

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LYN FRAZIER,

Appellant.

No. 39621-1-II

UNPUBLISHED OPINION

Armstrong, P.J. — A jury convicted Zachary Lyn Frazier of five felonies in 2006, this court vacated two of his convictions in 2008, and the Pierce County Superior Court resentenced Frazier in 2009. Frazier appeals, arguing that the sentencing court violated his right to due process by allowing the State to present additional evidence of his criminal history at resentencing. We affirm.

**FACTS**

In 2006, a jury convicted Frazier of first degree robbery, second degree burglary, two counts of second degree assault, and third degree assault. At the sentencing hearing, the State presented Washington State judgments and sentences showing that Frazier’s criminal history included three prior Washington offenses and five prior California offenses. The State calculated Frazier’s offender score as nine based on this criminal history and asked whether Frazier disputed the calculation. Frazier responded that he did not object to the State’s evidence but he believed that some of the California offenses had washed out. He acknowledged, however, that the issue was moot because his offender score would still be nine with or without the challenged

convictions. Accordingly, the sentencing court found Frazier's offender score was nine and sentenced him within the standard range to a total of 156 months.

On appeal, we held that Frazier's second degree assault convictions merged with his robbery conviction and remanded for resentencing. *See State v. Calhoun*, 142 Wn. App. 1022, 2008 WL77389 (2008) (unpublished opinion). At the resentencing hearing in July 2009, the State offered additional evidence of Frazier's five prior California convictions.<sup>1</sup> Frazier objected, arguing that the State was precluded from offering additional evidence of his California convictions at resentencing. Although a 2008 amendment to RCW 9.94A.530(2) expressly allows parties to present additional evidence at resentencing, Frazier argued that the sentencing court must apply the law in effect at the time he committed the offenses.

The sentencing court ruled that the 2008 amendment applied and admitted the State's additional evidence. The court then ruled that the State had proven the prior convictions by a preponderance of the evidence, rejected Frazier's argument that the California convictions had washed out, and determined that Frazier's offender score was still nine. The court resentenced Frazier to a total of 156 months.

#### ANALYSIS

Frazier appeals his sentence for the second time, arguing that the sentencing court violated his right to due process by allowing the State to present additional evidence of his prior

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<sup>1</sup> Although the State was not able to obtain certified copies of the California judgments, it presented certified abstracts of the judgments and a certified chronology of Frazier's incarceration in California.

California convictions at resentencing. He contends that the law in effect at the time he committed the underlying offenses, rather than the 2008 amendment to RCW 9.94A.530(2), controls his resentencing hearing. He also contends that he made a specific objection to the California convictions at the 2006 sentencing hearing, therefore the State was precluded from presenting additional evidence at resentencing under the law in effect prior to 2008. Frazier asks us to reverse his sentence and remand for resentencing on the record established at the 2006 sentencing hearing.

#### I. Presenting Additional Evidence of Criminal History at Resentencing

At sentencing, the State must prove a defendant's criminal history by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). Prior to 2008, the State could present additional evidence at resentencing unless the defendant made a specific objection at the original sentencing hearing:

Where the defendant raises a specific objection and “the disputed issues have been fully argued to the sentencing court, we . . . hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced.”

*State v. Lopez*, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002) (quoting *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)). In 2008, the legislature amended RCW 9.94A.530(2) in response to *Lopez* and *Ford*, in order “to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing.” Laws of 2008, ch. 231, § 1. The legislature amended RCW 9.94A.530(2) to provide:

On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

Laws of 2008, ch. 231, § 4.

## II. Specific Objection

Even if we accept Frazier's argument and hold that the resentencing court should have applied the law in effect when he committed the offenses, the State was still allowed to present additional evidence of Frazier's prior California convictions. Prior to 2008, the State was precluded from presenting additional evidence at resentencing only when the defendant made a "specific objection and 'the disputed issues [had] been fully argued to the sentencing court.'" *Lopez*, 147 Wn.2d at 520-21 (quoting *Ford*, 137 Wn.2d at 485). At the 2006 sentencing hearing, Frazier stated that he thought some of the California convictions had washed out, but he was not going to pursue the argument at that time because his offender score would be the same with or without those convictions. Because Frazier chose not to object to his criminal history at the original sentencing hearing, the issue was never fully argued to the sentencing court and the State was not precluded from presenting additional evidence of his criminal history at resentencing. *See Lopez*, 147 Wn.2d at 520-21.

Thus, we do not need to reach the issue of whether the 2008 amendment to RCW 9.94A.530(2) applied to Frazier's resentencing hearing. Even if the amended statute did not apply, as Frazier contends, the State was still allowed to present additional evidence of his criminal history under the law in effect prior to the 2008 amendment. Finding no reversible

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error, we affirm Frazier's sentence.

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.

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Armstrong, P.J.

We concur:

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Hunt, J.

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Van Deren, J.