IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES TRUJILLO, Appellant.	No. 41748-1-II UNPUBLISHED OPINION

Penoyar, J. — James Trujillo pleaded guilty to possession of oxycodone with intent to deliver. He appeals his sentence, arguing that he objected to the State's summary of his criminal history and that the State failed to meet its resulting burden to present evidence. We hold that because Trujillo personally acknowledged his community custody status and stipulated to his criminal history via counsel, the State was not required to present evidence of his criminal history. We affirm Trujillo's sentence.

FACTS

The State charged Trujillo with unlawful possession of a controlled substance with intent to deliver within 1,000 feet of a school bus route stop[1] after a warrant-based search of his home revealed 400 oxycodone pills. Trujillo pleaded guilty and signed a plea agreement which stated,

> I Have Been Informed and Fully Understand That:
>
> . . . .
>
> I am charged with the crime(s) of: . . . Unlawful possession of a controlled substance with intent to deliver—oxycodone on 3/23/10 in Pierce county did possess with intent to deliver to another a controlled substance oxycodone and the crime was aggravated by the following: *the defendant was under community custody at the time of the commission of the crime adding one point to the offender score*.

[1] In violation of RCW 69.50.401 and RCW 69.50.435(1)(a).

Clerk's Papers (CP) at 27 (emphasis added). The plea agreement also listed Trujillo's offender score as 3 and the standard range for his sentence as 20 to 60 months, with an additional 24 months for the school bus stop enhancement for committing the crime within 1,000 feet of a school bus route stop.[2]

During Trujillo's plea colloquy, he orally affirmed that the information in the plea agreement was correct. He further stated that he was aware of the offender score and sentencing range listed in the plea agreement.

On the day of sentencing, the prosecutor and Trujillo's counsel signed a stipulation that again listed Trujillo's offender score as 3. The stipulation set forth that Trujillo had one point each for two prior felonies, and one point for community custody status. The stipulation was marked "Refused to sign—objects" in the space for Trujillo's signature. CP at 38.

During sentencing, Trujillo requested a drug offender sentencing alternative (DOSA).[3] The prosecutor argued that a DOSA was not appropriate, in part because Trujillo could have received drug treatment while on community custody from his last offense, but failed to do so. In response, defense counsel explained why Trujillo had not had treatment available in community custody:

> [The Department of Corrections] did not put him on community custody. What they did, as soon as he got out of prison the last time, rather than put him on probation, have him check in, have him report, get some help, he went in and they said, "We are not even going to supervise you. We are going to kick you loose."

Report of Proceedings (RP) (Dec. 6, 2010) at 18. Defense counsel further explained that,

[2] RCW 9.94A.533(6)

[3] RCW 9.94A.660.

although the Department of Corrections had declined to supervise Trujillo, Trujillo was still on community custody for sentencing purposes at the time of the current offense:

> Mr. Trujillo has asked me two or three times, he said I only have two points. The court ordered community custody in the prior case. That is clear on the Judgment and Sentence. Even though they didn't put him on community custody, even though they declined to supervise him. . . . [O]nce the court orders it at that point it counts. . . . I have tried to explain that to my client. Puts him in range of three points rather than two.

RP (Dec. 6, 2010) at 19.

The trial court sentenced Trujillo to 64 months' confinement, the middle of the standard range based on his offender score of 3 and the school bus stop enhancement. Trujillo appeals.

ANALYSIS

Trujillo argues that he objected to his criminal history on the basis that he was not in community custody at the time of his offense. He argues that the State was thus required to present evidence of his criminal history. We disagree.

Under RCW 9.94A.530(2), "In determining any sentence other than a sentence above the standard range, the trial 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." Under *State v. Ford*, due process requires the State to prove a defendant's criminal history with at least

some evidence unless the defendant affirmatively acknowledges his or her criminal history. 137 Wn.2d 472, 480-82, 973 P.2d 452 (1999); *see also State v. Mendoza*, 165 Wn.2d 913, 928-29, 205 P.3d 113 (2009) (reaffirming *Ford*).[4]

As such, this case turns on whether Trujillo affirmatively acknowledged his criminal history. If he did not, then the State failed to meet its burden of proof at sentencing and Trujillo is entitled to resentencing. But it is clear from the record that Trujillo did, in fact, acknowledge his criminal history.

Trujillo's plea agreement explicitly provided that he would receive one point on his offender score for community custody status. Trujillo signed the plea agreement and affirmed on the record that the information therein was correct. This constituted a waiver of his claim that he was not on community custody. *State v. Nitsch*, 100 Wn. App. 512, 521-22, 997 P.2d 1000 (2000) (defendant filed presentence report acknowledging standard range and thus waived claim that crimes included in offender score were same criminal conduct). Although defendants generally cannot waive legal challenges to their sentences, stipulating to the facts underlying a sentence waives any factual challenge based on those facts. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (citing *In re Pers. Restraint of Cadwallader*, 155

[4] *Ford* and *Mendoza* dealt with pre-2008 versions of RCW 9.94A.530. *Mendoza*, 165 Wn.2d at 925. In 2008, the legislature amended the statute to provide that failure to object to a prosecutor's statement of criminal history constitutes acknowledgement of the criminal history. Laws of 2008 ch. 231 § 4. But we held this amendment unconstitutional on due process grounds in *State v. Hunley*, 161 Wn. App. 919, 928-29, 253 P.3d 448, *review granted* 172 Wn.2d 1014 (2011). Here, the State does not argue that Trujillo acknowledged his criminal history merely by failing to object. As such, we do not rely on *Hunley*.

Wn.2d 867, 875, 123 P.3d 456 (2005)); *see also State v. Harris*, 148 Wn. App. 22, 29, 197 P.3d 1206 (2008) (defendant ordinarily waives right to challenge criminal history by entering plea agreement). Trujillo's claim that he was not on community custody was a factual claim, and thus he waived it by agreeing to his community custody status in his plea agreement. His refusal to sign the criminal history stipulation did not constitute an objection triggering the State's requirement to present evidence of Trujillo's criminal history.

Moreover, defense counsel's stipulation to Trujillo's criminal history constituted a valid affirmative acknowledgment. When counsel affirmatively acknowledges a defendant's criminal history, the State is entitled to rely on such acknowledgment. *State v. Bergstrom*, 162 Wn.2d 87, 96, 169 P.3d 816 (2007). A pro se objection from the defendant that counsel does not join does not trigger the State's burden to present evidence of criminal history. *Bergstrom*, 162 Wn.2d at 96-97. Nor was the trial court required to consider Trujillo's pro se objection in light of defense counsel's stipulation and oral assurances that Trujillo's objection was baseless. *Bergstrom*, 162 Wn.2d at 97. Trujillo's refusal to sign the stipulation of criminal history did not constitute an objection requiring the State to present evidence of his criminal history.

Because Trujillo acknowledged his community custody status in his plea agreement, he waived any objection to his offender score based on the factual claim that he was not on community custody. His objection did not trigger the state's requirement to present evidence.

And defense counsel's stipulation to Trujillo's criminal history constituted affirmative acknowledgment of said criminal history, obviating the State's need to present evidence. We affirm Trujillo's sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Hunt, J.