

NO. 41774-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS HALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 09-1-03211-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Defendant is not entitled to appeal his sentence where he waived any objection by stipulating, through counsel, to his prior offenses and the calculation of his offender score.

2. If this case is remanded for resentencing, the State is entitled to present evidence to prove defendant's prior offenses where it reasonably relied on defense counsel's stipulation to prior record.

B. STATEMENT OF THE CASE.

1. Procedure

On July 6, 2009, the State charged defendant, Thomas Hall, with failure to register as a sex offender. CP 1. On August 20, 2009, defendant's counsel withdrew from representation, and was replaced by substitute counsel from the Department of Assigned Counsel. CP 4. On September 15, 2009, the State amended the information, adding a charge of unlawful manufacturing of a controlled substance. CP 5-6. On November 5, 2009, the State amended the charges again adding a school zone enhancement to the manufacturing charge. CP 11-12. On March 3, 2010, the State filed a third amended information, changing the charging period for the failure to register. CP 16-17. On March 30, 2010, the court

disqualified defendant's counsel due to a conflict of interest, and appointed new counsel to represent defendant. CP 19.

Defendant's counsel represented him during pre-trial motions. RP (06/30/10) 1; RP (03/03/10) 2. After the parties completed voir dire, and the jury was sworn in, defendant waived his right to jury trial and proceeded to a bench trial. CP 50; RP (11/30/10) 7; RP (Vol. 2) 48. Defendant represented himself pro se, with standby counsel during the trial. The court found defendant guilty on both counts, and found the school zone enhancement applicable. CP 54-79.

At sentencing on January 7, 2011, defense counsel stated, "Earlier in the week [defendant] wished me to ask the Court to allow me to handle the sentencing. I contacted the State and told them that."

RP(01/07/2011) 2. Defendant did not contest this statement. *Id.*

Defendant's counsel explained that he had received the findings of fact and conclusions of law, and that he had spoken to defendant about his options during sentencing. RP (01/07/2011) 3. The State agreed that the understanding had been that defendant's counsel would represent him at the sentencing hearing, and that the findings of fact and conclusions of law had been sent to defendant's attorney for review because of this understanding. RP (01/07/2001) 4.

The State made its sentencing recommendation to the court, and defendant's counsel again stated, "Your Honor, Mr. Hall has asked me to speak on his behalf..." RP (01/07/2001) 8. Counsel then proceeded to

make a sentencing recommendation on defendant's behalf. RP (01/07/2001) 8-9. At no time during the sentencing recommendations of either party did the defense object to the State's calculation of defendant's offender score.

Defendant's counsel signed the findings of fact and conclusions of law, the stipulation on prior record and offender score, and the judgment and sentence. CP 80-96, 97-99; RP (01/07/2001) 13. Defendant refused to sign the judgment and sentence, the stipulation on prior record and offender score, and the findings of fact and conclusions of law. CP 54-79, 80-96, 97-99; RP (01/07/2001) 13, 15-17. Initially, defendant also refused to provide his fingerprints upon his sentencing. RP (01/07/2001) 16.

2. Facts

Andrea Shaw, an office assistant at the Pierce County Sheriff's Department Sex and Kidnap Registration Unit, testified that she is the record keeper for the unit. RP2 71. Ms. Shaw identified the judgment and sentence from King County Superior Court convicting defendant of rape in the second degree and unlawful imprisonment dated March 22, 1991. RP2 85-6. Ms. Shaw also identified the transient sex offender registration packets filled out by defendant on March 18, 2009, March 25, 2009, April 1, 2009, and April 8, 2009. RP2 88-9, 94, 97, 100, 104. Defendant then stipulated to the admissibility and contents of exhibits 6-17 as containing the same information as exhibits two through four which had already been

admitted. RP2 106-9. Defendant registered as transient living at the McMillan Trailhead from March 18, 2009 through to when he was arrested on July 2, 2009. RP (Vol. 2) 92, 102. Defendant never reported living at 1207 S. 27th Street in Tacoma, Washington. RP (Vol. 2) 115.

Lieutenant Larry Minturn of the Pierce County Sheriff's Department, testified that he assisted in the surveillance of 1207 South 27th Street in Tacoma, Washington on June 5, 10, 11, and 12, 2009. RP (Vol. 2) 169. Lieutenant Minturn explained that during his surveillance, two vehicles registered to defendant were parked at the address the majority of the time, and that they were driven on occasion, by a man matching defendant's description. Lieutenant Minturn was unable to positively identify defendant as the man driving the vehicles.

Detective Lynelle Anderson testified that as a part of the investigation she drove to the McMillan Trailhead to determine if defendant had been staying there. RP (Vol. 3) 203. She saw no evidence of a tent at that location, or in the parking lot or surrounding neighborhood. RP (Vol. 3) 204, 208. Neither of defendant's vehicles was at the location. RP (Vol. 3) 204.

Ms. Karen Hudesman testified that defendant's son had originally rented the house at 1207 S. 27th Street in Tacoma from her. RP (Vol. 4) 484. At some time in January or February of 2009, defendant's son moved out of the house, and defendant moved in. RP (Vol. 4) 486. Defendant rented the house from Ms. Hudesman until July 2009. *Id.* Ms.

Hudesman testified that on two occasions she personally collected rent at the house from defendant. RP (Vol. 4) 488.

When officers executed a search warrant for defendant's arrest, they found evidence of marijuana manufacture. RP (Vol. 5) 559-63. The officers stopped their search and waited for a search warrant for the grow operation. *Id.* Once that arrived officers collected marijuana plants, window covering, lamps, and planting containers. *Id.* While on the way to jail, defendant asked the officer transporting him about the marijuana charges and about medical marijuana. RP (Vol. 6) 641-43. The officer told him that if he had a prescription, he needed to have it posted at his home. RP 643. Defendant did not ask any other questions. *Id.*

C. ARGUMENT.

1. DEFENDANT WAIVED ANY OBJECTION TO HIS OFFENDER SCORE CALCULATION WHERE DEFENSE COUNSEL STIPULATED TO DEFENDANT'S PRIOR OFFENSES AT SENTENCING.

Only an illegal or erroneous sentence is reviewable for the first time on appeal. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). While a defendant may not waive his objection to an illegal sentence, he may explicitly or implicitly waive an objection to calculation of his offender score. *In re Personal Restraint of Goodwin*, 146 Wn. 2d 861, 874, 50 P.3d 618 (2002).

Standby counsel's role is not to represent the pro se defendant. *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987). Instead, standby counsel's role is to provide the *pro se* defendant with technical information and "to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Bebb*, 108 Wn.2d at 525, 740 P.2d 829 (quoting *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S. Ct. 2525 (1975)). *State v. Pugh*, 153 Wn. App. 569, 222 P.3d 821 (2009). There is, moreover, no Sixth Amendment right to "hybrid representation," whereby a defendant serves as co-counsel with his attorney. *State v. Hightower*, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984), *review denied*, 101 Wn.2d 1013 (1984); *see also State v. Romero*, 95 Wn. App. 323, 326, 975 P.2d 564 (1999). "The right to self representation in a criminal matter... is an all-or-nothing process." *Romero*, 95 Wn. App. at 326. Even when a request to proceed pro se is unequivocal, "a defendant may still waive the right of self-representation by subsequent words or conduct." *State v. Vermillion*, 122 Wn. App. 844, 851, 51 P.3d 188 (2002), *citing State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

Here, defendant represented himself throughout the trial, but defendant asked that his standby counsel step in to represent him during the sentencing hearing. RP (01/07/2011) 2. Standby counsel explained this to the court, and the State represented that this was their understanding of the agreement between the defendant and his standby

counsel. RP (01/07/2011) 2-4. After requesting that standby counsel represent him, defendant was no longer pro se, and is bound by the tactical decisions of his counsel.

After waiving the issue at sentencing, defendant is not permitted to challenge the calculation on appeal. *State v. Ross*, 152 Wn.2d 220, 226-27, 229-32, 95 P.3d 1225 (2004). In *Ross*, the State relied on criminal history, including convictions from other jurisdictions that defense counsel affirmatively acknowledged were properly included in the defendants' offender scores. *Id.* at 226-27. The Court held that the defendants had waived legal challenges that the State failed to prove their offenses were comparable to Washington crimes. *Id.* at 232. As in *Ross*, here defendant waived the right to challenge his offender score because through counsel he had affirmatively acknowledged that it was correct.

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P. 3d 816 (2007). "The best evidence of a prior conviction is a certified copy of the judgment. However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) citing *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). During sentencing in this case, the trial court considered the judgment and sentence entered at the bench trial without objection. RP (01/07/2011) 15; RP (Vol. 2) 85; Exhibit 1. The court

noted that defendant's criminal history was listed on the prior judgment and sentence. RP (01/07/2011) 15. The court had before it a calculation of defendant's offender score prior to the current offenses in the judgment and sentence for the underlying sex offense. The inclusion of the prior offenses on that document means that defendant either stipulated to those offenses previously, or they were found to be prior offenses committed by defendant at the time that judgment and sentence was entered. Thus, even if defendant did not waive his objection at sentencing, the court had sufficient evidence to find that the State had met its burden of showing defendant's prior offenses.

2. IF THIS CASE IS REMANDED FOR
RESENTENCING, THE STATE IS ENTITLED TO
PRESENT EVIDENCE OF DEFENDANT'S
PRIOR CONVICTIONS.

Where the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P. 3d 816 (2007), citing *In Re the Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). In *Bergstrom*, the State alleged, but did not prove, the defendant's prior convictions in a sentencing report. 162 Wn.2d at 96. Defense counsel did not object to the allegations and score. *Id.* at 94-95. When the

defendant personally argued that some of the priors were same criminal conduct, defense counsel stated that she had examined the issue, implying that she agreed with the State's analysis. 162 Wn.2d at 90-91. However, out of respect for the defendant, counsel declined to take a position contrary to her client's position. *Id.* Although Bergstrom personally contested his offender score and argued that some of his prior convictions encompassed the same criminal conduct, the State reasonably relied on defense counsel's earlier affirmative acknowledgment and consequently did not offer any evidence. *Id.* at 96-97. The Court remanded the case to permit the State to provide evidence to prove the criminal history. *Id.* at 95.

Like *Bergstrom*, defense counsel explained his client's position to the court, but nevertheless expressly agreed with the State's offender score calculation by signing the stipulation to prior offenses. CP 97-99; RP (01/07/2011) 15. The State requested that the court find defendant's prior offenses counted toward defendant's offender score, and reminded the court that a certified judgment and sentence for the underlying sex offenses had been presented at the bench trial and was a part of the record already. RP (01/07/2011) 15. Defense counsel signed the stipulation to prior record. CP 97-99. The court sentenced defendant after finding that there was no objection to the standard range calculation. RP (01/07/2011) 15. The State was then entitled to rely on the stipulation to defendant's criminal history and the offender score calculation which were signed by

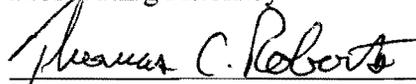
defense counsel. If this case is remanded, the State should be permitted to submit evidence to prove defendant's offender score.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the judgment and sentence be upheld or that it be permitted to present evidence upon remand for resentencing.

DATED: January 10, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney

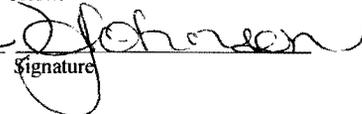


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Margo Martin
Rule 9 Intern

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