

NO. 64004-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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COURT OF APPEALS  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MARTINEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable David Needy, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erroneously calculated Martinez's offender score by including three prior New York State convictions that were not proven by a preponderance of the evidence.

Issue Pertaining to Assignment of Error

Due process requires that the State prove by a preponderance of the evidence the existence of prior convictions before they may be used to calculate a defendant's offender score. In determining appellant's offender score, the sentencing court included three New York State burglary convictions. The only "proof" of the New York convictions were documents entitled "certificate of disposition indictment" and indictments. The "certificate of disposition indictment" is a certification by a court clerk that the clerk examined some unidentified records and it appeared there was a conviction. Did the court improperly rely on these documents to calculate appellant's offender score?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

Anthony Martinez was charged by information with burglary in the second degree, malicious mischief in the first degree, and making or having

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<sup>1</sup> The hearing on December 15, 2008 is referred to as 1RP; the hearing on December 16, 2008 is referred to as 2RP; the hearing on February 6, 2009 is referred to as 3RP; the hearing on February 12, 2009 is referred to as 4RP.

burglar tools. CP 1-2. A jury found Martinez guilty of all three charges. CP 59-61.

2. Substantive Facts

On October 14, 2008, the Mount Vernon police responded to an alarm at a mini mart. 1 RP 19. Officer Vandekamp watched a person come down the side of the building on a pole. 1 RP 22. Vandekamp identified the person he saw as Martinez. 1 RP 23.

Martinez then turned and ran into an adjoining parking lot. 1 RP 23. Vandekamp and Officer Walter Martinez followed and caught him. 1 RP 25. Police later recovered a backpack from the roof. 1 RP 25. The backpack contained various tools, such as a pipe wrench, a screwdriver, tin snips, a flashlight, and a crowbar. 1 RP 48. Subsequent examination of the roof revealed damage to the roof and water damage to the interior ceiling below the damaged portion of the roof. 1 RP 114-115.

3. Facts Pertaining to Assignment of Error

The court calculated Martinez's offender score based on three New York convictions. 4 RP 7, 9. The State alleged Martinez had the following prior convictions:

<u>Sentencing Date</u>	<u>Offense</u>	<u>Jurisdiction</u>	<u>Disposition</u>
1/30/02	Burglary 3°	New York	Guilty (2-4 years)
3/30/99	Burglary 3°	New York	Guilty (2-4 years)
6/30/93	Burglary 3°	New York	Guilty (1-3 years)

Supp. CP \_\_\_\_ (Sub No. 56 at 1-2, January 28, 2009 State Sentencing Brief).

To prove Martinez's three New York convictions, the state introduced the following exhibits:

- 1) Uncertified New York Criminal History Summary provided by New York State Division of Parole. 3 RP 2; Supp. CP \_\_\_\_ (Sub No. 56 at 33-36, State's Sentencing Brief, Appendix E).
- 2) Certified copy of a Queens County indictment with a cause number 2770/2000 for 3<sup>rd</sup> Degree Burglary, 3<sup>rd</sup> Degree Criminal Mischief, Possession of Burglar's Tools, 5<sup>th</sup> Degree Criminal Possession of Stolen Property, and 2<sup>nd</sup> Degree Attempted Escape, and naming Anthony Martinez with a date of birth of 8/23/1980. 3 RP 2; Supp CP \_\_\_\_ (Sub No. 56 at 16-19, State's Sentencing Brief, Appendix A).
- 3) Queens County certificate of disposition indictment from case number 2770/2000 for 3<sup>rd</sup> Degree Burglary and naming Anthony Martinez with a date of birth of 8/23/1980. 3 RP 2-3; Supp. CP \_\_\_\_ (Sub No. 56 at 15, State's Sentencing Brief, Appendix A).

- 4) Certified copy of a Bronx County certificate of disposition indictment from case number 3973/97 for 3<sup>rd</sup> Degree Burglary and naming Tony Ramos with a date of birth of 3/2/65. 3 RP 3; Supp. CP \_\_\_\_ (Sub No. 56 at 21, State's Sentencing Brief, Appendix B).
- 5) Certified copy of a Bronx County certificate of disposition indictment from case number 0225-93 for 3<sup>rd</sup> Degree Burglary and naming Miguel Lopez, a/k/a Anthony Montana, with a date of birth of 3/2/66. 3 RP 3; Supp. CP \_\_\_\_ (Sub No. 56 at 23, State's Sentencing Brief, Appendix C).
- 6) Certified copy of three fingerprint cards from the State of New York, comparing the three different names on the certificate of disposition documents. 3 RP 3; Ex. 6.
- 7) A fingerprint comparison report from the Washington State Patrol identification section, linking the New York fingerprint cards to Martinez's fingerprints. 3 RP 3; Ex. 7.

According to the State, there were no Judgment and Sentence documents or plea forms available from the State of New York for the presented convictions. 3 RP 22, 25. Martinez objected to the introduction of the New York documents as proof of his prior convictions. 3 RP 6, 15-18, 22-25, 36; 4RP 2-8.

The court calculated Martinez's offender score for the burglary and malicious mischief convictions using the three New York burglary convictions as prior convictions. Martinez was sentenced to 38 months for burglary in the second degree (based on an offender score of seven), 14 months for malicious mischief (based on an offender score of four), and 365 days for making or having burglary tools. 4 RP 11; CP 71-80.

The court found the documents entitled "certificate of disposition indictment" showed by a preponderance of the evidence a valid conviction. There is a "certificate of disposition indictment" for each alleged New York burglary. Each document contains the language "I hereby certify that it appears from an examination of the records on file in this office..." and then it identifies a date, a judge a crime and a sentence. Supp. CP \_\_\_\_ (Sub No. 56 at 15, 21 and 23). The document does not certify the accuracy of the records examined, identify what those "records" consist of or that there was in fact a conviction, as opposed to noting there appears to be a conviction. The court hesitantly found that these certificates of indictment were valid proof of the prior convictions, commenting that:

[b]y making these findings, to make it clear, that this is not an absolute certainty in my mind ... I fully expect this is a possible area of new rulings from our higher court should they examine this case to determine whether single page documents, certificate[s] of dispositions, and indictments, along with indictment information themselves are going to be

enough for the State of Washington to count them as criminal history.

4 RP 8-9.

C. ARGUMENT

THE STATE DID NOT PROVE BY A PREPONDERANCE OF EVIDENCE MARTINEZ'S PRIOR NEW YORK CONVICTIONS.

The State is required to prove criminal history by a preponderance of the evidence. RCW 9.94A.500(1). "The best evidence of a prior conviction is a certified copy of the judgment." State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). While the best evidence of a prior conviction is a certified copy of the judgment, the Ford Court also held the State "may introduce other *comparable documents* of record or transcripts of prior proceedings to establish criminal history." Id. at 480, 973 P.2d 452 (emphasis added). The Ford Court reasoned principles of due process requires that something similar to a judgment is necessary to prove a prior conviction because a sentence must be based on reliable information:

Although facts at sentencing 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.

Id. at 481 (citations omitted).

While the permitted other means of proof have not been fully and clearly defined, certain materials have been deemed adequate. See, e.g., State v. Morley, 134 Wn.2d 588, 611, 952 P.2d 167 (1998) (complete court martial record); State v. Winings, 126 Wn. App. 75, 91-93, 107 P.3d 141 (2005) (criminal complaint, statement on plea of guilty, minute order, and abstract of judgment); State v. Reinhart, 77 Wn. App. 454, 456-57, 891 P.2d 735 (combination of FBI RAP sheet, certified copies of unsigned judgments and sentences, presentence reports from alleged convictions, and penitentiary "Sentence Data Record"), *review denied*, 127 Wn.2d 1014 (1995).

In State v. Vickers, 148 Wn.2d 91, 120, 59 P.3d 58 (2002), for example, the issue was whether the State met its burden of proving Vickers' prior convictions by introducing a signed docket sheet (indicating a guilty plea) from a Massachusetts court. The docket sheet was acknowledged by signature of a Massachusetts judge and attested as a true copy by a court clerk. *Id.* at 120. The Vickers Court found the signed docket sheet supported the fact of the prior conviction. *Id.* at 121.

In contrast to the docket sheet in Vickers, attested to as a true copy by a court clerk and signed by the judge, or other documents of record like a statement of plea of guilty, the court record, a minute order or an abstract of judgment, the "certificate of disposition indictment" offered by the

State are merely the statements of a court clerk that unidentified “records” were examined and it appeared the person named was convicted of a particular offense. In each of the cases where the courts have found something other than a certified copy of a judgment and sentence proves a prior conviction, documents have been introduced that are more reliable (like the attested to docket sheet in Vickers) than the “certificate of disposition indictment” in this case. There is no evidence of what “records” or documents, if any, were supposedly examined, what those records showed or the accuracy of those records. And, the court clerk only states it “appears” from the examination of those unidentified records there was a conviction. As a result, the documents lack indicia of reliability. The documents are not comparable to a certified judgment. The certification by a court clerk that he examined unidentified “records” and it appeared from that examination the person named was convicted of a crime does not prove by a preponderance of the evidence that Martinez was convicted of the three New York burglaries.

This sentencing error cannot be considered harmless. The court used the New York convictions to calculate Martinez’s offender score in determining his standard range sentence for the second degree burglary and malicious mischief convictions. Without the New York convictions, Martinez’s offender score for the burglary and malicious mischief

convictions is one, making his standard three to eight months for the burglary and two to six months for the malicious mischief. RCW 9.9A.525 and RCW 9.9A.510.

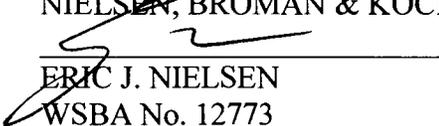
Where, as here, the State offered some supporting evidence in an attempt to prove criminal history, and the defense specifically objects to that evidence, the State is not offered a second opportunity to prove that history on remand. Rather, it is held to the existing record. State v. Rivers, 130 Wn. App. 689, 705-707, 128 P.3d 608 (2005); see In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005) (when the defendant objects and the disputed issues have been fully argued at sentencing, the State will be held to the existing record).

D. CONCLUSION

Martinez's sentence is based on an erroneously calculated offender score. Martinez respectfully requests this Court reverse his sentence and remand for resentencing based on an offender score that does not include the New York convictions.

DATED this 30 day of July 2009.

Respectfully submitted,  
NIELSEN, BROMAN & KOCH

  
ERIC J. NIELSEN

WSBA No. 12773

Office ID No. 91051

Attorney for Appellant

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64004-6-1
	)	
ANTHONY MARTINEZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 30<sup>TH</sup> DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273

[X] ANTHONY MARTINEZ  
DOC NO. 328827  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JULY 2009.

x *Patrick Mayovsky*