

NO. 43525-0-II

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

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STATE OF WASHINGTON, Respondent

v.

JEREMY PUTNAM BAKKE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00015-0

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. THE EVIDENCE IS SUFFICIENT TO PROVE THE DEFENDANT'S CRIMINAL HISTORY.

B. STATEMENT OF THE CASE

The defendant pled guilty to attempted burglary in the second degree. CP 72. At his sentencing hearing the State argued that the defendant had 14 and ½ points on his offender score. CP 84-85. Bakke challenged the inclusion of his juvenile conviction for attempted indecent liberties from February 22, 1990 and his adult Oregon conviction for unauthorized use of a motor vehicle from February 1, 2001. Report of Proceedings. The trial court held that these two convictions could not be included in the defendant's offender score. RP 32. Bakke also claimed that his 1995 conviction for custodial assault had been vacated but produced nothing but a bare assertion on this point. RP 24. Last, he claimed that his felony convictions occurring prior to his 2009 failure to register as a sex offender conviction washed out. However, his crime of failure to register began on June 7, 2006, whereas his last felony conviction preceding that date was on November 6, 2001. CP 84-85, RP 22. The trial court

concluded that Bakke had thirteen points in his offender score. RP 32.

Bakke filed this timely appeal of his sentence.

C. ARGUMENT

I. THE EVIDENCE IS SUFFICIENT TO PROVE THE DEFENDANT'S CRIMINAL HISTORY.

Bakke's first argument about how the trial court miscalculated his offender score stems from his claim that the State failed to disprove by a preponderance of the evidence that his conviction for custodial assault from 1995 had not been vacated.

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction. *Id.* at 482; *State v. Lopez*, 147 Wn.2d 515, 523, 55 P.3d 609 (2002). While the preponderance of the evidence standard is "not overly difficult to meet," the State must at least introduce "evidence of some kind to support the alleged criminal history." *Ford*, 137 Wn.2d at 480. Further, unless convicted pursuant to a plea agreement, the defendant has "*no obligation* to present the court with evidence of his criminal history." *Lopez*, 147 Wn.2d at 521.

*State v. Hunley*, 287 P.3d 584, slip opinion at 9-10 (2012).<sup>1</sup> "The best evidence of a prior conviction is a certified copy of the judgment." *Ford* at 480. Here, the State produced a certified copy of the judgment and sentence reflecting Bakke's conviction for custodial assault. RP 25. Bakke

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<sup>1</sup> Bakke was convicted pursuant to a plea agreement, not following a trial.

acknowledged the conviction at the sentencing hearing. RP 24. The State met its burden of proving the existence of this conviction by a preponderance of the evidence.

Bakke baldly asserted that his conviction had been vacated, but produced nothing that would suggest that was true. While it is true that the defendant bears no burden of proving his criminal history, he appears to argue in this appeal that his bald contention that his conviction had been vacated triggered an additional, higher burden of proof on the State. The State's burden of proof remained preponderance of the evidence, and the State met that burden by producing a certified copy of the judgment and sentence.

“When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.” *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Bakke would like this Court to hold that the State's inability to show that this conviction *had not been* vacated equals proof that it actually had been vacated. But when a conviction has not been vacated, there will be no documentation to speak of other than a judgment and sentence, which the State produced. Moreover, as the State pointed out, Bakke had numerous felony convictions in the five years following

his custodial assault conviction. Pursuant to RCW 9.94A.640(2), a conviction may not be vacated where, in the case of a Class C felony, the offender has been convicted of a new crime in this state, any other state, or federal court within five years following the date of his discharge. Bakke never went more than five years between crimes since his first noted conviction in 1990. CP 84-85. It is not believable that his 1995 custodial assault conviction had been vacated. The trial court properly weighed the evidence put before it and found the State had met its burden of proof. The evidence is sufficient to sustain the trial court's finding.

Bakke's second argument about how the trial court miscalculated his offender score stems from his claim that the State did not prove the comparability of his 2001 Oregon conviction for unauthorized use of a motor vehicle. See Brief of Appellant at page 9. This claim is bizarre. The trial court did not include this conviction in the offender score. The trial court said:

I make the following findings:

I will delete the attempted indecent liberties which is half a point; and the Oregon conviction, which was in 2001 from Multnomah County, Oregon.

So deducting one and a half points from the list on the declaration of criminal history, I find that the offender score is 13.

RP 32, CP 84-85. It is not clear whether appellate counsel deliberately misrepresented the record or simply didn't bother to read it. This claim of error fails.

Bakke's third argument about how the trial court miscalculated his offender score stems from his claim that the State failed to prove by a preponderance of the evidence that his conviction for failure to register as a sex offender occurred within five years of his release from confinement on his second degree theft conviction from 11/6/01. The State submitted proof that the defendant admitted, as part of his plea of guilty to the charge of failure to register as a sex offender, that he began his commission of that crime on June 7, 2006—less than five years from his release from confinement on his second degree theft conviction. RP 22. Bakke admitted at the current sentencing hearing that he commenced the commission of that crime on June 7, 2006. *Id.* The State met its burden of proof. Bakke cites no authority which holds that when a defendant commits a crime as part of a continuing course of conduct, only the last day on which the conduct occurs counts when calculating a wash-out period. This claim of error fails.

The trial court properly calculated the defendant's offender score.

D. RESPONSE TO PERSONAL RESTRAINT PETITION

Bakke filed a timely personal restraint petition claiming the following errors: (1) That his juvenile convictions for burglary in the second degree under cause number 90-8-00359-6 and residential burglary under cause number 90-8-00996-9 should not count in his offender score because he was younger than 15 at the time of their commission; (2) That juvenile convictions cannot be included in an offender score because they are “adjudications” rather than “convictions; (3) His three convictions for PSP II must be counted as same criminal conduct simply because they were filed under the same cause number, were sentenced on the same date, and were served concurrently; (4) that his convictions that are more than 10 years old cannot be included in his offender score because they would be inadmissible at trial for impeachment purposes; and (5) his juvenile convictions cannot be included in his offender score because they would be inadmissible at trial for impeachment purposes. The petition is frivolous and must be dismissed.

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d

802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint\_of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn.App. 329, 254 P.3d 899 (2011).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

#### I. RESPONSE TO FIRST GROUND FOR RELIEF

Bakke, relying on a former version of the SRA, claims that juvenile convictions cannot be counted in an offender score if the offender was fifteen or younger when the offense was committed. The current statute which codifies the rules for offender scoring is found at RCW 9.94A.525. Nowhere in current RCW 9.94A.525 does it state that juvenile

convictions committed when the offender was fifteen or younger must be excluded from the offender score. The law in place at the time the current offense was committed is the law that controls the current sentencing. *In re Pers. Restraint of Jones*, 121 Wn.App. 859, 869, 88 P.3d 424 (2004), (whether a prior juvenile adjudication counts toward an offender score depends on the statutes in effect on the date of the current offense). *State v. Sulayman*, 97 Wn.App. 185, 188, 983 P.2d 672 (1999) (“Generally, a statute operates prospectively when the precipitating event for its application occurs after the effective date of the statute.’ A ‘statute does not operate retroactively “merely because it relates to prior facts or transactions where it does not change their legal effect. It is not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage . . . .””) (internal citations omitted). Bakke is not entitled to sentencing under any former version of the SRA. Bakke fails to make a prima facie showing of error and this claim is frivolous.

## II. RESPONSE TO SECOND GROUND FOR RELIEF

Bakke appears to claim that juvenile adjudications cannot be used as points in an adult offender score because adjudications are not convictions. As an initial matter, it is frankly not clear whether Bakke intends this to be a stand-alone claim or whether he makes this argument to bolster his previous argument (above). In any event, he cites to *State v.*

*J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999) for the proposition that juvenile adjudications cannot be used in an offender score. However, *J.H.* makes no such holding. The Court of Appeals said:

...[T]he consideration of prior juvenile adjudications when sentencing an adult is nothing new. Even before enactment of the SRA, it was permissible to consider prior juvenile offenses at a subsequent adult sentencing. "The mere fact that such use is now mandatory in certain circumstances does not constitute any additional punishment for the prior behavior or attach any additional 'stigma' to the juvenile offenses." Changes in the way juvenile offenses are treated as prior offenses under the SRA do not affect the punishment imposed upon the juvenile for the juvenile offense, and so do not support a conclusion that juveniles are entitled to jury trials.

*J.H.* at 177-78 (internal citation omitted). Bakke bears the burden of making a prima facie showing of error. He cites no authority for his claim that juvenile adjudications cannot be used as points in an offender score under RCW 9.94A.525. This claim is frivolous.

### III. RESPONSE TO THIRD GROUND FOR RELIEF

Bakke believes that when cases are filed under the same cause number and are sentenced on the same day, and were served concurrently, they are statutorily deemed to be same criminal conduct. He cites no authority for this absurd assertion. Under RCW 9.94A.589(1)(a), two crimes cannot be deemed to encompass same criminal conduct unless they involve the same criminal intent, were committed at the same time and

place, and were committed against the same victim. The date upon which the crimes were sentenced is irrelevant to this consideration. And, of course, crimes sentenced on the same date are served concurrently unless the court orders them to be served consecutively. See RCW 9.94A.589(1)(a). Here, Bakke's three PSP IIs were committed on three different dates (4/30/97; 7/7/97; and 7/18/97, respectively). See CP 84-85. These convictions cannot be deemed same criminal conduct. This claim is frivolous.

IV. RESPONSE TO FOURTH AND FIFTH GROUNDS FOR RELIEF

In these grounds for relief, Bakke claims that because his juvenile convictions could not be used at a trial for impeachment purposes under the rules of evidence (because they are adjudications and because they are over ten years old) they cannot be included in his offender score under the SRA. He claims that the court's consideration of his prior convictions was "prejudicial." A sentencing hearing is not a trial. This claim is patently frivolous. The petition must be dismissed.

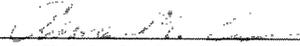
E. CONCLUSION

The trial court properly calculated the defendant's offender score and his sentence should be affirmed. His personal restraint petition must be dismissed.

DATED this 27<sup>th</sup> day of February, 2012.

Respectfully submitted:

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By:   
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# CLARK COUNTY PROSECUTOR

## January 03, 2013 - 4:05 PM

### Transmittal Letter

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Case Name: State v. Jeremy Bakke (consolidated)

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

STATE OF WASHINGTON,  
Respondent,

v.

JEREMY PUTNAM BAKKE,  
Appellant.

No. 43525-0-II (Consolidated)

Clark Co. No. 11-1-00015-0

DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK )

On July 11, 2013, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: 

Jeremy Bakke, DOC# 737768 Airway Heights Corr. Center PO Box 1899 Airway Heights, WA 99001-1899
--

DOCUMENTS: Brief of Respondent/Response to Personal Restraint Petition

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

Jeremy Putnam Bakke  
Date: July 11, 2013.

Place: Vancouver, Washington.

# CLARK COUNTY PROSECUTOR

## January 04, 2013 - 9:53 AM

### Transmittal Letter

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