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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31223-2-III

STATE OF WASHINGTON, Respondent,

v.

JAIME TORRES, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Jaime Torres's sentence exceeded the standard range because the prosecutor did not present sufficient evidence of his prior convictions to establish the offender score of 1.5 used by the trial court. His sentence should be vacated and the case remanded for resentencing.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in sentencing Torres based on an offender score of 1.5 when the State did not present evidence of his prior convictions and he did not stipulate to them.

ASSIGNMENT OF ERROR 2: The trial court erred in imposing a sentence that exceeded the standard range based on the criminal history proven by the State.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the State meet its burden to establish Torres had an offender score of 1.5? NO.

ISSUE 2: Does the sentence imposed by the trial court exceed the maximum sentence that can be imposed based the evidence of criminal history before the court? YES.

IV. STATEMENT OF THE CASE

The State charged Torres with one count of second degree robbery with a deadly weapon allegation. CP 5. The jury convicted Torres of robbery but answered “no” to the deadly weapon allegation. CP 58-59. The trial court sentenced Torres to ten months’ total confinement based on an offender score of 1.5. CP 63. However, Torres did not stipulate to any criminal history and no proof of conviction was entered into the record; the only evidence of the score is the prosecutor’s bare statement on the face of the judgment and sentence. CP 61; RP 4/6/10 at 123-29. Torres appeals. CP 70.

With a score of 1.5, Torres faced a standard range sentence of 6-12 months and was sentenced to 10 months. CP 61-63. Had he received a sentence based on an offender score of zero, the range would have been 3-9 months. Consequently, the sentence imposed by the trial court exceeded the standard range based on the evidence presented by the prosecuting attorney, and was therefore unlawful. The judgment and sentence should be vacated and the case remanded for resentencing.

V. ARGUMENT

Errors in sentencing may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). On appeal, the appellate court reviews the offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 819 (2007).

The prosecutor bears the burden of proving the defendant's prior convictions by a preponderance of the evidence. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). A defendant has no obligation to produce information about his criminal history. *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); *State v. Ammons*, 105 Wn.2d 175, 185, 713 P.2d 719 (1986). "The State must introduce evidence of some kind to support the alleged criminal history." *Ford*, 137 Wn.2d at 480. Furthermore, the facts relied upon by the trial court must have some basis in the record beyond mere allegation. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *Ford*, 137 Wn.2d at 482 (citing *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). The sentencing 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).

In the present case, Torres did not plead guilty and did not acknowledge any criminal history. The basis for the offender score reflected in the record consists of the bare assertions of the prosecuting attorney in the judgment and sentence and at the time of sentencing. CP 61; RP 4/6/10 at 123-29. No reliable, competent evidence in support of the State's calculated score was presented to the sentencing court.

In *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012), the Washington Supreme Court held that provisions of the Sentencing Reform Act were unconstitutional to the extent they permitted a sentencing court to make a finding as to a defendant's criminal history based solely on a prosecutor's summary statement and the defendant's failure to object. In *Hunley*, the defendant was convicted by a jury and the State presented a written summary of his alleged history without supporting documentation. *Id.* at 905. The defendant neither disputed nor affirmatively agreed with the prosecutor's summary. *Id.* On appeal, the Court of Appeals and the Supreme Court held that calculating Hunley's offender score based solely on his failure to object to the prosecutor's statement of his alleged criminal history unconstitutionally relieved the State of its burden to prove the defendant's history by a preponderance of the evidence. *Id.* at 908.

The present case is factually indistinguishable from *Hunley*. Torres neither acknowledged nor disputed the prosecutor's statement of criminal history. As in *Hunley*, the prosecutor presented no evidence of the alleged convictions beyond mere assertion. Because the State failed to present competent evidence supporting the alleged offender score of 1.5, the trial court erred in finding that Torres's score *was* 1.5 and in sentencing him according to that score.

Moreover, the error was not harmless. Robbery in the second degree is a seriousness level IV offense. RCW 9.94A.515. With an offender score of 1, the standard range is 6-12 months' incarceration; however, an offender score of zero carries a range of 3-9 months' imprisonment. RCW 9.94A.510. Torres was sentenced to 10 months' imprisonment. CP 63. His sentence accordingly exceeds the maximum sentence that would be permitted based on the record presented by the State.

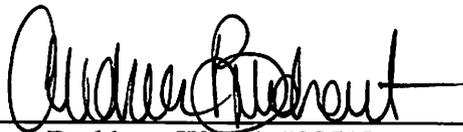
However, because Torres did not object to the offender score at the time of sentencing, the appropriate remedy is to remand the case for resentencing, at which time the State may present competent evidence of Torres's criminal history for consideration. *State v. Hunley*, 161 Wn. App. 919, 929-30, 253 P.3d 448 (citing *Mendoza*, 165 Wn.2d at 930).

VI. CONCLUSION

The State's failure to present evidence supporting its allegation of Torres's criminal history renders his offender score erroneous. The sentence actually imposed by the trial court exceeds the high end of the standard range based on the convictions actually proved, admitted or acknowledged. Consequently, the sentence is erroneous and the case should be remanded for resentencing.

RESPECTFULLY SUBMITTED this 25th day of March, 2013.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 25th day of March, 2013 in Walla Walla, Washington.



Andrea Burkhart