

NO. 46456-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT EDWARD DOTY JR,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The offender score issue is properly before the Court.

The State's claim that Robert Doty "affirmatively acknowledged" the existence and comparability of out-of-state convictions at his sentencing below is not well-taken.¹ Mr. Doty's refusal to acknowledge, in writing, the State's assertion of his criminal history cannot be minimized. His lawyer's acceptance of what the prosecution said was the applicable sentencing range was not an affirmative acknowledgement that any foreign convictions were true and comparable. The fact that Mr. Doty and his lawyer signed the judgment & sentence is of no import. A review of the settled law on this point confirms the issue is proper for review.

"[A]n unpreserved sentencing error may be raised for the first time upon appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Jones, 182 Wn. 2d 1, 6, 338 P.3d 278 (2014) (internal citation omitted.) "[I]t violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations

of prior convictions. And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history." State v. Hunley, 175 Wn.2d 901, 915, 287 P.3d 584 (2012) (holding sentencing provisions to the contrary unconstitutional). Only "[w]hen a defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score," does the error escape appellate review. State v. Collins, 144 Wn. App. 547, 555, 182 P.3d 1016 (2008) (internal citation omitted.)

"[A] defendant's tacit acceptance of his criminal history does not constitute the acknowledgement needed to relieve the State of its obligation to establish criminal history by a preponderance of the evidence." State v. Allen, 150 Wn. App. 300, 207 P.3d 483, 490 (2009), citing to State v. Mendoza, 165 Wn. 913, 205 P.3d 113 (2009). "If a defendant does not affirmatively acknowledge his criminal history and the State does not provide facts or information establishing that history, resentencing is required." Allen, citing to Mendoza.

In Allen, there was no affirmative acknowledgement even though counsel "implicitly accepted" the sentencing range suggested by

¹ Resp. at 11-14.

the State and argued client should receive a mid-range sentence. Allen at 315. Reversal for resentencing was likewise ordered in State v. Jackson, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005), even though that defendant “did not dispute the fact of his Oregon felony conviction or its inclusion in his criminal history.”

Similarly, in State v. Lucero, 168 Wn.2d 785, 787, 230 P.3d 165 (2010), defense counsel, at sentencing, conceded that his client’s “offender score was at least six,” including a California burglary conviction. Defense counsel challenged a different California prior, a drug possession, by arguing it had washed out. Id. The Court of Appeals deemed this to be an “affirmative acknowledgement” of the prior burglary, but in a per curiam decision, the Supreme Court reversed, specifying that at most, Lucero had “acknowledged that without the challenged California drug possession conviction, his offender score would still include the California burglary conviction.” Id. at 789. What occurred, was “not the ‘affirmative acknowledgement’ of comparability that Mendoza requires.” Id.

B. CONCLUSION.

For the reasons articulated in the opening brief, Mr. Doty's arrest was without authority of law. The motion to suppress should have been granted and the evidence suppressed. The conviction should be reversed and dismissed. For the reasons articulated herein, and in the opening brief, a reversal and resentencing is required to remedy the offender scoring issue.

DATED this 30th day of April 2015.

Respectfully submitted,

/s/ Mick Woynarowski

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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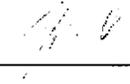
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| Respondent, |) | |
| |) | NO. 46456-0-II |
| v. |) | |
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| ROBERT DOTY, JR., |) | |
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| Appellant. |) | |

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