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April 16, 2012
Court of Appeals
Division III
State of Washington

No. 30197-4-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

LARRY ALLEN POWELL,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Gregory D. Sypolt

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

In violation of the Fourteenth Amendment and article I section 3 guarantee of due process of law, the State presented insufficient evidence to prove Mr. Powell committed qualifying offenses under the Persistent Offender Accountability Act.

Issue Pertaining to Assignment of Error

Principles of due process impose the burden to prove criminal history upon the State. Should this Court conclude that the State presented insufficient evidence to prove Mr. Powell's identity with regard to the alleged qualifying offenses from 2006 and 1975?

B. STATEMENT OF THE CASE

The defendant, Larry Allen Powell, walked out of a K-Mart Store in Spokane County, Washington without paying for about $36 worth of jewelry and a computer flash drive. RP 60, 69, 83–85, 109, 177–78, 180, 183, 192. Within a few minutes, three loss prevention officers had confronted Mr. Powell outside. RP 73, 112, 126, 130, 140. In the ensuing scuffle, a security officer was shoved one or two times. RP 77, 90, 114–15, 117, 141, 157–58. While a second officer attempted to detain him, a third officer wrestled a knife from the sheath on Mr. Powell's belt and threw it aside. RP 80–81, 118, 143–46. Mr. Powell was eventually

handcuffed, and police subsequently arrived. RP 82–83, 103, 119, 146, 176, 189.

The jury convicted Mr. Powell of first degree robbery and second degree assault as charged. CP 204, 207. Prior to sentencing, the state filed certified copies of prior Judgment and Sentence documents as alleged prior strikes in support of its recommendations of sentences of life without the possibility of parole on the two present convictions. RP 302; CP 242–287. Included in the attachments were (1) a 2006 Judgment and Sentence indicating that "Larry A. Powell" pled guilty to Second Degree Assault (CP 255–56), and (2) a 1975 Judgment and Sentence indicating that "Larry A. Powell" pled guilty to First Degree Assault (CP 244).

At the sentencing hearing on August 19, 2011, the State advised the trial court that "it appears Mr. Powell's a persistent offender and should be sentenced under the three strikes provision of the Sentencing Reform Act." RP 302. When asked for comments, defense counsel responded, "I have reviewed the predicate prior convictions at length prior to reviewing several times the applicable case law. They appear to qualify as prior convictions under the Persistent Offender statute. I told [the prosecutor] that as long as he provided certified copies of those Judgments and Sentences, which I had seen previously through my research, that I

would be stipulating that those do qualify. So I believe that's the appropriate sentence." RP 303–04. The court did not review the issue with Mr. Powell, and no written stipulation was filed. The State did not present further evidence to establish that Mr. Powell was the same person identified in the documents submitted by the State. The court concluded it was "really without any choice here but to follow the recommendation of the State," and imposed a life sentence on each count without possibility of parole. RP 306; CP 299–300. This appeal followed. CP 307–08.

C. ARGUMENT

The prosecution produced insufficient evidence to prove that Mr. Powell is a persistent offender.

A. Principles of due process impose the burden to prove criminal history on the State. It is the State's burden and obligation to prove criminal history and to assure that the record before the sentencing court supports the criminal history determination. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The burden is on 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." State v. Ford, 137 Wn.2d 742, 480, 973 P.2d 454 (1999) (quoting In re Personal Restraint of Williams, 111 Wn.2d 353, 357,

759 P.2d 436 (1988)). "This reflects fundamental principles of due process, which require that a sentencing court base its decision on information bearing 'come minimal indicium of reliability beyond mere allegation.'" Mendoza, 165 Wn.2d at 920 (emphasis in original, citation omitted).

B. The prosecution must present more than identity of names to establish a prior conviction when seeking a life sentence under the POAA. An offender has a constitutional right to remain silent pending sentencing, and the prosecution bears the burden of proving any prior convictions. In re Detention of Post, 145 Wn. App. 728, 758, 187 P.3d 803 (2008); Mendoza, 165 Wn.2d at 920; State v. Knippling, 166 Wn.2d 93, 206 P.3d 332 (2009). Absent an admission or acknowledgement, the prosecution may not simply rely on a prosecutor's summary of criminal history. State v. Hunley, 161 Wn. App. 919, 927, 253 P.3d 448 (2011); *see also* RCW 9.94A.530(2) ("In determining any sentence other than a sentence above the standard range, the trial 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 …").[1]

Generally, identity of names is insufficient to prove that a document relates to the person before the court. *See*, e.g., State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005). After the SRA was enacted, the Supreme Court created an exception to this general rule, holding that identity of names is sufficient to establish an offender's criminal history to determine the standard range. State v. Ammons, 105 Wn.2d 175, 190,713 P.2d 719 (1986). The Ammons rule required additional proof at sentencing (beyond mere identity of names), but only if the offender states under oath that s/he was not the person convicted.[2] Id. This common-law rule predated the POAA (which was enacted in 1993). The context in which the Ammons case was decided suggests that the balance struck by

[1] The statute also provides that "Acknowledgment includes … not objecting to criminal history presented at the time of sentencing;" however, this provision was found unconstitutional in Hunley, along with another provision declaring that a prosecutor's summary of criminal history shall be *prima facie* evidence of criminal history. Hunley at 927 (addressing provisions of RCW 9.94A.500(1) and .530(2)).

[2] According to the Court, "[t]hese requirements achieve the proper balance." Ammons, at 190.

the court was not meant to apply where a sentence of life without parole is at issue.

At the time Ammons was decided, career offenders could be sentenced as "habitual criminals" following a jury finding beyond a reasonable doubt that they qualified for such treatment. *See* State v. Manussier, 129 W.2d 652, 682, 921 P.2d 473 (1996) (outlining procedures under former RCW 9.92.080). The Ammons Court recognized that the relaxed procedures used for determining the presumptive standard range—including its own rule regarding identity of names—could not constitutionally be applied in habitual criminal proceedings: "[T]he SRA recognizes and relies upon the fundamental distinction between the more rigid procedural protections necessary in using a prior conviction to prove an element of a crime or of habitual criminal status on the one hand, and in using a prior conviction to help determine a presumptive standard sentence range on the other." Petition of Williams, 111 Wn.2d 353, 367, 759 P.2d 436 (1988).

There is no indication that the Ammons Court intended identity of names to be sufficient proof of persistent offender status under the Persistent Offender Accountability Act. Furthermore, prior convictions are not used in persistent offender sentencing proceedings "to help

determine a presumptive standard sentence range;" instead, they are used to eliminate judicial discretion, resulting in mandatory punishment more severe than any other punishment short of death. RCW 9.94A.570; *see* Graham v. Florida, ___ U.S. ___, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentences of life without parole "share some characteristics with death sentences that are shared by no other sentences").

Because of the parties' shared interest in an accurate determination of persistent offender status, the identity-of-names standard should not apply where the state seeks to incarcerate a person for life without the possibility of parole. Nor should an offender be required to state under oath that s/he is not the person named in a prior conviction. Instead, the state should be required to prove identity by independent evidence, such as by fingerprints or eyewitness testimony. *See*, e.g., Ammons at 190 (outlining acceptable means of proving identity).

C. Mr. Powell did not waive his constitutional right to have the prosecution prove that he had two prior "strike" offenses. Courts indulge every reasonable presumption against waiver of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of "an intentional relinquishment or abandonment of a known right or privilege."

Zerbst, 304 U.S. at 464. The "heavy burden" of proving a valid waiver of constitutional rights rests with the government. Matter of James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). Moreover, "[a]ny waiver of a right guaranteed by a state's constitutional should be narrowly construed in favor of preserving the right. Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

Here, Mr. Powell did not waive his constitutional right[3] to have the prosecution prove that he had two prior "strike" offenses. First, there is no indication in the record that he intentionally relinquished or abandoned a known right or privilege. Zerbst, 304 U.S. at 464. The brief colloquy between the court and defense counsel does not establish that counsel discussed the matter with Mr. Powell, or that Mr. Powell knew he had the right to demand the prosecution meet its burden of proof. His attorney's statement does not constitute an effective waiver. Id.

Second, even if Mr. Powell had endorsed his attorney's statement (that the prior convictions" appear" to qualify as predicate offenses), this statement did not excuse the prosecution from proving the alleged criminal history. The absence of a specific dispute is not an admission or an acknowledgement of criminal history, and does not relieve the prosecution

[3] Guaranteed by both the state and federal constitutions. *See* Mendoza, supra.

of its duty to prove facts necessary to a finding of criminal history. Indeed, this principle is at the heart of both RCW 9.94A.530(2) (as modified by Hunley) and the Supreme Court's decision in Ammons. Under these authorities, the prosecution must meet its burden to prove criminal history even if the defendant does not dispute the prosecutor's allegations; when the defendant *does* dispute the allegations, the prosecutor's burden increases. *See*, e.g. Ammons, 105 Wn.2d at 190; RCW 9.94A.530(2); Hunley, 161 Wn. App. at 927.

D. The prosecution failed to produce sufficient evidence to connect alleged prior convictions to Mr. Powell. In this case, the prosecution produced no evidence beyond unity of names to prove that the person named in the documents submitted to the court was the same Larry Powell who appeared in court. Even if all of the documents pertained to one person, no evidence—such as testimony regarding Mr. Powell's birth date, ID number, or fingerprints—was introduced establishing that the documents pertained to the same Larry Powell who was convicted by the jury in this case. Because the evidence was insufficient, Mr. Powell's life sentence must be vacated and the case remanded for sentencing within the standard range. In re Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005).

D. CONCLUSION

For the reasons stated, this court should reverse Mr. Powell's persistent offender sentences and remand with direction that he receive standard range sentences.

Respectfully submitted on April 16, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 16, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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