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NO. 55374-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GORDON BERGSTROM,

Appellant.

FILED
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF APPEAL.

Mr. Bergstrom was convicted of unlawful possession of a firearm in the first degree. At sentencing, Mr. Bergstrom argued his offender score should be a "7" because his convictions from 1994 and 1989 constituted the same course of criminal conduct. The State argued Mr. Bergstrom failed to produce any evidence to prove his prior convictions constituted the same course of criminal conduct. Based on the State's assertion Mr. Bergstrom failed to present sufficient evidence at sentencing to challenge his offender score, the sentencing court calculated Mr. Bergstrom's offender score as an "11" and imposed a sentence within the standard range for that score. Mr. Bergstrom appeals the calculation of his offender score.

B. ASSIGNMENTS OF ERROR.

1. The sentencing court erroneously calculated Mr. Bergstrom's offender score.
2. The sentencing court erroneously shifted the burden to Mr. Bergstrom to prove his prior convictions constituted the same course of criminal conduct.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In establishing the defendant's sentence, the State has the burden to prove the calculation of the offender score and when the sentence is challenged and the State offers no evidence to support its position, it is impermissible to place the burden of refutation on the defendant. Here, the State argued Mr. Bergstrom failed to present sufficient evidence to prove his prior convictions constituted the same course of criminal conduct. Did the sentencing court err in ruling Mr. Bergstrom failed to present sufficient evidence his prior convictions constituted the same course of criminal conduct? (Assignments of Error 1 and 2)

2. Where a defendant specifically objects to a sentencing calculation, the sentencing court must conduct an evidentiary hearing and allow the State to adduce additional evidence to prove its calculated offender score. In the instant case, Mr. Bergstrom argued some of his prior convictions constituted the same course of criminal conduct, but the sentencing court refused to grant an evidentiary hearing on the issue. Did the sentencing court err in refusing to grant Mr. Bergstrom an evidentiary hearing on his same course of criminal conduct claim?

D. STATEMENT OF THE CASE.

On December 17, 2002, Appellant Gordon Bergstrom helped his brother, Tracy Bergstrom move out of his ex-girlfriend's house back to their mother's house. 4/14/04RP at 74-75. Tracy had most of his belongings packed in boxes, which he then packed into Gordon's car, while Gordon talked to the ex-girlfriend. 4/14/04RP at 86-87. Gordon only helped move the big items. 4/14/04RP at 86.

Tracy testified he packed his hunting and fishing equipment, including his marine flare gun. 4/14/04RP at 93. Tracy testified Gordon had no idea the flare gun was packed in the car, since Tracy had all the boxes already packed by the time Gordon arrived to help him move. *Id.* Both Tracy and Gordon were tired after the move and left some of Tracy's belongings in the car, including hunting/fishing equipment, a baseball bat, a baseball glove, and other items. 4/14/04RP at 75.

On December 18, 2002, Gordon and Tracy stopped at a gasoline station to get gasoline and cigarettes before they drove to West Seattle for a construction job. 4/14/04RP at 76. The gasoline station was closed. 4/14/04RP at 77. Tracy testified he saw a young man run by him and saw his brother Gordon with his

hands in the air. *Id.* Suddenly, the young man confronted Tracy and took \$10 out of his hands and ran away. *Id.*

Tracy and Gordon returned to their car and started to chase the young man. 4/14/04RP at 77. They saw two police patrol cars and drove erratically to draw attention, then parked on the curb by the juvenile. 4/14/04RP at 77-78. When the officers stopped, the Bergstroms explained they had been robbed by the young man and the young man was arrested. 4/14/04RP at 78. Tracy testified Gordon put on one of his hunting jackets to stay warm while speaking to police officers. 4/14/04RP at 80.

Seattle Police Officer John Davidge testified Gordon Bergstrom was very agitated about being robbed. 4/14/04RP at 20. Davidge saw two baseball bats near the center console and, because he was concerned for officer safety, he and other officers had Gordon and Tracy exit their car and patted them down for weapons. 4/14/04RP at 22-23.

Officer Davidge discovered two live 12-gauge shotgun shells and a 12-gauge flare in the coat that Gordon wore (Tracy's hunting jacket). 4/14/04RP at 24-26. More shotgun shells were discovered in the glove compartment. *Id.* at 26. A flare gun was discovered under the driver's seat. *Id.* at 27. Gordon admitted he was a

former felon and was not allowed to carry a firearm. *Id.*

Gordon was arrested for unlawful possession of a firearm in the first degree, handcuffed and taken to the police station.

4/14/04RP at 47. Mr. Bergstrom did not believe the flare gun was a firearm. 4/14/04RP at 48.

Following a jury trial, Mr. Bergstrom was found guilty as charged. 4/15/04RP at 7. At sentencing, Mr. Bergstrom argued his offender score was a "7." Judge Erlick imposed a standard range sentence based on an offender score of "11."

This appeal follows. CP 33.

E. ARGUMENT.

THE TRIAL COURT MISCALCULATED MR.
BERGSTROM'S OFFENDER SCORE, REQUIRING
REMAND FOR RESENTENCING

1. Mr. Bergstrom properly challenged the same course of criminal conduct determination below. An appellant can waive his right to raise on appeal an erroneous offender score based on a determination whether his crimes constituted the same course of criminal conduct, if he fails to raise the issue before the sentencing court. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). In *Nitsch*, the defendant affirmatively stated his standard range was correct at sentencing. 100 Wn. App. at 522. In

contrast, at sentencing in the instant case, Mr. Bergstrom stated on the record that some of his prior convictions constituted the same course of criminal conduct. 11/17/04RP at 4.¹

Mr. Bergstrom argued under the SRA, the court was required to count multiple prior convictions served concurrently as one offense when calculating an offender score. 11/17/04RP at 5-6. Mr. Bergstrom argued his 1990 forgery convictions from cause number 89-1-06176-3 constituted the same course of criminal conduct. 11/17/04RP at 6.² He also argued his three forgery

¹ Defense counsel refused to take a position contrary to her client's and allowed him to personally present his same course of criminal conduct argument. 11/17/04RP at 4.

² Multiple crimes constituting the same course of criminal conduct are counted as one offense for the purpose of determining the defendant's criminal history at sentencing. RCW 9.94A.360(5)(a)(i); RCW 9.94A.400(1)(a) (Recodified in 2001 as RCW 9.94A.589. Laws of 2001, ch. 10, sec. 6).; *State v. Young*, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999). Crimes are considered the same course of criminal conduct if they involve the same criminal intent, were committed at the same time and place, and were committed against the same victim. *Young*, 97 Wn. App. at 240. .

RCW 9.94A.360(5)(a)(i) (Recodified in 2001 as RCW 9.94A.525(5)(a). Laws of 2001, ch. 10, sec. 6) provides:

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except: ...
(i) Prior offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently ... whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.400(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the

convictions from cause number 94-1-04110-6 constituted the same course of criminal conduct. 11/17/04RP at 5. Accordingly, he challenged the State's offender score calculation of "11," arguing his correct offender score would be a "7." *Id.*

The deputy prosecutor argued the statutory presumption is that the prior convictions do not constitute the same course of criminal conduct unless the prior sentencing court specifically found the convictions constituted the same course of criminal conduct. *Id.* at 7-8. Because the prior court did not find the offenses

highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations[.]

The statute referred to in RCW 9.94A.360(5)(a)(i) above provides:

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.... "*Same criminal conduct,*" as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

(Emphasis added.) But separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short duration of time. *Young*, 97 Wn. App. at 240, citing *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

constituted the same course of criminal conduct, the deputy prosecutor argued the current sentencing court should follow the presumption in the absence of any evidence to the contrary. *Id.*

The deputy prosecutor admitted it was possible that the prior sentencing court failed to find the same course of criminal conduct because no one raised the issue before. 11/17/04RP at 9. The State argued Mr. Bergstrom had the burden of presenting some evidence the offenses would constitute the same course of criminal conduct. *Id.*

The sentencing court ruled against Mr. Bergstrom, holding there was no evidence presented to make a finding of same course of criminal conduct. 11/17/04RP at 9. The sentencing court ruled Mr. Bergstrom had the burden to prove his prior convictions constituted the same course of criminal conduct. *Id.* Absent a showing the prior sentencing judge made a same course of criminal conduct finding and without any evidence presented to prove the prior convictions arose from the same course of criminal conduct, the sentencing court concluded it could not decide in Mr. Bergstrom's favor. 11/17/04RP at 9-10.

Mr. Bergstrom properly raised the same course of criminal conduct issue below such that he can raise this issue on appeal.

2. The State, not the defendant, bears the burden of proof at sentencing. In establishing the defendant's criminal history for sentencing purposes, the State has the burden to prove prior convictions by a preponderance of the evidence. *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). "Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point." RCW 9.94A.370. While the best evidence of prior convictions is a certified copy of the judgment, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (citing *Cabrera*, 73 Wn.App. at 168).

"Although facts need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Ford*, 137 Wn.2d at 481. Where the State offers no evidence in support of its position, it is impermissible to place the burden of refutation on the defendant. *Ford*, 137 Wn.2d at 480 (citing *United States v. Weston*, 448 F.2d 626, 634 (9th Cir.1971), *cert. denied*, 404 U.S. 1061 (1972)). "The SRA (Sentencing

Reform Act) expressly places this burden on the State because 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.'" *Ford*, 137 Wn.2d at 480 (quoting *In re Williams*, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)).

3. After Mr. Bergstrom made a prima facie showing, the State failed to refute Mr. Bergstrom's prior convictions did not constitute the same course of criminal conduct. The sentencing court erred. "A criminal defendant is simply not obligated to disprove the State's position, at least insofar as the State has failed to meet its primary burden of proof. The State does not meet its burden through bare assertions, unsupported by evidence." *Ford*, 137 Wn.2d at 482.

In *State v. Lopez*, the jury found Lopez guilty of two counts of first degree assault, two counts of the lesser-included offense of second degree assault, and one count of unlawful possession of a firearm in the first degree. 147 Wn.2d 515, 518, 55 P.3d 609 (2002). At sentencing the prosecution asked the court to impose a life sentence without the possibility of parole under the Persistent Offender Accountability Act (POAA), but failed to provide evidence of Lopez's prior convictions. *Id.* Lopez objected, and when asked

to respond, the prosecution replied it did not have the judgment and sentences:

I don't, your Honor. I don't know if that--I guess that's a challenge that probably should have been brought up earlier. We can provide copies of the judgments and sentences in both cases. I don't have them with me right now.

Id. Rather than order the State to obtain copies of the judgments and sentences, the judge proceeded with sentencing and imposed a life sentence without the possibility of parole. *Id.*

The Court of Appeals overturned the persistent offender finding, and remanded for sentencing before a different judge on the existing record. 147 Wn.2d at 519. The State petitioned the Supreme Court for discretionary review "on the sole issue of whether the Court of Appeals erred when it remanded for sentencing without providing the state an opportunity to present evidence of Lopez's prior convictions on remand." *Id.*

The Supreme Court found the State alleged prior convictions but failed to provide any supporting evidence. *Id.* at 520. Accordingly, "the sentencing court erred when it considered these unproved convictions." *Id.* The State argued it should be entitled to submit evidence of Lopez's prior convictions on remand because Lopez did not provide a specific objection. *Id.*

Citing *Ford*, the Court ruled the State was completely unprepared to prove prior offenses and “does not meet its burden through bare assertions, unsupported by evidence.” *Lopez*, 147 Wn.2d at 520 (citing *Ford*, 137 Wn.2d at 482). The *Lopez* Court concluded remand without the prior convictions was proper because allowing the State to have a second opportunity to prove its allegations after the defendant objected at the first sentencing would send the wrong message to the trial courts, defendants and the public. 147 Wn.2d at 523.

Here, Mr. Bergstrom specifically challenged the State’s calculation of his offender score, arguing two cause numbers included convictions that constituted the same course of criminal conduct. 11/17/04RP at 6. Specifically, he argued he pled to the 1990 offenses – two counts of forgery for prescriptions “on the same instrument, which ran concurrently under Cause No. 89-1-06176-3.” *Id.* Mr. Bergstrom also argued his three counts of forgery, under cause number 94-1-04110-6, constituted the same course of criminal conduct and should be counted as one point. *Id.*

The State produced no evidence the prior convictions arose from separate victims, places, or with different intent. Although Mr. Bergstrom did not produce any evidence to prove the convictions

constituted the same course of criminal conduct, he had no duty to do so. The State produced no evidence or minimally reliable facts upon which the court could not make its decision. Because the State had the burden to prove the prior convictions did not constitute the same course of criminal conduct, the sentencing court erred in ruling against Mr. Bergstrom.

4. Remand for imposition of a sentence based on an offender score counting the prior 1989 and 1994 convictions as one point each based on the same course of criminal conduct is required. Where a defendant specifically objects to a sentencing calculation, the sentencing court should conduct an evidentiary hearing to allow the State to adduce additional evidence to prove its calculation. If the State then fails to prove the requisite felony classifications, the State will not have another opportunity to prove the classifications on remand following appeal. *State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490 (1999).

Although the *McCorkle* Court applied this rule to a felony classification and not to a same course of criminal conduct argument, *McCorkle* clearly holds the State does not get a second chance to meet its burden if it fails to do so at trial after a specific

objection is made. *State v. Gill*, 103 Wn.App. 435, 450, 13 P.3d 646 (2000), citing *McCorkle*, 137 Wn.2d at 497 (“where the State fails to carry its burden of proof after a specific objection, it [will] not be provided a further opportunity to do so.”). The State was aware of Mr. Bergstrom’s objections, but it failed to present actual copies of the judgment and sentence, information, certificate for determination of probable cause, or plea forms indicating the prior convictions encompass anything other than the same course of criminal conduct. Instead, the deputy prosecutor admitted, “I don’t have the certified judgments and sentences, so I can’t argue different victim or whatever, I don’t know.” 11/17/04RP at 7. Accordingly, Mr. Bergstrom’s sentence must be reversed and the matter remanded for resentencing with the prior convictions counted as one point each. *McCorkle*, 88 Wn.App. at 500.

F. CONCLUSION.

Because Mr. Bergstrom’s offender score was erroneously calculated, this Court should remand the matter for a new sentencing hearing with instructions to reduce Mr. Bergstrom’s offender score with instructions the prior convictions from cause number 94-1-04110-6 constituted the same course of criminal conduct and count as one point and the prior convictions from

cause number 89-1-06176-3 constituted the same course of criminal conduct and count as one point.

DATED this 27th day of May, 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J.B. Saunders', written over a horizontal line.

JASON B. SAUNDERS (24963)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 55374-7-1
)	
GORDON BERGSTROM,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 27TH DAY OF MAY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
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[X] GORDON BERGSTROM
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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MAY, 2005.

X _____
[Signature]

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DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 27TH DAY OF MAY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **VERBATIM REPORT OF PROCEEDINGS** TO BE SENT TO THE APPELLANT AT THE ADDRESS STATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GORDON BERGSTROM
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MONROE, WA 98272

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MAY, 2005.

X _____ 