

COURT OF APPEALS
DIVISION II

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No. 41214-4-II

STATE OF WASHINGTON
BY _____
COUNCIL

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

^ DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHARLES HARTZELL,

Appellant.

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

The Honorable Chris Wickham, Judge
Cause No. 07-1-01831-3

BRIEF OF RESPONDENT

J. Andrew Toynbee
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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

On remand for resentencing, the parties are entitled to present relevant evidence regarding criminal history, including criminal history not previously presented. All relevant criminal history had previously been presented to the sentencing court, and Hartzell was allowed the opportunity to argue for a lower offender score. Did the lower court's reliance on the previously-stipulated to criminal history deny Hartzell the opportunity to present evidence at resentencing?

B. STATEMENT OF THE CASE.

A jury convicted Charles Hartzell of Assault in the Second Degree While Armed With a Deadly Weapon and Unlawful Possession of a Firearm in the First Degree. CP 74. Hartzell represented himself at trial, with the assistance of standby counsel. 3/7/08 VRP 6. Hartzell initially refused to stipulate to his criminal history, so the State presented the sentencing court with certified copies of Hartzell's prior judgments and sentences. 3/7/08 VRP 2, 4; EX _____. The court took a recess, after which, Hartzell's offender score was again addressed. The following exchange occurred between the sentencing court, Hartzell, and Hartzell's standby attorney:

MR. JEFFERSON: Your Honor, for the record, I have reviewed the State's documents, and they appear to me to be correct, and they are all certified

copies, and I went through and made a check mark by every listed offense, and I checked every offense that the State is alleging, and I conveyed that information to Mr. Hartzell this morning.

I went over the scoring sheet with Mr. Hartzell this morning, and I believe that as far as I'm concerned as stand-by counsel that the criminal history as stated by the State is correct, and the standard range that Mr. Hartzell is looking at is 63 to 84 months with the deadly weapon enhancement of 36 months and with the standard range of 99 to 140 months. So that is what I have explained to Mr. Hartzell.

THE COURT: Mr. Hartzell?

MR. HARTZELL: After reviewing it with Mr. Jefferson, it appears that it is correct. 3/7/08 VRP 6-7.

Hartzell subsequently appealed his conviction, raising, *inter alia*, the imposition of a firearm enhancement where the jury returned a verdict finding that he was armed with a "deadly weapon." *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010). This Court reversed the firearm enhancement and remanded for resentencing, reflecting the deadly weapon enhancement. *Id.* at 943-4. Hartzell did not challenge his offender

score or the existence of prior convictions used to calculate that score. *Id.*

At resentencing, Hartzell argued at length that his offender score should be lower, citing two prior cases where his two convictions should have been counted as one offense for scoring purposes. 9/16/10 VRP 7-10. After hearing Hartzell's argument, the lower court sentenced Hartzell using the same criminal history as a basis for calculating his offender score. 9/16/10 VRP 12; CP 75.

C. ARGUMENT.

ON REMAND FOR RESENTENCING, THE PARTIES ARE ENTITLED TO PRESENT RELEVANT EVIDENCE REGARDING CRIMINAL HISTORY, INCLUDING CRIMINAL HISTORY NOT PREVIOUSLY PRESENTED. ALL RELEVANT CRIMINAL HISTORY HAD PREVIOUSLY BEEN PRESENTED TO THE SENTENCING COURT, AND HARTZELL WAS ALLOWED THE OPPORTUNITY TO ARGUE FOR A LOWER OFFENDER SCORE. DID THE LOWER COURT'S RELIANCE ON THE PREVIOUSLY-STIPULATED TO CRIMINAL HISTORY DENY HARTZELL THE OPPORTUNITY TO PRESENT EVIDENCE AT RESENTENCING?

Hartzell claims that the lower court erred in "refus[ing] to allow Hartzell to present evidence relevant this offender score calculation...." Brief of Appellant at page 6. He specifically argues that the lower court failed to follow RCW 9.94A.530(2), which states:

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.

As Hartzell points out, this provision of the statute was added in response to Washington cases which limited the State's ability to establish criminal history upon remand for resentencing. The situation for which this provision was added is not present in this case. The State previously entered into the record certified copies of all of Hartzell's prior judgments. Hartzell received copies, and he and his standby counsel reviewed those judgments, and agreed that they were correct. Thus, no party was denied the opportunity to present "criminal history not previously presented."

Further, Hartzell was not denied the opportunity to argue his position: That in two of his prior case the convictions should constitute only one point in his offender score. Indeed, he argued this at some length. While he requested a continuance, he failed to state what evidence such a continuance might allow him to produce. The best evidence of his criminal history was already part of the record, as introduced at the original sentencing hearing.

Hartzell's argument that this Court should remand the case so that he may present evidence relating to his offender score

exalts form over substance. It is difficult to imagine what evidence he would seek to present, as the judgments from his prior convictions have already been presented to the sentencing court. His argument seems to be that, in two cases, his convictions should be scored as one offense. However, each of these involves a burglary convictions coupled with another felony conviction. Under the burglary anti-merger statute, these convictions would not merge for purposes of calculating his offender score. See RCW 9A.52.050. While the lower court may have stated that it was relying on the “law of the case” doctrine, it afforded Hartzell the opportunity to argue for a lower offender score, ultimately rejecting his arguments, and finding that the previously agreed-to criminal history had been established to its satisfaction.

D. CONCLUSION.

Hartzell stipulated to his prior convictions at the original sentencing. He did not challenge the calculation of that offender score, but was afforded the opportunity to argue for a lower score at sentencing. While he asserts he was denied the opportunity to present evidence at the hearing, he fails to state what that evidence might have been. The best evidence of the convictions had previously been admitted into evidence. While the lower court’s

choice of words—i.e., stating that it was relying on the “law of the case” doctrine—was unfortunate in that it conveyed the idea that it had not or would not consider Hartzell’s argument, it is not clear that the lower court did not consider Hartzell’s argument and reject it. Remand for resentencing would likely only result in Hartzell re-arguing same criminal conduct argument, which, considering the exhibits and RCW 9A.56.050, would likely be rejected.

Thus, Hartzell’s request for relief should be denied.

Respectfully submitted this 22nd day of February, 2011.


J. Andrew Toynbee, WSBA# 22582
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, Motion to Transfer a Portion of the Records from the Court of Appeals No. 37425-1-II To this Case Motion, and Supplemental Designation of Exhibits on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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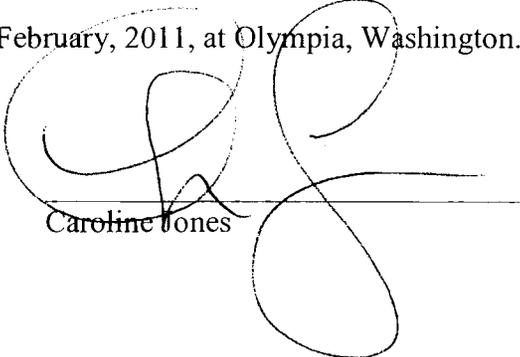
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--AND--

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

Dated this 22 day of February, 2011, at Olympia, Washington.



Caroline Jones