

NO. 41774-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEWIS HALL,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
11 OCT -3 AM 11:05  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming

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BRIEF OF APPELLANT

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pm 9/30/11

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A. ASSIGNMENT OF ERROR

The trial court erred in sentencing appellant and entering a judgment and sentence without requiring the State to prove appellant's criminal history by a preponderance of the evidence.

Issue Pertaining to Assignment of Error

Is a remand for resentencing required where the trial court imposed sentence and entered a judgment and sentence without requiring the State to prove appellant's criminal history by a preponderance of the evidence when appellant objected to the State's allegations of criminal history?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On July 6, 2009, the State charged appellant, Thomas Lewis Hall, with one count of failure to register as a sex offender "during the period between the 10<sup>th</sup> day of June, 2009 and the 2<sup>nd</sup> day of July, 2009." CP 1. The State amended the information on September 15, 2009, adding one count of unlawful manufacturing of a controlled substance, to-wit: marijuana. CP 5-6. On November 5, 2009, the State filed a second amended information, adding a school zone enhancement to the charge of

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<sup>1</sup> There are 15 volumes of verbatim report of proceedings: 1RP - 03/03/10; 2RP - 06/30/10; 3RP - 08/04/10; 4RP - 08/20/10; 5RP - 09/03/10, 11/15/10, 11/18/10; 6RP - 11/30/10 a.m.; 7RP - 11/30/10 p.m.; 8RP - 12/01/10; 9RP - 12/02/10; 10RP - 12/06/10; 11RP - 12/07/10 (Judge Fleming); 12RP - 12/07/10 (Judge Chushcoff); 13RP - 12/08/10; 14RP - 12/13/10; 15RP - 01/07/11.

unlawful manufacturing of a controlled substance. CP 11-12. The State filed a third amended information on March 3, 2010, amending count one to failure to register as a sex offender “on or about the period between the 10<sup>th</sup> day of June, 2009 and the 2<sup>nd</sup> day of July, 2009.” CP 16-17.

Following pre-trial hearings and a bench trial before the Honorable Frederick W. Fleming, the court found Hall guilty as charged on December 13, 2010. 14RP 793-94; CP 54-79. On January 7, 2011, the court sentenced Hall to 42 months in confinement and 12 months of community custody. 15RP 10-11; CP 82-96.

Hall filed a timely notice of appeal. CP 100-02.

2. Substantive Facts

a. Trial<sup>2</sup>

Hall was registered with the Pierce County Sheriff’s Department Sex Offender Registration Unit as a transient staying in a tent at the Foothills Trail, McMillan Trailhead, between the Puyallup and Carbon Rivers. 8RP 84, 90-92, 156-59.

In June 2009, the Pierce County Sheriff’s Department commenced surveillance of a house located at 1207 South 27<sup>th</sup> Street. At various times, deputies saw Hall at the residence and observed two cars registered to Hall parked near the house. 8RP 170-77; 9RP 216-21, 238-45. Deputy Robert

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<sup>2</sup> Hall represented himself pro se with standby counsel. 3RP 3-17.

Tjossem testified that on June 10, 2009, he followed Hall who drove from the house to the County-City Building and registered as a transient then drove back to the house. 11RP 552-55. Deputies also checked the area around the McMillan Trailhead and did not see Hall or any cars. 9RP 203-04; 10RP 422-24.

On July 2, 2009, the Sheriff's Department obtained a warrant to search the house at 1207 South 27<sup>th</sup> Street. 9RP 259-10. Deputies went to the house and knocked and announced several times. After receiving no response, they used a ram on the door and forced their way into the house. 9RP 277-78; 10RP 378-79. Detective Michael Portman testified that when they entered the house, he saw Hall come down the stairs from the second floor. Portman read the search warrant to Hall and he was patted down, arrested, and handcuffed. Hall was "cooperative" and had no weapons. 10RP 379-80. Detective Heishman advised Hall of his *Miranda* rights. 10RP 380, 432-33.

Deputies searched the house and found documents and mail addressed to Hall. 9RP 359-60, 10RP 382, 433-35. During the search, they discovered evidence of a marijuana grow operation. After obtaining a warrant to conduct a search for marijuana, they recovered equipment and marijuana plants inside and outside the house. 11RP 559-63. Detective John Crawford noticed that "the plants did not appear to be very healthy."

10RP 416. He field tested a bud from one of the plants and it tested positive for marijuana. 10RP 404-05. Marie Oberg, a forensic technician, testified that she analyzed the green vegetable material collected as evidence and concluded that they were marijuana plants. 11RP 517-26. The total weight of the plants that she tested equaled “1,983.5 grams, which comes out to a little bit less than four and a half pounds.” 11RP 528-29.

Deputy Shawn Butler testified that while transporting Hall to the Pierce County Jail, Hall asked him about the marijuana charge. When he told Hall that it was against the law to grow marijuana, Hall said, “Even one plant?” and “Well, what about personal use?” 13RP 641-43. Then Hall mentioned something about medical marijuana and Butler told him that he needed a prescription for medical marijuana and/or a certificate posted at his residence. “At that point, there was no other discussion. He did not say anything else.” 13RP 643.

Karen Hudesman owns the property located at 1207 South 27<sup>th</sup> Street in Tacoma. 10RP 481. Hudesman testified that she initially rented the house to Hall’s son but in January 2009, his son moved out and Hall “moved in and resumed paying rent.” 10RP 484-85, 491. Between February and June 2009, Hudesman went to the house at least three times

and spoke with Hall. He was still living at the house on July 2, 2009. 10RP 487-89.

Maude Kelleher is the lead routing specialist for the Tacoma Public School District. 11RP 612. Kelleher testified that she used a computer software program to create all the bus stops and bus routes located within 1,000 feet of 1207 South 27<sup>th</sup> Street and displayed them on a map. 11RP 613-17. The map showed that there were five school bus stops with 1000 feet of that address. 11RP 619-20; Ex. 68.

b. Sentencing.

When the court imposed sentence, the prosecutor requested that the court make a finding that it “is counting Mr. Hall’s prior sex offenses and prior offenses in the offender score that the Court sentenced him on today,” stating that the certified Judgment and Sentence relating to the underlying sex offenses was provided “to the Court during the course of the trial and I believe those are part of the trial record. 15RP 15. The court noted that the Judgment and Sentence contained Hall’s criminal history and the standard range. 15RP 15. Hall’s standby counsel responded that Hall was not agreeing to his criminal history or the standard range. 15RP 15. Hall refused to sign the Judgment and Sentence and the Stipulation on Prior Record and Offender Score. CP 82-99.

C. ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING HALL WITHOUT REQUIRING THE STATE TO PROVE HIS CRIMINAL HISTORY BY A PREPONDERANCE OF THE EVIDENCE WHEN HALL OBJECTED TO THE STATE'S ALLEGATIONS OF CRIMINAL HISTORY.

A remand for resentencing is required because the trial court erred in sentencing Hall and entering a judgment and sentence without requiring the State to prove his criminal history by a preponderance of the evidence when Hall objected to the State's allegations of criminal history.

A trial court "shall conduct a sentencing hearing" before imposing a sentence upon a defendant. "If 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. "Under the SRA, the trial court must conduct a sentencing hearing, and, if the court decides by a preponderance of the evidence that a defendant has a criminal history, the court must specify the convictions it has found." State v. Thorne, 129 Wn.2d 736, 781, 921 P.2d 514 (1996)(citing former RCW 9.94A.110 recodified as RCW 9.94A.500).

The use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. State v. Ford, 137

Wn.2d 472, 479-80, 973 P.2d 452 (1999)(citing State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986)). Absent an affirmative acknowledgment, the State must meet its burden of proving a defendant's criminal history by a preponderance of the evidence. State v. Lucero, 168 Wn.2d 785, 788-89, 230 P.3d 165 (2010).

The Washington Supreme Court emphasized in Ford that sentencing is not to be taken lightly:

Sentencing is a critical stage 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. Sentencing courts require reliable facts and information. To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public.

Ford, 137 Wn.2d at 484.

“When 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)(citing State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002)).

Here, when the court proceeded to impose sentence, Hall refused to sign the Judgment and Sentence, stating, “I don't agree with the proceedings, I don't agree with this sentence.” 15RP 12. Without

providing any evidence of Hall's criminal history at sentencing, the State asked the court to find that he had prior offenses which were included in his offender score:

MS. GINER: Your Honor, the State would request further that you make a finding that the Court is counting Mr. Hall's prior sex offenses and prior offenses in the offender score that the Court sentenced him on today. And the State did provide the certified Judgment and Sentence related to the underlying sex offenses to the Court during the course of the trial and I believe those are part of the trial record.

THE COURT: That's correct.

MS. GINER: Would the Court like me to just indicate that finding on the -- I could put it on the stipulation. Would that be the --

THE COURT: That's fine. It's right in the Judgment and Sentence what his criminal history is and I've been advised and there wasn't any objection to what his standard range was for each count.

MR. BLANFORD: And, Your Honor, Mr. Hall is not signing the standard range. He indicates he believes it to be inaccurate. He believes several of these crimes are not him. And that's what he's told me, Your Honor.

THE COURT: And the State has just indicated that the Judgments and Sentences were provided and admitted during the trial to verify his criminal history.

MR. BLANFORD: I'm not arguing with the Court. I'm simply telling the Court that Mr. Hall believes that these are not his convictions and he is going to decline to sign this.

15RP 15-16. (Mr. Blanford, as standby counsel, represented Hall for sentencing at Hall's request. 15RP 2.)

Hall refused to sign the Judgment and Sentence and the Stipulation on Prior Record and Offender Score. CP 82-99. Despite Hall's objection to his criminal history and standard range, the State did not present any evidence of prior offenses and the court did not require the State to provide any proof.

The record reflects that the State moved to admit a Judgment and Sentence during the trial and the court admitted it without objection. The Judgment and Sentence states that Hall was sentenced for rape in the second degree and unlawful imprisonment on March 22, 1991 and lists indecent liberties as a prior conviction. 8RP 85-86; Ex. 1. Importantly, the State did not provide a Judgment and Sentence for an indecent liberties conviction.

Regardless of any evidence admitted at trial, the SRA requires the sentencing court to specify on the record any convictions it finds by a preponderance of the evidence, which the court failed to do. Without any finding on the record, the court entered a Judgment and Sentence indicating that Hall had a criminal history of indecent liberties, rape in the second degree, and unlawful imprisonment, which the court counted to calculate Hall's offender score. CP 82-96.<sup>3</sup>

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<sup>3</sup> The Judgment and Sentence entered here and the 1991 Judgment and Sentence contain conflicting information. The Judgment and Sentence here (and the

In Lopez, the Washington Supreme Court concluded that a sentencing court commits reversible error when it considers unproved convictions. The Court held that when a defendant objects and the State fails to produce evidence of his criminal history, no further evidence is allowed on a remand for resentencing. Citing Ford, the Court reiterated that upholding “procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public” and emphasized that allowing the State a second opportunity to prove its allegations “would send an equally wrong message.” Lopez, 147 Wn.2d at 520-23.

The court’s failure to require the State to prove Hall’s criminal history by a preponderance of the evidence when Hall objected to the State’s allegations of criminal history constitutes reversible error. Like in Lopez, a remand for resentencing before a different judge is required and the State must be held to the existing record.

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Stipulation on Prior Record and Offender Score) states that Hall committed indecent liberties on 09/02/80 and was sentenced on 04/12/83 and the sentencing date for the crime of unlawful imprisonment is “unknown.” CP 83, 97. The 1991 Judgment and Sentence states that Hall was sentenced for indecent liberties on 4-11-83 and has no date for when the crime was committed and indicates that Hall was sentenced for unlawful imprisonment on March 22, 1991. Ex. 1. The Judgment and Sentence here also erroneously reflects that Hall was sentenced to 12 months of community custody for Count I when the community custody applies to Count II. CP 88.

D. CONCLUSION

For the reasons stated, and as due process requires, this Court should vacate Hall's Judgment and Sentence and remand for resentencing.<sup>3</sup>

DATED this 30<sup>th</sup> day of September, 2011.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Thomas Lewis Hall

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<sup>3</sup> 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 interests 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.

Ford, 137 Wn.2d at 484 (citing *ABA 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 Thomas Lewis Hall, DOC # 274882, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326-0769.

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

DATED this 30<sup>th</sup> day of September 2011, in Kent, Washington.

  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851

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