

No. 47343-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

GUY MILTON SAMPLE, III,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-02865-4
The Honorable Gretchen Leanderson, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to meet its constitutional burden of proving beyond a reasonable doubt the essential element of identity.
2. The State failed to present sufficient evidence to prove that Guy Sample was the individual who attempted to elude a police officer.
3. The State failed to meet its statutory burden of establishing the existence and comparability of Guy Sample's prior criminal convictions.
4. The trial court violated Guy Sample's right to due process by basing his sentence on prior convictions that were demonstrated only by the prosecutor's written summary, without any proof of the existence or comparability of the listed convictions.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State showed a connection with the motorcycle used to elude the police officer, but presented no evidence connecting Guy Sample to the motorcycle at the time of the offense, did the State fail to present sufficient evidence to prove beyond a reasonable doubt that Guy Sample was the individual who attempted to elude a police officer?

(Assignments of Error 1 & 2)

2. Where the State presented no documentation to establish the existence of Guy Sample's prior convictions, did the trial court err when it imposed a sentence using the State's calculation of Sample's offender score and standard range?

(Assignments of Error 3 & 4)

3. Where the State presented no documentation to establish the existence of three out-of-state convictions and presented no documentation to establish that the convictions are comparable to Washington felonies, and where the court failed to conduct a comparability analysis on the record, did the trial court err when it included three out-of-state convictions in Guy Sample's offender score? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Guy Milton Sample, III, with one count of attempting to elude a police vehicle (RCW 46.61.024) and one count of resisting arrest (RCW 9A.76.040). (CP 1-2) The State also alleged that the eluding offense was aggravated because Sample's conduct endangered the safety of one or more other

persons (RCW 9.94A.834). (CP 1) The jury convicted Sample as charged. (CP 65-67; 12/19/14AM VRP 5)¹ The trial court sentenced Sample under the special drug offender sentencing statute, imposing 18.75 months of confinement and 18.75 months of community custody. (03/30/15 RP 14-15; CP 80, 85-86, 93-94) At Sample's request, the trial court imposed only mandatory legal financial obligations. (03/30/15 RP 15; CP 83) This appeal timely follows. (CP 98)

B. SUBSTANTIVE FACTS

Roy Police Officer Tillman Atkins was on patrol in his marked police vehicle on the morning of July 21, 2014. (12/17/14 RP 24, 28) As he was driving northbound on State Route 507, he saw a silver motorcycle carrying a driver and passenger. (12/17/14 RP 27) The driver wore a black leather jacket and a blue and white helmet, and the passenger wore a gray striped sweatshirt and a black helmet. (12/17/14 RP 27, 27, 28) Officer Atkins believed the driver was a male based on the driver's physical build, and believed the passenger was a female based on long hair he could see sticking out of the helmet. (12/17/14 RP 27, 12/18/14 RP 84)

¹ The transcripts will be referred to by the date of the proceeding contained therein.

As Officer Atkins pulled behind the motorcycle, it abruptly stopped in the middle of the road, made a quick u-turn, and drove southbound. (12/17/14 RP 28) Officer Atkins believed this maneuver was unsafe due to the moderately heavy traffic present at the time, so he turned around to follow the motorcycle. (12/17/14 RP 28, 29) As Officer Atkins drove southbound, he saw the motorcycle pass his patrol vehicle, once again driving northbound. (12/17/14 RP 29) Officer Atkins decided to initiate a traffic stop and activated his emergency lights and siren. (12/17/14 RP 33) Officer Atkins pursued the motorcycle, but it sped away and turned down a cross street. (12/17/14 RP 34) Officer Atkins followed down the same street, but lost sight of the motorcycle. (12/17/14 RP 34)

As Officer Atkins' vehicle passed a driveway, he saw the motorcycle pull out and the driver look at him. (12/17/14 RP 34) The motorcycle sped off again and turned back onto southbound Route 507. (12/17/14 RP 35) With his patrol vehicle's lights and siren still activated, Officer Atkins pursued the motorcycle for several miles, reaching speeds near 100 miles per hour. (12/17/14 RP 35-36) He saw the motorcycle pull into oncoming lanes in order to pass vehicles on the roadway, and became concerned for the safety of other motorists, as well as the driver and passenger of the

motorcycle. (12/17/14 RP 36, 37, 38) Officer Atkins decided to end the pursuit, and he deactivated the lights and siren. (12/17/14 RP 40)

Officer Atkins continued to drive around the area to look for the motorcycle. (12/17/14 RP 41; 12/18/14 RP 49) About five minutes later, he saw a female walking quickly down the street. (12/18/14 RP 51) She had long brown hair and was wearing a sweatshirt similar to that worn by the motorcycle's passenger. (12/18/14 RP 51) The woman, Marie Collins, appeared upset and shaken. (12/18/14 RP 55)

About five hours later, Pierce County Sheriff's Deputies responded to a call regarding a suspicious vehicle abandoned in a yard about a block away from where Officer Atkins contacted Collins. (12/18/14 RP 59, 84, 98, 99, 124) Deputies found a silver motorcycle, a black leather jacket, and two motorcycle helmets under a plastic wading pool in some bushes on the property. (12/18/14 RP 56, 58, 100, 101, 102) In the pocket of the jacket, Deputies found a crumpled and torn traffic citation written to an individual named Guy Sample. (12/18/14 RP 60, 63-64, 103, 105)

As the officers waited at the scene for a tow truck to arrive, they noticed a green pick-up truck turn onto the street then stop

and quickly back up and drive away. (12/18/14 RP 69, 70, 106) The officers found the behavior suspicious, so they followed the truck. (12/18/14 RP 71, 106) Deputy Lucas Baker saw the passenger door open and saw a person jump out and run away. (12/18/14 RP 108) Deputy Baker followed the man on foot and yelled for him to stop, but the man continued to run. (12/18/14 RP 109, 110) Deputy Baker eventually caught up to the man and, after striking him several times with a flashlight, handcuffed him and placed him under arrest. (12/18/14 RP 110, 111)

The man was later identified as Guy Sample III. (12/18/14 RP 112) Department of Licensing records showed that the registered owners of the motorcycle are Guy Sample and Robert Seacrest. (12/18/14 RP 68, 115) Officer Atkins also learned that Collins is Sample's wife. (12/18/14 RP 55)

Officer Atkins testified that he knows another man named Guy Sample, who is related to and also has a similar frame and build to the Guy Sample on trial. (12/18/14 RP 85-86) Officer Atkins testified that he made no effort to contact the other Guy Sample. (12/18/14 RP 85-86) Deputy Baker also testified that he made no effort to locate Robert Seacrest. (12/18/14 RP 115)

IV. ARGUMENT & AUTHORITIES

- A. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE PERSON ON TRIAL NAMED GUY SAMPLE WAS THE SAME INDIVIDUAL WHO ATTEMPTED TO ELUDE OFFICER ATKINS.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvenc, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). This includes the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the charged offenses. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State charged Sample with one count of attempting to elude a police vehicle under RCW 46.61.024(1), which states:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

Thus, the State was required to prove beyond a reasonable doubt that Sample was the individual driving the motorcycle when it failed to stop after being signaled to do so by Officer Atkins. The State failed to meet this burden.

The State's evidence showed a connection between Guy Sample and the motorcycle, but did not show that he was the driver at that time. The evidence showed that Guy Sample was one of two registered owners. A traffic ticket issued to Guy Sample was found in the jacket presumably worn by the driver. But the condition of the ticket indicated it was issued some time ago, and there was no evidence establishing that the ticket was issued to the same Guy Sample on trial, rather than to his relative who is also named Guy Sample. Sample was eventually arrested trying to leave the area where the motorcycle was located. But a co-owner naturally would be interested in retrieving his property, even if he had nothing to do with it being abandoned.

Thus, the State showed Sample's connection to the

motorcycle and potentially to the jacket. But the State failed to present sufficient evidence from which the jury could find beyond a reasonable doubt that Sample was the individual driving the motorcycle. The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Because the State failed to prove the essential element of identity, Sample's attempting to elude conviction must be reversed and dismissed.

B. THE TRIAL COURT ERRED WHEN IT IMPOSED A SENTENCE USING THE STATE'S CALCULATION OF SAMPLE'S OFFENDER SCORE AND STANDARD RANGE WITHOUT REQUIRING ANY PROOF OF THE EXISTENCE OR COMPARABILITY OF THE LISTED OFFENSE.

A defendant's offender score affects the sentencing range and is generally calculated by adding together the defendant's current offenses and prior convictions. RCW 9.94A.589(1)(a). In determining the proper offender score, the court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). The purpose of this limitation is

“to protect against the possibility that a defendant’s due process rights will be infringed upon by the sentencing judge’s reliance on false information.” State v. Herzog, 112 Wn.2d 419, 431-32, 771 P.2d 739 (1989); Wash. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”).

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. Ford, 137 Wn.2d at 482; State v. Lopez, 147 Wn.2d 515, 523, 55 P.3d 609 (2002). The preponderance of the evidence standard is “not overly difficult to meet,” and the State must at least introduce “evidence of some kind to support the alleged criminal history.” Ford, 137 Wn.2d at 480.

The burden lies with the State because it is “inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove.” In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988). That burden is relieved only if the defendant *affirmatively* acknowledges the alleged criminal history.

Ford, 137 Wn.2d at 482-83; State v. Mendoza, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); State v. Hunley, 175 Wn.2d 901, 917, 287 P.3d 584 (2012).

Furthermore, an out-of-state conviction may not be used to increase a defendant's offender score unless the State proves it is equivalent to a felony in Washington. State v. Weiland, 66 Wn. App. 29, 31-32, 831 P.2d 749 (1992). The State bears the burden of establishing the comparability of offenses, typically by proving that the out-of-state conviction exists and by providing the foreign statute to the court, then the sentencing court must conduct the comparison on the record. Ford, 137 Wn.2d at 479-482; State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005).

In this case, the State presented for filing a Stipulation on Prior Record and Offender Score listing 11 prior offenses, including three from the State of Oregon, and calculating Sample's offender score as nine-plus.² (CP 75-77) Sample's counsel signed only "as to form," and Sample refused to sign the stipulation. (CP 77) At the sentencing hearing, the State again asserted that Sample's offender score was nine-plus, but presented no documentation to

² Although Sample exercised his right to trial and was found guilty by a jury, the form incorrectly states that the stipulation is pursuant to a guilty plea. (CP 75)

support its summary of his criminal history. (03/30/15 RP 4)
Sample did not specifically object to the State's summary or
offender score calculation, but also did not affirmatively
acknowledge their accuracy. (03/30/15 RP 6)

The facts in this case are similar to those in State v. Hunley.
In Hunley, the State presented a written summary of its
understanding of the defendant's criminal history. The State did not
present any documentation of the alleged offenses. The defendant
"neither disputed nor affirmatively agreed with the prosecutor
summary." The trial court relied on the summary and on the failure
of the defendant to challenge the offender score or sentence at the
trial court. 175 Wn.2d at 905. On appeal, the Washington State
Supreme Court held that "to treat the defendant's failure to object to
such assertions or allegations as an acknowledgment of the
criminal history" and "to base a criminal defendant's sentence on
the prosecutor's bare assertions or allegations of prior convictions"
violates due process. 175 Wn.2d at 915.

As in Hunley, the State failed to present any documentation
supporting its summary of Sample's prior convictions, or any
documentation to support a conclusion that the Oregon offenses
are comparable to Washington felonies. Sample's mere failure to

object is not an acknowledgement, and did not relieve the State or the sentencing court of its obligations. Accordingly, Sample's sentence must be vacated and his case remanded for a full and proper sentencing hearing.³

V. CONCLUSION

The State failed to present proof beyond a reasonable doubt that Sample was the individual driving the motorcycle when it eluded Officer Atkins. Sample's attempting to elude conviction must be reversed. Furthermore, the trial court also erred when it failed to ensure that the State met its burden of establishing Sample's criminal history, and when it sentenced Sample on the basis of a criminal history and offender score that had no factual support. Sample's case must therefore also be remanded for resentencing.

DATED: September 8, 2015



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³ See Mendoza, 165 Wn.2d at 928-29; Lopez, 147 Wn.2d at 523; Ford, 137 Wn.2d at 482.

CERTIFICATE OF MAILING

I certify that on 09/08/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Guy M. Sample, III, DOC# 968898, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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