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AUG 23, 2013

Court of Appeals
Division III
State of Washington

No. 31485-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ALFREDO BRICE INOCENCIO,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Michael G. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defense motion to strike the 2005 theft convictions from the offender score.

2. The trial court erred in including the 2005 theft convictions in its calculation of the offender score.

Issue Pertaining to Assignments of Error

Whether a trial court is allowed to include prior convictions that originated in juvenile court in its calculation of the offender score where no declination hearing was held, the juvenile was not fully informed of the rights being waived and the written finding that transfer to adult court was in the best interest of the juvenile or the public is unsupported in the record.

B. STATEMENT OF THE CASE

The case comes before this court on Appellant Alfredo Brice Inocencio's appeal upon resentencing.

Background. Mr. Inocencio appealed his 2009 Yakima County convictions of two counts of first degree assault. He was sentenced to 462 months. CP 2–3. This court affirmed his judgment and sentence on appeal. *See State v. Inocencio*, Commissioner's Ruling no. 28691-6-III (Wash. Ct. App. 2011) at CP 10–24.

Mr. Inocencio thereafter sought relief from personal restraint, in part alleging the trial court incorrectly computed his offender score on both counts and failed to exercise its discretion to impose concurrent sentences under RCW 9.94A.589(1)(b). The State conceded that rather than the offender score used in the judgment and sentence of 7 for each offense, the offender score for count one should be 4 (based upon prior criminal history) and the offender score for count two should be 0, pursuant to RCW 9.94A.589(1)(b). This court remanded the matter to the trial court for resentencing (with an opportunity to exercise its discretion under Mulholland¹ to depart from RCW 9.94A.589(1)(b) if it chooses) and correction of a clerical mistake, and dismissed the petition. *See In the Matter of the Personal Restraint of Inocencio*, Agreed Order Transferring Personal Restraint Petition to Superior Court for Resentencing and Dismissing Petition, no. 30908-8-III (Wash. Ct. App. 2012) at CP 26–31.

Resentencing from which this appeal has been taken. For purposes of resentencing, the prosecutor calculated Mr. Inocencio's offender score to be 4 based upon the defendant's adult convictions in 2005 for first and second degree theft. CP 34.

¹ In re Personal Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007).

At the time of the 2005 convictions, the defendant was 16 years of age. The initial charge of first degree robbery triggered an automatic decline from juvenile to adult court pursuant to RCW 13.04.030(1)(e)(v)(C). He was also charged with unlawful possession of a firearm and possession of a stolen firearm. As part of a plea agreement, the charges were subsequently reduced to first and second degree theft. CP 34, 41. Mr. Inocencio signed a written stipulation waiving his right to a declination hearing in juvenile court regarding the reduced charges. CP 42–43.

For purposes of resentencing, defense counsel motioned to strike the 2005 convictions from the offender score on the basis Mr. Inocencio had not been properly declined by the juvenile court prior to the entry of the convictions in adult court. CP 33-39; RP 1–7. Counsel provided the court with a transcript of Mr. Inocencio’s 2005 adult court guilty plea hearing² (CP 47–69), and copies of the Findings of Fact and Conclusions of Law on Agreed Declination of Juvenile Court Jurisdiction (CP 41–43) and the Order on Agreed Declination of Juvenile Court Jurisdiction (CP 45).

² Yakima Co. Cause No. 05-1-01347-3, August 15, 2005. CP 46.

At the 2005 adult court hearing, the court elicited two facts during colloquy with defense counsel and Mr. Inonencio: that as part of his plea agreement Mr. Inocencio had agreed to forego his right to have his case transferred back to juvenile court and that he understood if he signed the waiver declining juvenile jurisdiction, he would be out of the juvenile system forever. CP 48–50.

In Finding of Fact III, the 2005 court found that:

Inocencio knowingly, intelligently and voluntarily waives his right to a declination hearing in the Juvenile Division under RCW 13.40.110(1). Inocencio understands that entry of this order will subject him to Adult Division jurisdiction for any and all subsequent criminal offenses, because he will no longer meet the definition of “juvenile” under RCW Title 13 as interpreted by State v. Oreiro, 73 Wn. App. 868 (1994).

CP 42.

In Finding of Fact V, the 2005 court continued:

In light of the facts, reports and opinions submitted, the best interests of Inocencio and the community would be served by declination of Juvenile Division jurisdiction over the amended charges of First Degree Theft and Second Degree Theft (and any and all subsequent charges) pursuant to [former] RCW 13.40.110(2) and the criteria set forth in Kent v. United States, 383 U.S. 541 (1966) and State v. Holland, 98 Wn.2d 507 (1983).

CP 42–43 (alteration added).

The resentencing court determined the 2005 adult court met the standards for finding a valid waiver of juvenile court jurisdiction pursuant

to RCW 13.40.110(1) and State v. Saens³, and denied the motion to strike the 2005 convictions from the offender score. RP 7–11. Using the State’s offender score of 4, the court resentenced Mr. Inocencio on the two assault convictions to a total term of confinement of 306 months. CP 90.

This appeal followed. CP 96.

C. ARGUMENT

The transfer of Mr. Inocencio’s 2005 amended charges of first and second degree theft to adult court was defective, and his 2005 convictions in adult court cannot be included in the calculation of his current offender score.

The inclusion of a prior conviction in an offender score requires one to be an “offender”. The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, requires the sentencing court to calculate a defendant's offender score by the sum of points accrued under RCW 9.94A.525. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The State is required to prove the defendant's criminal history to the sentencing judge by a preponderance of the evidence. RCWA 9.94A.500(1); State v. Ford, 137 Wn.2d 472, 479–81, 973 P.2d 452, 456 (1999); State v. Ammons, 105 Wn.2d 175, 185–86, 713 P.2d 719, 725–26 (1986), 718

³ 175 Wn.2d 167, 283 P.3d 1094 (2012).

P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

A sentence based on an incorrect offender score calculation is a sentence in excess of that authorized by statute. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Although the prosecution may agree to sentencing recommendations, the sentencing court bears the ultimate responsibility to determine the correct offender score and sentencing range. RCW 9.94A.460; Ross, 152 Wn.2d at 229.

For purposes of the SRA, an “offender” is defined as:

“Offender” means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.

RCW 9.94A.030(34). This means a juvenile can be an offender only if he or she “committed a felony” and the “case is under [adult] jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110.” Id. In this case, the transfer to adult court was defective and the 2005 convictions cannot be counted in the offender score.

In the absence of a decline hearing, transfer to adult court requires a valid waiver and a finding supported in the record that declination is in the best interests. Here, in 2005 Mr. Incencio had been charged with first degree robbery when he was a juvenile, a charge automatically filed in adult court. RCW 13.04.030(1)(e)(v)(C). The information was amended down to charge Mr. Inocencio with lesser charges of second and third degree theft, which have original jurisdiction in the juvenile court. RCW 13.04.030(1). Under similar facts, the Supreme Court held that since the amended charges conferred exclusive jurisdiction in the juvenile court, a declination hearing was required in order to transfer the case back to superior court. State v. Knippling 166 Wn.2d 93, 97, 206 P.3d 332 (2009).

In Knippling, the State relied upon a juvenile's prior conviction in adult court in seeking a Persistent Offender sentence. The Supreme Court held that the prior conviction could not be a strike under the POAA⁴ because, where the juvenile court failed to follow the statutory transfer procedure or show that there was a valid waiver of the right to that declination proceeding, the State could not show the defendant was

⁴ Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981, chapter 9.94A RCW.

convicted as an “offender” in adult court as required by [RCW 9.94A.030(34)]. Id. at 101–02 (alteration added).

In the recent opinion in State v. Saenz, 175 Wn.2d 167, 283 P.3d 1094 (2012), the Supreme Court identified two specific prerequisites for a valid transfer of juvenile court jurisdiction to the adult court when the juvenile has signed a written waiver of the statutory decline hearing contemplated by RCW 13.40.110. First, the waiver must be made after the juvenile has been fully informed of the rights being waived. Second, prior to any transfer to adult court, the juvenile court must enter written findings of the issue of whether the transfer is justified:

... [A] juvenile's waiver of juvenile court jurisdiction and a decline hearing must be an “express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.” RCW 13.40.140(9). Second, after a decline hearing but before transferring a case to adult court, juvenile courts must enter findings in the record, including a finding that transfer to adult court is in the best interest of the juvenile or the public. Former RCW 13.40.110(2), (3).⁵ Only then can the juvenile court properly transfer the case to adult court. Id.

Saenz, 175 Wn.2d at 175 (2012).

Thus, in this case the State must show that the statutory prerequisites to transfer were met before the 2005 convictions can be used in calculation of an offender score. Since there was no decline hearing, the

State must show the hearing was properly waived *and* the juvenile court entered written findings that transfer of the case was in either Mr. Inocencio's or the public's best interest. The written findings must be supported by relevant facts and opinions produced at the hearing. RCW 13.40.110(3) and (4).

Inadequate record of Mr. Inocencio's waiver. A waiver of the increased protections of the juvenile justice system must be an “express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived.” RCW 13.40.140(9). This is required because “moving a case from juvenile court to adult court is ‘a “critically important” action determining vitally important statutory rights of the juvenile.’ ” Saenz, 175 Wn.2d at 174 (citation omitted).

The Saenz court enumerated some of the rights and protections accorded to juveniles: “[T]he Juvenile Justice Act of 1977, chapter 13.40 RCW ... preserved the fundamental difference between juvenile courts and adult courts—unlike wholly punitive adult courts, juvenile courts remained rehabilitative. This fundamental difference is manifest in the additional protections juveniles receive in juvenile court but not in adult

⁵ These requirements are now codified under RCW 13.40.110(3) and (4).

court. ... [J]uvenile offenses do not count as strikes under the POAA. There are numerous other protections as well. For example, juvenile courts have far more discretion to order alternative sentences, such as diversion agreements in lieu of prosecution, community supervision, and individualized programs involving employment, education, or treatment. In juvenile court, convicted offenders cannot be confined past the age of 21. Juvenile offenses are not generally considered crimes, so a juvenile cannot be convicted of a felony. A juvenile cannot be sent to adult prison, or to any adult jail or holding facility. There are limitations on the use of juvenile records and the length of time they will be made public. Juvenile courts can consider mitigating factors at disposition hearings, and can impose sentences outside standard sentencing ranges to prevent “manifest injustice.” Saenz, 175 Wn.2d at 173 (citations omitted).

As a 16-year-old juvenile offender in 2005, Mr. Inocencio was guaranteed these increased protections because juvenile courts have automatic, statutorily granted jurisdiction over any person under 18 who is charged with a crime (with some exceptions). Saenz, 175 Wn.2d at 173–74; RCW 13.04.030. By waiving juvenile court jurisdiction Mr. Inocencio also waived the increased protections of the juvenile justice system, “exiting a system designed to rehabilitate and entering a system designed

to punish. This exit is a one-way street with no return: by waiving juvenile jurisdiction once, the juvenile enters the adult system permanently, forfeiting the right to be tried in juvenile court for all future offenses.”
Saenz, 175 Wn.2d at 174; RCW 13.40.020(14).

Here, the limited colloquy conducted at the 2005 adult court hearing fails to establish that Mr. Inocencio was “fully informed” of those rights and protections, as well as the implications of waiving the decline hearing or juvenile court jurisdiction.

MR. THERRIEN [defense counsel]: Your Honor, before we start just so we can have this on the record, the entry of these pleas of guilty, at least to my client, Alfredo is-- he has to stipulate to waive jurisdiction of Juvenile Court. He is 16 years old. He'll be 17 next April. I've gone over a stipulation agreement with him explaining to him the consequences of pleading guilty to these charges, this amended information, and we would waive a reading of this amended information and explain to him by entering a plea of guilty and waiving jurisdiction in juvenile court he is in fact effectively waiving jurisdiction for any subsequent charges that come up before his 18th birthday, and even though I tried to posture the agreement where that would not be the case, I've been informed and verified, and I've verified to Ms. Barnes, who, I think, is one of the experts in these types of field [sic] that in fact if he pleads guilty[,] under *United States v. Kent* (phonetic), the *Kent* criteria[,] that in fact [he] has waived jurisdiction for purposes of any subsequent charges. Alfredo understands that-- do you understand that, Alfredo?

MR. INOCENCIO: Yes.

MR. THERRIEN: And we talked about it and I told you I was going to tell the Court, you know, that we talked about this stipulation and your waiver of jurisdiction, right?

MR. INOCENCIO: Yes.

MR. THERRIEN: Okay. You understand that?

THE COURT: Well, first of all, I want to thank you for bringing this up because it occurred to me as I was getting prepared for today that this was an issue that was going to have to be put on the record. I think another way of saying what you're saying is because the charges are being reduced, if these charges were just filed initially, he would have to be in juvenile court—

MR. THERRIEN: Right.

MR. KNITTLE [prosecutor]: Yes, Your Honor.

THE COURT: --number one. By saying that he doesn't want to go back to juvenile court and he is submitting himself to the jurisdiction of the adult court, he's also saying that he's submitting himself forever to the jurisdiction of the adult court. So if for some reason before he turns 18, he winds up getting picked up for shoplifting or forgery or anything, he wouldn't go to juvenile court where he normally would go, he'd have to go to adult court. This is a very important concept and what your attorney said is very, very carefully described so that you're properly before the Court. Alfredo, I had you in Court before, do you remember me?

MR. INOCENCIO: Yes.

THE COURT: Okay. And your birthday is what now?

MR. INOCENCIO: 4/5/89.

THE COURT: 4/5/89, which means that you just turned 16 this past April, correct?

MR. INOCENCIO: Yes.

THE COURT: All right. So what we're saying is because of this agreement that your attorney has negotiated with the prosecutor, you are agreeing that you should stay here in adult court rather than go back to juvenile court, correct?

MR. INOCENCIO: Yes.

THE COURT: Okay. Secondly, by submitting yourself to the adult court now, this is forever. You'll be part of the jurisdiction of the adult court under the authority of the adult court forever. Do you understand that?

MR. INOCENCIO: Yes.

THE COURT: Okay. Mr. Therrien, I know that you're conscientious and careful and you've gone over this in all of its detail, okay.

MR. THERRIEN: Thank you, Your Honor.

CP 48–50.

At best, the exchange shows nothing more than that Mr. Inocencio agreed to forego his right to have his case transferred back to juvenile court and that he understood if he signed the waiver declining juvenile jurisdiction, he would be out of the juvenile system forever. The colloquy does not detail all the rights Mr. Inocencio gave up by exiting the juvenile system, and the record contains no evidence that he was ever informed of those rights. The record is also devoid of evidence that shows Mr. Inocencio understood the varied and serious implications of having his case transferred to adult court.

The 2005 adult court apparently relied on defense counsel, rather than the court, to ensure the decision of a juvenile to waive juvenile court jurisdiction is made with knowledge and intelligence. The court stated, “[Defense counsel], I know that you're conscientious and careful and you've gone over this in all of its detail, okay.” However, the court may not presume that the function has been fully and adequately performed by defense counsel. Saenz, 175 Wn.2d at 177. Although Mr. Inocencio’s attorney stated that his client understood waiver of the decline hearing included “waiving jurisdiction for any subsequent charges that come up before his 18th birthday”, the record does not indicate what else was discussed in those extra-judicial conversations, whether Mr. Inocencio was “intelligently” waiving his rights or whether he had been “fully informed of the right being waived” as required by RCW 13.40.140(9).

The 2005 adult court ultimately found that the waiver was “knowingly, intelligently and voluntarily made” because “... Inocencio understands that entry of this order will subject him to Adult Division jurisdiction for any and all subsequent criminal offenses, because he will no longer meet the definition of ‘juvenile’ under RCW Title 13 as interpreted by State v. Oreiro, 73 Wn. App. 868[, 871 P.2d 666] (1994).” Finding of Fact III at CP 42. This is certainly one consequence of waiving

juvenile court jurisdiction. However, without proof that Mr. Inocencio had some inkling of the numerous protections he was surrendering by waiving juvenile jurisdiction and a decline hearing, his waiver cannot be considered to have been made intelligently. Saenz, 175 Wn.2d at 178.

Written finding of the best interest of the juvenile or the public is unsupported in the record. The Saenz decision requires that, “under RCW 13.40.110, a judge must carefully weigh whether declining jurisdiction is in the best interest of the juvenile or the public and enter findings to that effect, even where the parties waive the decline hearing and stipulate to transfer to adult court.” Saenz, 175 Wn.2d at 180. The judge must independently decide whether declining juvenile court jurisdiction is in the best interest of either the juvenile or the public **and must set forth written findings supporting its decision**. If unable to enter findings without a hearing, the judge should order a hearing. Id. at 179–80 (emphasis added).

Here, the 2005 adult court entered a single written finding:

In light of the facts, reports and opinions submitted, the best interests of Inocencio and the community would be served by declination of Juvenile Division jurisdiction over the amended charges of First Degree Theft and Second Degree Theft (and any and all subsequent charges) pursuant to [former] RCW

13.40.110(2) and the criteria set forth in Kent v. United States, 383 U.S. 541 (1966) and State v. Holland, 98 Wn.2d 507 (1983).

Finding of Fact V at CP 42–43.

The finding that “the best interests of Inocencio and the community would be served by declination” is more akin to a “conclusion”. The resentencing court charitably recognized that the finding was “somewhat conclusory”, but accepted it as the statutorily required finding that declination was in the juvenile’s and the public’s best interests because “it’s there, and I don’t think [Saenz] requires anything more than [that] it be there.” RP 10. Quite to the contrary, the legislature and Saenz require that written findings must be grounded in the record to support the 2005 adult court’s decision. RCW 13.40.110(3) and (4); Saenz, 175 Wn.2d at 180–81.

The 2005 adult court states its “finding” is made “pursuant to [former] RCW 13.40.110(2) and the criteria set forth in Kent v. United States, 383 U.S. 541[, 566-67, 86 S.Ct. 1045, 16 L.Ed.2d 84] (1966) and State v. Holland, 98 Wn.2d 507[, 656 P.2d 1056] (1983). This too is conclusory. Former RCW 13.40.110(2), now codified as RCW 13.40.110(3), requires that a court “consider the relevant reports, facts, opinions, and arguments presented by the parties and their counsel.” The

record does not reveal the parties and their counsel (or anyone) presented any reports, facts, opinions and arguments. Similarly, the 2005 adult court record contains no mention, discussion or weighing or balancing of the detailed criteria⁶ set forth in the Kent and Holland cases.

RCW 13.40.110 and Saenz require a court to independently weigh a minor's critical decision to waive juvenile jurisdiction. A finding that is unsupported in the record would ordinarily be stricken. State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 (2011). The 2005 adult court's finding is unsupported in the record and is therefore insufficient to meet the requirements of RCW 13.40.110(3) and (4) for Mr. Inocencio's valid transfer to adult court.

Because the transfer to adult court was defective, the 2005 convictions cannot be counted in the offender score. The 2005 adult court failed to follow the statutory transfer procedure or show that there was a valid waiver of the right to that declination proceeding. Since the State

⁶ In deciding whether the decline juvenile court jurisdiction, the court "must consider the following eight factors: (1) the seriousness of the alleged offense and whether the protection of the community requires declination; (2) whether the offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system." State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993) (citing State v. Holland, 98 Wn.2d

cannot show Mr. Inocencio was convicted as an “offender” in adult court as required by RCW 9.94A.030(34)⁷, the 2005 convictions cannot be counted in his offender score at resentencing.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing based on an offender score which does not include the 2005 convictions.

Respectfully submitted on August 23, 2013.

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507, 515, 656 P.2d 1056 (1983); Kent v. United States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

⁷ See Knippling 166 Wn.2d at 101-02.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 23, 2013, 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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