NO. 43985-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY ANDERSON,

Appellant.

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

The Honorable Carol Murphy, Judge
The Honorable James J. Dixon, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY 2

1. THERE WAS NO VALID BASIS FOR CONTINUING THE TRIAL PAST THE TIMELY TRIAL DATE, AND THE CHARGE AGAINST ANDERSON MUST BE DISMISSED 2

2. THE STATE FAILED TO PROVE THAT THE ALLEGED CALIFORNIA CONVICTION SHOULD BE INCLUDED IN ANDERSON'S OFFENDER SCORE 3

3. THE COURT'S FAILURE TO DETERMINE WHETHER ANDERSON'S PRIOR CONCURRENTLY-SENTENCED OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING. 5

B. CONCLUSION 7

TABLE OF AUTHORITIES

Washington Cases

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007) 5, 6

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 3, 4

State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013) 4, 6

State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012) 3

State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) 3, 5

State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999) 4

State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007) 3

State v. Torngren, 147 Wn. App. 556, 196 P.3d 742 (2008), abrogated on other grounds in State v. Graciano, ___ Wn.2d ___, 2013 WL 376076, 5 (January 31, 2013) 4

Statutes

RCW 9.94A.525(5)(a)(i) 4

A. ARGUMENT IN REPLY

1. THERE WAS NO VALID BASIS FOR CONTINUING THE TRIAL PAST THE TIMELY TRIAL DATE, AND THE CHARGE AGAINST ANDERSON MUST BE DISMISSED.

When a mistrial was declared following the first trial on June 7, 2012, the parties agreed to a new trial date within the 60 day time for trial period. 2RP 4. More than a month after the trial date was agreed upon, the prosecutor moved for a continuance, stating that when the date had been set, she had forgotten about her prescheduled vacation. 1RP 3. By the time the prosecutor brought this request to the court, the trial could not be reset within the 60-day timely trial period, and the defense objected to the requested continuance. 1RP 5. The court granted the request and continued the trial date to August 13, 2012, thereby extending the time for trial to September 13, 2012. 1RP 6-7.

The trial court abused its discretion in ordering the continuance. The continuance was granted in this case not because of the prosecutor's previously scheduled vacation, as the State suggests, but because the prosecutor failed to inform the court of that vacation in a timely manner. Even if the prosecutor forgot about the vacation because she was so

flustered by the mistrial and the need to schedule a new trial[1], there was no explanation for her delay of more than a month in bringing the schedule conflict to the court's attention. It was this delay which made it impossible to schedule the new trial within the timely trial period. The prosecutor's forgetfulness and case mismanagement are not legitimate reasons to continue, and the lower court abused its discretion.

2. THE STATE FAILED TO PROVE THAT THE ALLEGED CALIFORNIA CONVICTION SHOULD BE INCLUDED IN ANDERSON'S OFFENDER SCORE.

At sentencing, the State alleged that Anderson had seven prior felony convictions, including one from California. It presented certified copies of the judgments from the six Washington convictions. It presented only uncertified documents relating to the California judgment, however, and offered no explanation as to why it did not obtain a certified copy of the California judgment. 4RP 11-12. Moreover, none of the certified copies of the Washington judgments even listed the California conviction in Anderson's criminal history.

The State has the burden of proving the defendant's convictions by a preponderance of the evidence at sentencing. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); State v. Lopez, 147 Wn.2d 515,

[1] Br. of Resp. at 4.

519, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). "The best evidence of a prior conviction is a certified copy of the judgment." Ford, 137 Wn.2d at 480. The State may introduce other comparable evidence of the conviction only if it demonstrates that a certified copy of the judgment is unavailable for some reason other than the fault of the prosecutor. Lopez; 147 Wn.2d at 519; State v. Rivers, 130 Wn. App. 689, 698-99, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007). Other acceptable proof of a conviction usually consists of other court-certified records. Rivers, 130 Wn. App. at 701.

The State's unexplained failure to produce a certified copy of the California judgment, and its failure to present other evidence of comparable reliability, is fatal to the proof of that conviction. It may not be used in the calculation of Anderson's offender score.

The State argues in its brief that Anderson may not raise this issue for the first time on appeal. Br. of Resp. at 6-8. It is well established, however, that a defendant may challenge the trial court's offender score calculation for the first time on appeal, when the challenge is based on a legal error such as the State's failure to introduce evidence to support an out of state conviction. State v. McCorkle, 137 Wn.2d 490, 495–96, 973

P.2d 461 (1999); Ford, 137 Wn.2d at 475. The State's argument is without merit and must be rejected.

3. THE COURT'S FAILURE TO DETERMINE WHETHER ANDERSON'S PRIOR CONCURRENTLY-SENTENCED OFFENSES ENCOMPASSED THE SAME CRIMINAL CONDUCT REQUIRES REMAND FOR RESENTENCING.

If a defendant has prior convictions for which concurrent sentences were imposed, but the prior sentencing court did not make a finding that the sentences encompass the same criminal conduct, the current sentencing court is required by statute to make a same criminal conduct determination. RCW 9.94A.525(5)(a)(i); State v. Torngren, 147 Wn. App. 556, 563, 196 P.3d 742 (2008), abrogated on other grounds in State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013). Anderson was sentenced to concurrent sentences for seven separate offenses on June 8, 2004. The court below did not appear to understand that it was required to determine whether these offenses encompassed the same criminal conduct. In fact, when the defense raised the same criminal conduct issue, the court stated that "it would be improper for the Court to consider – for today's purpose to consider even the issue of whether those prior convictions constitute the same course of conduct for sentencing purposes. So I will not make any finding that any of those prior convictions constitute same course of conduct." 4RP 11.

Moreover, the court improperly shifted the burden of proof to the defense to establish that the prior offenses encompassed the same criminal conduct. The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence, including whether concurrently sentenced prior convictions encompass the same criminal conduct. State v. Bergstrom, 162 Wn.2d 87, 89, 169 P.3d 816 (2007) (trial court erred in relying on the State's offender score calculation without requiring the State to prove that the prior offenses should be counted separately). The defendant has no obligation to provide separate proof of his criminal history. Lopez, 147 Wn.2d at 520-21.

The State relies on Graciano in support of its argument that the defense bears the burden of proving that prior convictions encompass the same criminal conduct. Br. of Resp, at 16. At issue in Graciano was the appropriate standard of review of a trial court's same criminal conduct determination, and the Supreme Court held that the abuse of discretion standard applies. Graciano, 176 Wn.2d at 537-38. The Court also noted that whether the sentencing court abused its discretion may depend on who carries the burden of proof. It held that the defendant bears the burden of proving that current convictions encompass same criminal conduct, as distinguished from State's burden of proving criminal history: "The State's burden to prove the existence of prior convictions at

sentencing does not include establishing that *current* offenses—treated as prior convictions for purposes of offender score calculation—constitute separate criminal conduct." Graciano, 176 Wn.2d at 539 (emphasis in original). The Court did not overturn its previous holding in Bergstrom that the State has the burden of proving that prior concurrently served convictions should be counted separately. See Bergstron, 162 Wn.2d at 89.

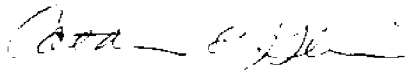
Remand for a same criminal conduct determination is required. Because Anderson specifically raised this issue at sentencing and the State failed to produce any evidence regarding the challenged prior convictions, the State may not present any new evidence on remand. Bergstrom, 162 Wn.2d at 93; In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

B. CONCLUSION

For the reasons discussed above and in the Brief of Appellant, the charge against Anderson must be dismissed. Moreover, remand for resentencing on the existing record is required.

DATED July 1, 2013.

Respectfully submitted,



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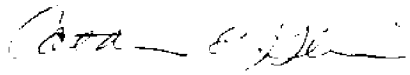

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