

No. 41748-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES TRUJILLO,

Appellant.

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

The Honorable Linda C.J. Lee
The Honorable Edmund Murphy

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 MR. TRUJILLO'S SENTENCE MUST BE
 REVERSED WHERE HE OBJECTED, THROUGH
 COUNSEL, TO HIS OFFENDER SCORE 1

B. CONCLUSION 4

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007) 3

State v. Ford, 125 Wn.2d 919, 891 P.2d 712 (1995) 3

STATUTES

RCW 9.94A.525(1). 2

RCW 9.94A.441. 3

UNITED STATES COURT OF APPEALS CASES

United States v. Miller, 588 F.2d 1256 (9th Cir. 1978), cert. denied,
440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). 3

A. REPLY ARGUMENT

MR. TRUJILLO'S SENTENCE MUST BE REVERSED WHERE HE OBJECTED, THROUGH COUNSEL, TO HIS OFFENDER SCORE.

The appellant Mr. Trujillo relies on the arguments in his Appellant's Opening Brief. In response, the State argues that Mr. Trujillo's agreement in his guilty plea that he was on community custody forever waived his right to challenge his offender score, including at his subsequent sentencing. However, Mr. Trujillo reserved the right to object to his offender score computation, and indeed objected to his offender score, prior to the trial court's imposition of sentence, both by factually objecting to the community custody point through counsel, and by affirmatively refusing to sign the stipulation to his prior convictions and offender score at sentencing.¹

It is plainly stated in the plea of guilty that the defendant's offender score may be disputed by him at sentencing.

If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing.

CP 28-29 (Plea statement, section 6(c)). Although the context of

¹ As noted in the Opening Brief, Mr. Trujillo's plea of guilty was not predicated on a particular length of a term of incarceration; indeed, the parties

this provision suggests it is directed at circumstances where the offender score is placed into dispute by documentation at the time of the plea, the provision does clearly state that the defendant may challenge his offender score at sentencing.

Mr. Trujillo would reasonably have understood this to be the case, particularly considering that the very same plea agreement also permitted the State to locate additional prior convictions between the time of the plea and sentencing, and to thereby increase the defendant's score. CP 29 (Plea Statement, section 6(d)).

In Mr. Trujillo's statement on plea of guilty he did agree to his offender score. But subsequently, at sentencing and prior to imposition of sentence, he argued that he had not been on community custody for purposes of that additional point in his offender score. A sentencing court is required to calculate the defendant's offender score on "the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). When, as here, the defendant enters a guilty plea and objects to his criminal history calculation, the "disputed issues as to criminal history shall be decided at the sentencing hearing."

acknowledged in the plea that the defendant would be seeking a DOSA sentence. CP 27-35.

RCW 9.94A.441. If the defendant objects, at sentencing the State must prove prior convictions by the preponderance of evidence with either a certified judgment and sentence or, if none is available, other comparable evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P.3d 816 (2007).

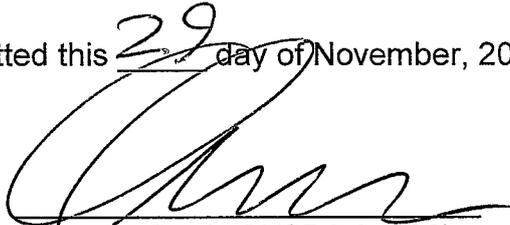
The Respondent suggests that if resentencing is required, the State may submit additional evidence. This is incorrect, per Bergstrom, supra. That case does not involve, as the present case does, an attorney who voiced the defendant's objection to the score, and then nevertheless entered a stipulation regarding the offender score over the known, expressed objections of the defendant. The Respondent has offered no response to the arguments in the Appellant's Opening Brief with regard to the defense attorney's lack of authority to so stipulate, and the trial court's lack of authority to accept such a stipulation, over the defendant's voiced objections. It is the responsibility of the trial judge when accepting a defense stipulation to assure, in some manner, that it is made with the consent of the defendant. A stipulation cannot be entered over the known or expressed objections by the accused. See State v. Ford, 125 Wn.2d 919, 922, 891 P.2d 712 (1995); United States v. Miller, 588 F.2d 1256 (9th

Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979). Mr. Trujillo objected at every instance and at every turn he was ignored.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Trujillo respectfully requests this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 29 day of November, 2011.



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41748-1-II
v.)	
)	
JAMES TRUJILLO,)	
)	
APPELLANT.)	

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