

NO. 30658-5-III

---

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

RESPONDENT,

v.

IGNACIO COBOS,

APPELLANT.

---

RESPONDENT'S BRIEF

---

D. ANGUS LEE  
PROSECUTING ATTORNEY

By: Carole L. Highland, WSBA #20504  
Deputy Prosecuting Attorney  
Attorney for Respondent

PO BOX 37  
EPHRATA WA 98823  
(509)754-2011

TABLE OF CONTENTS

Page No.

I. IDENTITY OF RESPONDENT.....1

II. RELIEF REQUESTED.....1

III. ISSUE.....1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT.....4

1. The State was entitled to rely upon the ratification and adoption by Defense Counsel of Appellant's calculated offender score of nine .....4

VI. CONCLUSION.....10

TABLES OF AUTHORITIES

State Cases

	Page No.
<i>State v. Bergstrom</i> , 162 Wn.2d 87, 169 P.3d 816 (2007).....	5, 7, 8
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	10
<i>State v. Lopez</i> , 147 Wn.2d 515, 55 P.3d 609 (2002).....	9, 10
<i>State v. Nitsch</i> , 100 Wn.App. 512, 997 P.2d 1000, <i>review denied</i> 141 Wn. 2d 1030 (2000).....	10
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	8

Statutes

RCW 9.94A.010(1)(2)(3).....	9
-----------------------------	---

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asks that if this matter is remanded to the Superior Court to affirm Appellant's offender score and range, that the Appellant's motion to limit the record on remand be denied.

III. ISSUE

Should the State, upon remand, be precluded from presenting certified copies of Appellant's prior Judgments and Sentences, when at sentencing Appellant's counsel affirmatively ratified Appellant's offender score, and it was only at the continued sentencing hearing, when the Appellant appeared *pro se*, that the State was made aware of Appellant's challenge to his history and score?

IV. STATEMENT OF THE CASE

The Appellant, Ignacio Cobos, was found guilty of Delivery of Methamphetamine, Possession of Methamphetamine, and

Voyeurism on December 16, 2011. CP 207, 210, 211. Sentencing was originally scheduled for January 18, 2012, continued to January 31, 2012, and then again continued to February 7, 2012. On February 7, 2012, Appellant's counsel, Quinn Rosborough, affirmatively ratified Mr. Cobos' offender score as nine. CP 371-374.

As the State noted in its "Response to Appellant's Motion For Accelerated Review" filed with this Court on May 18, 2012, Appellant has failed to provide a transcript of the February 7, 2012 sentencing proceeding. The State is relying upon the clerk's minutes for its representations of what occurred on the February 7, 2012 sentencing hearing prior to Appellant being allowed to proceed *pro se*. CP 371-374.<sup>1</sup>

At the hearing of February 7, 2012, subsequent to counsel's affirmative ratification of Appellant's history and score, the Court entertained Mr. Cobos' motion to appear *pro se* even though the Appellant's motion had not been properly noted. Mr. Cobos was allowed to dispense with his attorney, refused standby counsel, and requested a one week continuance of his sentencing. *Id.*

---

<sup>1</sup> Appellant's brief refers only to the continued sentencing hearing of February 14, 2012, and omits *any* reference to the initial sentencing hearing of February 7, 2012. This omission leads to a misrepresentation of the procedural facts upon which Appellant's argument is based.

On February 14, 2012, Mr. Cobos, for the first time, informed both the Court and the State that he disagreed with his offender history and/or had no clear recollection of his prior convictions. RP 02/14/12 5, 6-10. The Court was disinclined to continue the hearing, and found that Appellant's objection was untimely under CrR 7.1(sic). RP 02/14/12 11, 13. The State, indicating that it wanted Mr. Cobos' sentencing to be done correctly, requested a two week continuance to obtain certified copies of Mr. Cobos' prior Judgments and Sentences. RP 02/14/12 14, 15. The Court offered to continue Appellant's sentencing two weeks, and the State amended its request to a one week continuance which the Court allowed. RP 02/14/12 17. Mr. Cobos objected to the State's continuance request. RP 02/14/12 18, 20.

It was the recollection of both the Court and the State that Appellant's prior counsel, Ms. Rosborough, had agreed with the representation of Appellant's history and that there had been no representations to the contrary. RP 02/14/12 20, 21. The Court then went on to inform Mr. Cobos that since his prior attorney had agreed to his offender score as nine, that if the parties were to proceed at the current time, the Court would follow that prior agreement and representation. RP 02/14/12 23.

Mr. Cobos renewed his objection, and told the Court that it could continue the proceedings if it so chose. RP 02/14/12 24. The Court responded that both the Court and the State had relied on counsel's representation and asked Mr. Cobos specifically if he wished to proceed on the record before the Court or if he wanted to continue the sentencing proceeding. RP 02/14/12 25.

Mr. Cobos objected to both his purported offender score, as well as any continuance of the proceedings, and the Court proceeded to sentencing. RP 02/14/12 27.

#### V. ARGUMENT

THE STATE WAS ENTITLED TO RELY UPON THE RATIFICATION AND ADOPTION BY DEFENSE COUNSEL OF APPELLANT'S CALCULATED OFFENDER SCORE OF NINE.

Where the sentencing court's offender score determination is challenged on appeal for insufficient evidence of prior convictions, the case law provides three approaches to analyze the issue, assuming the defendant has not pleaded guilty.

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to "specifically object: before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

Second, if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant's prior convictions, then the State

may not present new evidence at resentencing. After the defense specifically objects, putting the sentencing court on notice that the State must present evidence, the State is held to the initial record on remand.

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed. *State v. Bergstrom*, 162 Wn.2d 87, 169 P.3d 816 (2007).

On February 7, 2012, Defense Counsel for Appellant affirmatively ratified the Appellant's offender score as a nine. There is no indication from the record that there was any conflict or controversy with Mr. Cobos' stated offender score at that time.

It was a week later when Mr. Cobos appeared *pro se* that Appellant challenged his offender score for the first time. The Court at that time told Mr. Cobos that if the parties were to proceed at that time (February 14, 2012), that the Court would rely upon the prior representations of Mr. Cobos' counsel that his offender score was a nine, or if he so chose, the Court would be willing to continue sentencing for a week (actually eight days due to docket scheduling) to give the State sufficient time to obtain certified copies of Mr. Cobos' Judgments and Sentences. Mr. Cobos, although having failed to provide sufficient notice to either the Court or the State, objected to both his offender score and any

continuance of his sentencing. The Court elected to proceed on prior counsel's agreement that Appellant scored as a nine.

The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. The Court noted on February 14, 2012, that the Pre-Sentence Investigation compiled by the Department of Corrections did not include a felony that the State was alleging in its Judgment and Sentence. RP 02/14/12 12, 15, 21. However it was the recollection of both the State and the Court that there had been no controversy or conflict about the Benton County conviction and that counsel had specifically concurred with Appellant's history as reflected in the Judgment and Sentence. RP 02/14/12 21,22. This situation differs from an allegation that counsel "ratified" Appellant's offender score by merely failing to object.

Once Mr. Cobos put the State on notice of his objection, the Court allowed him, at the State's request, to require that the State prove his criminal history. However, Mr. Cobos objected to any continuance to allow the State to provide certified copies of his prior Judgments and Sentences. Appellant was notified by the Court, that if the matter proceeded on February 14, 2012, the Court would rely on Appellant's counsel's representations made on February 7,

2012. The State would argue that the timing of Appellant's argument did not sufficiently notify the State of the need to present evidence regarding his prior convictions because at the time Appellant raised the issue, Defense Counsel had already affirmatively acknowledged the prior convictions and Appellant's offender score at the previous February 7, 2012 sentencing hearing.

It is also unclear whether Appellant's *pro se* argument would supersede Defense Counsel's prior acknowledgment. The State would argue that it was reasonable to rely on counsel's affirmative acquiescence, and that once Appellant had untimely challenged his history and score, Mr. Cobos had to choose between his former counsel's ratification and representation, or alternatively agree to a brief continuance to allow the State to present evidence. That he would refuse to choose and would then be allowed to request a remand without the State being allowed to prove his prior convictions would be both unconscionable and inequitable. The State was given no notice of appellant's challenge nor was the State given any time to respond. This case is very similar to *Bergstrom* in which the timing of Bergstrom's *pro se* argument did

not sufficiently notify the State of the need to present evidence of Mr. Bergstrom's prior convictions. *Bergstrom* at 96.

Additionally, as was also true in *Bergstrom*, Mr. Cobos fails to show that he received ineffective assistance of counsel or that his lawyer was wrong in agreeing to his history and offender score. He simply avoids referencing the representation and acceptance by his attorney of his offender score by omitting *any record* of the February 7, 2012 hearing; claiming that his offender score was wrong, and asking for remand with a lower offender score. A defendant who challenges the calculation of his offender score on appeal has an obligation to show that error has occurred. *State v. Ross*, 152 Wn.2d 220, 231-232, 95 P.3d 1225 (2004).

It is arguable whether or not Mr. Cobos is even entitled to a remand for resentencing, but if the Court does allow it, equity would require that the State be allowed to present evidence so that the resentencing court can make an informed decision. The original sentencing court and the prosecutor relied on Defense Counsel's acknowledgment that Mr. Cobos' offender score was nine. Under established law, the State did not have a burden to prove the offender score where it was acknowledged, and the State should not be penalized for relying on that law.

The first stated purpose of the Sentencing Reform Act is to “[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender’s criminal history.” RCW 9.94A.010(1). The second and third stated purposes focus on providing just punishment which is *commensurate* with that imposed on others committing similar offenses. RCW 9.94A.010(2), (3). These purposes can be accomplished only if the court is provided accurate information about a defendant’s criminal history.

Whether the Court allows the State to prove prior convictions at a resentencing hearing depends on a number of factors. If the State failed to prove a prior conviction where the defendant, through his lawyer contested its existence, that conviction may not be proved at a subsequent resentencing. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). (State did not supply certified copy of prior conviction for most serious offense when defense counsel objected). *Lopez* is distinguishable because in this case, the State alleged Appellant’s criminal history in the judgment and sentence, and Appellant’s offender score of nine was affirmatively agreed to by his counsel at the time.

If the defendant fails to object to the calculation of his criminal history, the State may prove that history on remand. *State v. Ford*, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999). Moreover, if a defendant affirmatively agreed to his offender score, he may not challenge it at all on appeal. *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030 (2000).

In light of the presumption of competence of counsel and the State's reasonable reliance on counsel's ratification, this case is more similar to *Ford* and *Nitsch* than it is to *Lopez*. Mr. Cobos' objection came after his counsel's concession of his offender score at the sentencing hearing of February 7, 2012. His belated challenge at the hearing of February 14, 2012 gave no reason for his dispute with the agreed upon offender score, nor did he agree to a continuance to allow the State to provide proof as the State requested. He gave neither sufficient notice of his motion nor sufficient time for the State to respond.

## VI. CONCLUSION

For the forgoing reasons, the State would respectfully ask that if this matter is remanded, that the State be allowed to present copies of Appellant's certified Judgments and Sentences to the

sentencing court. To do so would serve to confirm Appellant's offender score as a nine, and provide assurance as to the sentencing court's reliance on that score in having made its sentencing decision.

DATED this 2<sup>nd</sup> day of May, 2013.

Respectfully submitted:

D. Angus Lee  
Grant County Prosecuting Attorney

Carole L. Highland  
Carole L. Highland, WSBA #20504  
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

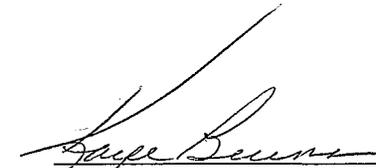
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	No. 30658-5-III
	)	
v.	)	
	)	
IGNACIO COBOS,	)	
	)	DECLARATION OF MAILING
Appellant.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant Ignacio Cobos containing a copy of the Respondent's Brief in the above-entitled matter.

Mr. Ignacio Cobos - #920217  
Coyote Ridge Correction Center  
PO Box 769  
Connell WA 99326

Dated: May 2, 2013.

  
\_\_\_\_\_  
Kaye Burns

Declaration of Mailing.