufficient to notify the sentencing court of its obligation to demand evidence of the prior convictions alleged by the State. Counsel informed the court that the

defense position was that the California convictions washed. CP 102-03. Once the objection was made and the trial court given an opportunity to correct the error, the State was limited to the existing record. Mendoza, 165 Wn.2d at 930; Lopez, 147 Wn.2d at 520-21; Ford, 137 Wn.2d at 485. The State is therefore precluded from offering additional evidence on remand.

Despite this well-established law, the trial court permitted the State to present additional evidence at resentencing, relying on a recent statutory amendment. RP 16. In 2008, the Legislature amended RCW 9.94A.530(2), adding the following language:

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Laws of 2008, ch. 231, § 4. The trial court found this amendment applied to Frazier's resentencing.

Contrary to the trial court's determination, the law in effect at the time of Frazier's offenses, rather than the 2008 amendment, controls for several reasons. The first is the Legislature's stated intent in RCW 9.94A.345. That statute provides "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." It would be difficult to find a clearer

statement of legislative intent to require the imposition of sentence in accordance with the law in effect when the offense was committed.

Second, in adopting the 2008 amendment, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.01.040. The saving statute provides that when a statute is amended, the version in effect on the date the offense was committed applies when punishing the offense, unless a contrary intent is expressly declared in the amending act. RCW 10.01.040. The saving statute is deemed a part of each statute that amends or repeals an existing penal statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The Legislature did not expressly declare its intent to apply the amendment to RCW 9.94A.530(2) to offenses committed before the effective date of the amendment. In fact, the act indicates that the Legislature did not intend retroactive application. The act includes several statutory amendments intended to ensure the accuracy of sentences based on complete criminal history. Laws of 2008, ch. 231, § 1. In section 2, the Legislature amended RCW 9.94A.500; section 3 amends RCW 9.94A.525; and section 4 amends RCW 9.94A.530. In section 5 the Legislature states, “Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after the effective date of

sections 1 through 4 of this act.” Laws of 2008, ch. 231, § 5. Significantly, the Legislature omitted section 4 from this declaration.

Where the Legislature specifically includes certain items in a category, an inference arises in law that items omitted from the category were omitted intentionally, ““under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication.”” State v. Stately, 152 Wn. App. 604, 216 P.3d 1102, 1105 (2009) (quoting Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999)). Here, while the Legislature specifically provided that the amendments to RCW 9.94A.500 and RCW 9.94A.525 apply to all pending cases as well as prospectively, it did not include the amendments to RCW 9.94A.530 in this category. Thus, the law in effect at the time Frazier committed his offenses controls regarding evidence at resentencing.

In ruling that the 2008 amendment applied, the court below stated it was relying on State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). In Pillatos, the Supreme Court addressed the act adding a new procedure for juries to find facts used to justify exceptional sentences. Pillatos, 159 Wn.2d at 465, 468. That act expressly applied to all pending cases. RCW 9.94A.537(1) (“At any time prior to trial or entry of the guilty plea....”). Because the legislation by its terms applied to all pending cases, the Court had to determine whether applying the new law to crimes committed

before its effective date violated principles of retroactivity or other Washington law. Pillatos, 159 Wn.2d at 470.

Here, on the other hand, the amendment to RCW 9.94A.530(2) does not expressly apply to pending cases. The Legislature could have included this amendment in the list of amendments to be applied retroactively, but it did not. The retroactivity analysis in Pillatos is therefore inapplicable in this case.

In determining whether RCW 9.94A.345 and RCW 10.01.040 applied despite the Legislature's clear expression of intent, the Court in Pillatos noted that the savings statutes apply only to substantive changes in the law, not procedural ones. Pillatos, 159 Wn.2d at 472. The court pointed out that both past and present law allows for exceptional sentencing. The law in effect at the time the crimes were committed included the possibility of exceptional sentences. Thus, the procedural change as to how those sentences would be imposed did not violate the savings statutes. Pillatos, 159 Wn.2d at 472-73.

By contrast, the law in existence at the time of Frazier's offenses did not allow the State a second opportunity to prove criminal history when the defendant raises a specific objection at sentencing. Lopez, 147 Wn.2d at 520-21. The amendment to RCW 9.94A.530(2) is a substantive change, not merely a procedural one, and the savings statutes apply. The

Legislature adopted the amendments in light of the Supreme Court's decisions in In re Cadwallader, 155 Wn.2d 867 (2005); State v. Lopez, 147 Wn.2d 515 (2002); State v. Ford, 137 Wn.2d 472 (1999); and State v. McCorkle, 137 Wn.2d 490 (1999), to ensure that sentences imposed accurately reflect the complete criminal history. Laws of 2008, ch. 231, § 1. Even a remedial amendment will be applied prospectively only if it contradicts previous interpretations of the amended statute by the Supreme Court. Pillatos, 159 Wn.2d at 473. Contrary to the lower court's finding, Pillatos does not support application of the 2008 amendment in this case.

The court below also said it was relying on Mendoza in ruling that the State was permitted to present additional evidence of Frazier's criminal history. RP 16. In Mendoza, the Court reaffirmed that "[w]hen a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing." Mendoza, 165 Wn.2d at 930. The Court was aware of the 2008 amendments to RCW 9.94A.530(2) and noted that the parties agreed the 2008 version would apply at resentencing. Mendoza, 165 Wn.2d at 930 n.9. Yet the Court reaffirmed the well established rule that the State should not have a second opportunity to prove a prior offense where a specific objection was raised below. The Court allowed the State to present additional evidence

on remand in Mendoza only because “there were no specific objections and the sentencing court never had an opportunity for the State to correct any errors.” Mendoza, 165 Wn.2d at 930.

Here, unlike the defendants in Mendoza, Frazier specifically objected to the inclusion of the California convictions in his offender score at the original sentencing hearing. The State had an opportunity to put on its evidence, and the court had the opportunity to correct any errors. The State is thus held to the record at that hearing and may not present additional evidence on remand. See Mendoza, 165 Wn.2d at 930.

D. CONCLUSION

The court below improperly concluded that the amendment to RCW 9.94A.530(2) applies in this case. Because Frazier raised a specific objection to the California convictions at the original sentencing hearing, permitting the State to present additional evidence of those convictions on remand violated Frazier’s right to due process. This Court should reverse Frazier’s sentence and remand for resentencing on the record established at the 2006 sentencing hearing.

DATED this 11th day of January, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written in a cursive style.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v. Zachary Lyn Frazier*, Cause No. 39621-1-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Zachary Lyn Frazier, DOC# 823690
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

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



Catherine E. Glinski
Done in Port Orchard, WA
January 11, 2010

10 JAN 13 AM 11:51
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II