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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

84949-8
NO. 276830

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JORGE ARIEL SAENZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY
Judge Hackett

APPELLANT'S RESPONSE TO CROSS APPEAL

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A. ASSIGNMENT OF ERROR

The trial court did not err when it denied the State's motion to sentence the defendant to life without the possibility of parole.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Trial courts are required to sentence persistent offenders to life in prison without possibility of parole. A persistent offender is one who has been previously convicted on at least two separate occasions of serious offenses.

Under the persistent offender section of the Sentencing Reform Act (SRA), the trial court must conduct a sentencing hearing and, if the court decides by a preponderance of the evidence that a defendant has a criminal history, the court must specify the convictions it has found to exist.

Fundamental principles of due process prohibit sentencing a defendant on the basis of facts unsupported in the record. In imposing a sentence, the facts relied upon by the trial court must have some basis in the record.

Here, the State moved to sentence the defendant to life without the possibility of parole under the persistent offender section of the SRA. The

judgment on one of the predicate convictions showed the defendant was a juvenile at the time of the offense. However, the State failed to present any evidence the defendant expressly waived juvenile jurisdiction and failed to present any evidence the juvenile court declined jurisdiction. Therefore, the trial court denied the State's motion. By so doing, did the trial court err?

C. STATEMENT OF THE CASE

For purposes of this response, Mr. Saenz adopts the procedural facts outlined in the State's Cross Appeal pursuant to Rule of Appellate Procedure 10.3 (b).

D. ARGUMENT

THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE STATE'S MOTION TO SENTENCE THE DEFENDANT TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

The Persistent Offender Accountability Act (POAA), also known as the "three strikes law", was approved in 1993. State v. Thorne, 129 Wash.2d 746, 921 P.2d 514 (1996). Under the POAA, trial courts are required to sentence persistent offenders to life in prison without possibility of parole. RCW 9.94A.570.

A persistent offender is defined as (1) someone who has previously

been convicted on at least two separate occasions, (2) in this state or elsewhere, (3) of felonies which would be considered most serious offenses under former RCW 9.94A.030 (23) (1997), and that (4) would be included in the offender score under RCW 9.94A.360. State v. Morley, 134 Wash.2d 603, 952 P.2d 167 (1998) citing former RCW 9.94A.030 (27) (a) (ii) (1997)). Review of a trial court's calculation of the offender score and sentence under the POAA is de novo. State v. Rivers, 130 Wash. App. 699, 128 P.3d 608 (2005), cert. denied, 549 U.S. 1308, 127 S.Ct. 1882, 167 L.Ed.2d 370 (2007).

Under the persistent offender section of the SRA, the trial court must conduct a sentencing hearing and, if the court decides by a preponderance of the evidence that a defendant has a criminal history, the court must specify the convictions it has found to exist. State v. Thorne, 129 Wash.2d 781, 921 P.2d 514 (1996) (citing RCW 9.94A.110).

Fundamental principles of due process prohibit sentencing a defendant on the basis of facts unsupported in the record. State v. Ford, 137 Wash.2d 481, 973 P.2d 452 (1999), review denied, 11 P.3d 824 (2000). In fact, Washington courts have long held that in imposing a sentence, the facts relied upon by the trial court "*must have some basis in*

the record.” Ford, 137 Wash.2d at 482, 973 P.2d 452 (quoting State v. Bresolin, 13 Wash. App. 396, 534 P.2d 1394 (1975)) (emphasis omitted).

The SRA places the burden of proving prior strikes 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. State v. Knippling, 166 Wash.2d 102, 206 P.3d 332 (2009) (citing State v. Ford, 137 Wash.2d at 480, 973 P.2d 452 (quoting In re Pers. Restraint of Williams, 111 Wash.2d 357, 759 P.2d 436 (1988)). Consequently, if the juvenile court declined jurisdiction, the State should have been able to produce the record because “all juvenile court declination decisions are to be in writing.” See RCW 13.40.110 (3). If there is no record of the declination hearing, this Court can presume that no such hearing occurred. See State v. Golden, 112 Wash. App. 80, 47 P.3d 587 (2002).

The same principle applies if the juvenile, himself, waived jurisdiction. The law requires that a waiver of any right under the Juvenile Justice Act of 1977, chapter 13.40 RCW, must be expressly and intelligently made after the juvenile has been fully informed of the right being waived. RCW 13.40.140 (9). Juvenile proceedings are required to

be transcribed to ensure an accurate record. State v. Knippling, 166 Wash.2d at 102 (citing RCW 13.40.140 (5)). This is the responsibility of the court, not the juvenile. Id. at 102 (citing State v. Golden, 112 Wash.App. at 80).

Here, the State argued express waiver was demonstrated by both the prior colloquy with the court where Mr. Saenz acknowledged his right to a hearing within 14 days, as well as the written waiver itself. Brief of Respondent (Br. Resp.) at 10. The State further argued although it would have been preferable for the Lewis County Court Commissioner to engage in additional colloquy with Mr. Saenz about the waiver, or find on the record that the waiver was voluntary, such scrutiny is not mandated by State v. Knippling. Br. Resp. at 10.

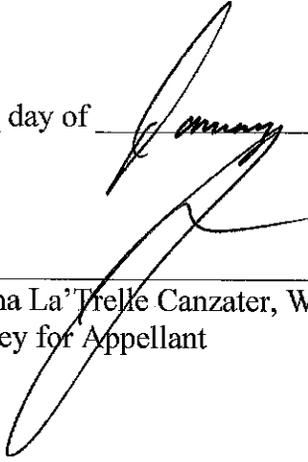
Contrary to the State's position, State v. Knippling does mandate such scrutiny. The ruling in Knippling reinforces Washington's long standing rule that facts relied upon by a trial court in imposing a sentence, must have some basis in the record. Here, nothing in the record proved how or why the case was before the superior court instead of the juvenile court, RCWA 9.94A.030 (32, 34, 37 (a) (ii)), 9.94A.570, 13.04.030, 13.40.110, nothing in the record proved Mr. Saenz was fully informed of

his right to waive, and nothing in the record proved Mr. Saenz fully understood the consequences of waiver. Given the lack of factual basis in the record, the trial court had no other alternative but to deny the State's motion to sentence Mr. Saenz as a persistent offender.

E. CONCLUSION

For the reasons set forth above, Mr. Saenz asks this Court to affirm the trial court's decision to dismiss the State's persistent offender sentence.

Respectfully submitted this 17th day of January, 2010.



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