

FILED

MAY 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30197-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY A. POWELL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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Spokane, Washington 99260
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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. In violation of the Fourteenth Amendment and article I section 2 guarantee of due process of law, the State presented insufficient evidence to prove Mr. Powell committed qualifying offenses under the Persistent Offender Accountability Act.

II.

ISSUE PRESENTED

- A. Did the State provide sufficient evidence from which the sentencing judge could find the existence of two prior criminal offenses and link the defendant to those prior convictions?

III.

STATEMENT OF THE CASE

For the purposes of this appeal the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE STATE PROVIDED CONCLUSORY EVIDENCE LINKING THE DEFENDANT TO TWO PRIOR "STRIKE" OFFENSES.

The State provided evidence in multiple forms. The State proffered copies of the Judgment and Sentences of the two prior strike convictions. These documents contained a defendant's name that matched that of the defendant in this case.

"We hold that the identity of names is sufficient proof, which may be rebutted by the defendant's declaration under oath that he is not the same person named in the prior conviction." *State v. Ammons*, 105 Wn.2d 175, 190, 713 P.2d 719 (1986).

It has already been established that a trial judge makes the determination of criminal history. "...If the court is *satisfied by a preponderance* of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist...." RCW 9.94A.500(1).

The defendant's single main argument on appeal is that there was insufficient proof that the defendant before the sentencing court was the same individual for whom the State presented two prior crimes. The defendant's argument flies in the face of the facts. The State presented copies of the prior Judgments and Sentences, the defense counsel agreed that the State's criminal

history was correct. RP 303-04. When given his right to allocution, the defendant stated that he had nothing to say. RP 306.

The sentencing judge told the defendant: “And this is your sentencing. You’re entitled, certainly, to make any comments here in court that you want me to listen to and consider in imposing a sentence.” RP 305-06. The defendant said nothing.

Now, apparently discovering that he really did not commit the two prior crimes noted by the State, the defendant would have this court believe that there was insufficient proof of his criminal history.

As noted previously, it is the trial court that makes the determination, using a preponderance of the evidence standard. RCW 9.94A.500(1).

With defense counsel stipulating that the two crimes named by the State apply to the defendant, and the defendant not raising any question as to the previous crimes, either before, during or after the trial, it would take a very obtuse sentencing judge *not* to find the prior two crimes by a preponderance of the evidence standard.

The defendant extends his argument by claiming that there was no testimony regarding his birthdate, ID number, or fingerprints introduced. The defendant fails to mention the information under which he was tried in this case. The information lists his name, birthdate, description, etc. Yet, at no point did the defendant challenge the information. It is true that no fingerprint expert was

called by the State, but it must be noted that defense counsel had already stated to the prosecutor that if the prosecutor produced copies of the prior convictions, the defendant would agree to the admission of the prior crimes as correct.

It would be highly disingenuous for the defendant to put the State “off its guard” by stipulating to the prior convictions, only so as to later (on appeal) challenge the prior convictions *after* the State has been deceived into “skipping” calling a fingerprint expert. This sort of “sharp practice” should not be condoned and the defendant’s argument dismissed.

In passing, it is noted that the defendant attempts to claim and support his position of the insufficiency of names alone as showing that prior crimes belong to the current defendant. Brf. of App. 5. The defendant tells this court that commonality of names is not enough for the State to meet its burden. The defendant then attempts to support his claim by citation to *State v. Huber*, 129 Wn. App. 499, 119 P.3d 388 (2005). What the defendant fails to mention is the *Huber* court was dealing with identity of the defendant *at trial*, not identity as it relates to past criminal history. The defendant has no support for his claim that names alone are insufficient for proof of prior criminal history. On the other hand, there is caselaw showing that if a defendant does not object, then names alone can form the basis for a finding of the existence of prior criminal events. *State v. Ammons*, 105 Wn.2d 175, 190, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The court in *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002) cited to *State v. Ford*, stating: “The best evidence of a prior conviction is a certified copy of the judgment.” *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Such copies were supplied to the sentencing court by the State in this case. The defendant did not raise an objection to his prior history until it reached this court.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 22nd day of May, 2012.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

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DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 30197-4-III
v.)	
)	CERTIFICATE OF MAILING
LARRY A. POWELL,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on May 25, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Susan M. Gasch
gaschlaw@msn.com

and mailed a copy to:

Larry A. Powell
DOC #245691
1313 N 13th Ave
Walla Walla WA 99362

<u>5/25/2012</u>	<u>Spokane, WA</u>	<u><i>Kathleen Owens</i></u>
(Date)	(Place)	(Signature)