

**FILED**

JANUARY 25, 2012

Court of Appeals

Division III

State of Washington

30382-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BILLY D. DOYLE, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in imposing a sentence without any evidence of the defendant's criminal history.

B. ISSUE

1. The defendant told the court he believed his prior convictions were unconstitutional. The State did not provide the court with a criminal history or any supporting evidence. Did the court err in imposing an agreed sentence based on an offender score of 9?

C. STATEMENT OF THE CASE

The State charged Billy Dean Doyle with one count of third-degree assault. (CP 1) Mr. Doyle allegedly kicked a corrections officer in the course of being arrested. (CP 73) At the time of the incident, Mr. Doyle was highly intoxicated with a BAC of 0.274. (CP 73)

A year later, Mr. Doyle agreed to plead guilty to the charge in exchange for the State's recommendation of a mitigated sentence of 46 months. (CP 66) In his Statement of Plea of Guilty, Mr. Doyle acknowledged that he had an offender score of 9. (CP 65) The State did not provide a statement of Mr. Doyle's criminal history.

At the beginning of the plea hearing Mr. Doyle told the court he objected to the constitutionality of his prior felony convictions. (RP 6-7) He explained that if any of his prior convictions were unconstitutional that would change his decision to plead guilty. (RP 6) The court acknowledged Mr. Doyle's challenge to his prior convictions and confirmed that he knew he had an offender score of 9. (RP 22)

The court did not request, and the State did not provide, a statement of Mr. Doyle's criminal history. Based on the acknowledged offender score and the parties' plea agreement, the court imposed a 46-month sentence. (RP 31) Mr. Doyle appealed. (CP 83)

#### D. ARGUMENT

1. WHEN A DEFENDANT CHALLENGES THE CONSTITUTIONALITY OF PRIOR CONVICTIONS THE STATE MUST PROVIDE SOME EVIDENCE OF CRIMINAL HISTORY.

A prior conviction that is constitutionally invalid on its face may not be considered in a sentencing proceeding. *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 (1986).

When a defendant objects to the criminal history upon which the State relies in calculating his offender score, the court must grant an

evidentiary hearing before relying on the challenged history in imposing sentence:

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 proven in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

RCWA 9.94A.530.

Although Mr. Doyle admitted that his offender score was 9 in his plea statement, at the time of sentencing he expressly objected to his criminal history on constitutional grounds. The court nevertheless failed to require the State to present any evidence whatsoever in support of the alleged criminal history.

The State must prove prior convictions by the preponderance of the evidence. *Ammons*, 105 Wn.2d at 185. The SRA expressly places the burden on the State to introduce evidence of some kind to support the alleged criminal history, as 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 472, 480, 973 P.2d 452 (1999) (quoting *In re Pers. Restraint of*

*Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)); *see also State v. Hunley*, 161 Wn. App. 919, 927-928, 253 P.3d 448, *review granted*, 172 Wn.2d 1014, 262 P.3d 63 (2011).

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA *but would result in an unconstitutional shifting of the burden of proof to the defendant.*

*Id.*, quoting *Ford*, 137 Wn.2d at 482 (emphasis added). The best evidence of a prior conviction is a certified copy of the judgment. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994). The State failed to present any evidence to support the claimed criminal history.

A facially invalid judgment is “a conviction which without further elaboration evidences infirmities of a constitutional magnitude.” *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 718, 10 P.3d 380 (2000). Had the State provided the court with certified copies of the judgments on which it relied, the court could have readily determined their facial validity without further evidence.

When the State fails to carry its burden of proof after a specific objection, it is not provided a further opportunity to do so on remand. *State v. Wilson*, 113 Wn. App. 122, 139, 52 P.3d 545 (2002). The State may argue that Mr. Doyle’s objection to his history was insufficiently

specific; when the only information provided to the defendant and the court is a bare assertion that the defendant has an offender score of 9, no more specific objection to criminal history is possible.

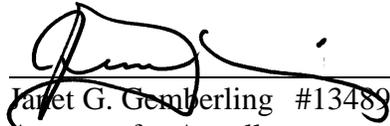
The court erred in imposing a sentence based on an offender score for which no evidence of the defendant's criminal history was provided.

E. CONCLUSION

Mr. Doyle's 46-month sentence should be reversed, and this matter remanded for imposition of a sentence based on an offender score of zero.

Dated this 25th day of January, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     No.   30382-9-III  
  )  
                          vs.                    )     CERTIFICATE  
  )     OF MAILING  
BILLY D. DOYLE,                 )  
  )  
                                  Appellant.    )  
\_\_\_\_\_

I certify under penalty of perjury under the laws of the State of Washington that on January 25, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes  
kevin.eilmes@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on January 25, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Billy Dean Doyle  
#933996  
Coyote Ridge Correction Center  
PO Box 769  
Connell, WA 99362

Signed at Spokane, Washington on January 25, 2012.

  
\_\_\_\_\_  
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