

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL EMANUAL ALSTON,

Appellant.

No. 39534-7-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Samuel Alston appeals his sentence for convictions of unlawful possession of a controlled substance and first degree unlawful possession of a firearm. He contends that in calculating his offender score, the trial court improperly counted a 1996 conviction of unlawful possession of marijuana. He asserts that the 1996 crime was not a felony because it involved less than 40 grams of marijuana.¹ We affirm.²

FACTS

The 1996 conviction was based on a guilty plea. That plea document did not indicate which provision of RCW 69.50.401 applied and did not provide any details about the crime.³ At

¹ See former RCW 69.50.401(a)(1)(ii), 69.50.401(d) and 69.50.401(e) (1994). The crime was committed in 1995, but the conviction was entered in 1996.

² A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

³ The plea statement states that Alston pleaded guilty to unlawful possession of a controlled substance (marijuana) as charged in the amended information. That information cited only RCW 69.50.401(d).

the sentencing hearing, Alston argued that the conviction was facially invalid because the plea was to simple possession of an unspecified amount of marijuana, but the judgment and sentence indicated a felony conviction. The trial court counted the conviction, noting that in at least one other instance, Alston himself had acknowledged that it was a felony for the purposes of his offender score. Based on an offender score of 7, the court imposed concurrent sentences of 89 months for the unlawful possession of a firearm charge and 24 months for the unlawful controlled substance charge.

ANALYSIS

“We review a sentencing court’s calculation of an offender score *de novo*.” *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). “The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence.” *Bergstrom*, 162 Wn.2d at 93. However, the State does not have the affirmative burden of proving the constitutional validity of a prior conviction. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 718 P.2d 796 (1986). The sentencing court may consider a prior conviction unless that conviction has been previously determined to have been unconstitutionally obtained, or is constitutionally invalid on its face. *Ammons*, 105 Wn.2d at 187-88. It is invalid on its face only if the constitutional infirmities are evident without further elaboration. *State v. Gimarelli*, 105 Wn. App. 370, 375, 20 P.3d 430 (2001). The face of a conviction includes a plea agreement and documents that the defendant signed as part of the agreement. *State v. Thompson*, 143 Wn. App. 861, 867, 181 P.3d 858, *review denied*, 164 Wn.2d 1035 (2008). It does not include evidence from earlier proceedings. *Ammons*, 105 Wn.2d at 188-89; *Gimarelli*, 105 Wn. App. at 375, 377.

Alston argues that his 1996 conviction was facially invalid because (1) the police report and the lab report indicated that he possessed less than 40 grams of marijuana, and (2) his statement on plea of guilty did not advise him that he was pleading guilty to a crime he did not commit (possession with intent to deliver, a felony, rather than simple possession, which is a misdemeanor).⁴ These matters do not establish facial invalidity. *See Ammons*, 105 Wn.2d at 188-89; *Gimarelli*, 105 Wn. App. at 375, 377; *State v. Bembry*, 46 Wn. App. 288, 291-92, 730 P.2d 115 (1986). The sentencing court properly counted the 1996 conviction in Alston's offender score.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Hunt, J.

⁴ Alston was initially charged with possession with intent to deliver, apparently because he offered to sell the marijuana cigars he possessed to an informant. According to the lab report, the cigars contained only 1.1 grams of marijuana.