FILED
APRIL 17, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29598-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
RONALD LYNDSEY BUTLER,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — The State may not introduce new evidence of prior criminal history at a later sentencing proceeding if the defendant objected to the record of his criminal history at the original sentencing proceeding. Here, the State offered evidence of the defendant's prior criminal history at his original sentencing proceeding but the judgments and sentences never made it into the clerk's file. The defendant pro se objected that some of his earlier convictions had washed out. His lawyer did not object. In a subsequent sentencing proceeding, the court allowed the State to file the necessary judgments and sentences after concluding that those documents had been considered but were missing from the clerk's file. We conclude that the court had discretionary authority to do that

and we affirm the sentence.

FACTS

A Franklin County Superior Court judge found Ronald Butler guilty of two counts of unlawful delivery of a controlled substance, methamphetamine, after a 2008 bench trial. At the sentencing hearing, the prosecutor said that he could file documents supporting the proposed offender score of nine: "I have reviewed the defendant's criminal history and for purposes of sentencing I've obtained certified copies of the Judgment and Sentence for all those convictions previously. I previously provided those to counsel. I am prepared to file those with the Court today." Report of Proceedings (RP) (Aug. 29, 2008) at 6. Mr. Butler argued that the offender score was incorrect: "The criminal history is not quite right. I do have extensive history and have been charged with all these charges, but there was charges that washed through the period of time. The first two, I believe, were supposed to be washed." RP (Aug. 29, 2008) at 9. The court concluded that Mr. Butler had an offender score of nine.

Mr. Butler moved to modify his sentence. He argued that the trial court incorrectly calculated his offender score because two of his prior convictions had "washed out." Clerk's Papers at 108. The motion was transferred to the Court of Appeals and treated as a personal restraint petition. The State conceded that the case

should be remanded for resentencing. At the resentencing hearing, the prosecutor explained why he agreed that another sentencing hearing was necessary:

> I asked the clerk to review the court's file because I recalled filing a number of certified copies of judgment and sentences in support of the defendant's offender score, and I wanted to address that with the [C]ourt of [A]ppeals and indicate that the State had established the offender score despite Mr. Butler's objection.
>
> My review of the court's file, based on my conversation with the clerk, was that there were no judgment and sentences, certified judgment and sentences in the court's file. So I went back and reviewed the transcript of the sentencing hearing with your Honor, and review of that indicates to me that I filed a number of certified copies with the court which are no longer available.
>
> So I indicated to the [C]ourt of [A]ppeals that the evidence wasn't in the court file, and that it should be [remanded] for a sentencing hearing. I am simply requesting the opportunity to—I've reordered those judgment and sentences. I am prepared to file those with the court today. They are the same ones that I filed last time. They are all reflected in the defendant's judgment and sentence.

RP (Dec. 14, 2010) at 2-3. The State also conceded that the offender score should be eight rather than nine. Mr. Butler objected. He argued that the State should be prohibited from submitting new evidence because Mr. Butler objected to his offender score at the initial sentencing hearing and because the clerk's file suggested that the State never submitted evidence of Mr. Butler's criminal history. The court allowed the State to file copies:

> I certainly recall the State handing forward the copies of the previous judgment and sentences. Why they're not in the court file I don't know . . . . So, I will accept these certified copies of judgment and sentences. I'll

ask them to be filed in the court file.

RP (Dec. 14, 2010) at 6. The State then filed certified copies of judgments and sentences that documented Mr. Butler's criminal history. The sentencing court indicated it would sign "an order which would amend the offender score to eight as opposed to nine," but would not amend the judgment and sentence. RP (Dec. 14, 2010) at 8.

DISCUSSION

Mr. Butler argues, as he did in the sentencing court, that the State should not have been allowed to introduce evidence of his prior convictions at his second sentencing hearing because he objected to the court's calculation of his prior criminal history at the first sentencing and these documents were not part of the record. The State responds that it is not introducing new evidence because this prior criminal history was before the court in the earlier proceeding; the documents simply never made it into the clerk's file. Whether evidence was before the court in the earlier sentencing hearing is a factual determination. And like other factual determinations, we defer to the trial court's decision. *See State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000) (citing *State v. Noltie*, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991); *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 755, 812 P.2d 133 (1991)).

The State, of course, must prove the prior convictions. *State v. Bergstrom*, 162

Wn.2d 87, 93, 169 P.3d 816 (2007). In a remand situation like this, there are three possible outcomes. *Id.* First, if the State alleged prior convictions and the defense failed to specifically object at an initial sentencing hearing, the State can present new evidence of convictions on remand. *Id.* Second, if the defense specifically objected and the State failed to produce evidence of prior convictions, the State cannot present new evidence on remand. *Id.* at 93-94 (citing *State v. Cadwallader*, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005); *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)). Third, if the defense agreed with the State's allegations of prior convictions, the defendant has waived his right to challenge the criminal history on appeal. *Id.* at 94.

Mr. Butler assumes that his pro se objection to his offender score was sufficient to require that the State produce some evidence of the offender score. And he contends that, because the clerk's file contains no such evidence, the court should not have permitted the State to submit "new" evidence on remand. Whether Mr. Butler's pro se objection was sufficient to invoke this rule from *Bergstrom* is questionable, especially since he was represented by competent counsel who expressed no concern. *See id.* at 97. But, ultimately, it is not determinative of the outcome here.

The record here supports the conclusion that the documents were presented, were considered, and simply did not make it into the clerk of the court's file. The court found

that the State had in fact filed certified copies of Mr. Butler's judgments and sentences at the first sentencing hearing. RP (Dec. 14, 2010) at 6. The judge presiding over these sentencing proceedings simply did not know why the copies were not in the clerk's file.

The court intended to admit the exhibits into evidence at the initial hearing, yet those exhibits were not part of the record. So, accepting the exhibits at the second hearing essentially "rectif[ied] the record as to acts which did occur." *State v. Smissaert*, 103 Wn.2d 636, 641, 694 P.2d 654 (1985). And the error corrected was "clerical" because accepting the exhibits merely embodied the court's prior intent to accept those exhibits. *State v. Ryan*, 146 Wash. 114, 116, 261 P. 775 (1927). Accepting the exhibits at the December 2010 hearing was a proper exercise of the court's discretionary authority. *State v. Jones*, 67 Wn.2d 506, 513, 408 P.2d 247 (1965). It was not obligated to resentence Mr. Butler with an offender score of zero.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

SAG 1: Mr. Butler suggests that the State should have been prohibited from presenting evidence on remand because defense counsel objected to the State's proposed offender score at the initial sentencing. He argues that defense counsel's comment, "Excuse me, Counsel. Whether or not 1, 2 and 3 and 4 had washed,"[1] is an objection. The quote indicates that defense counsel asked the State to clarify something, not that

[1] RP (Aug. 29, 2008) at 19.

defense counsel objected to the calculation of the offender score. But even assuming that the comment was an objection, we have concluded that the court correctly found that the State did not introduce new evidence of prior convictions.

SAG 2: Mr. Butler argues that the trial court erred in accepting the certified judgments and sentences because the record shows that the copies were not filed at the initial sentencing hearing. This is the same argument that appellate counsel has made and, therefore, has already been addressed.

SAG 3: Mr. Butler argues that his right under the equal protection clause of the United States Constitution was violated because similarly situated defendants have "received better treatment." SAG at 3. He argues that, while other defendants are sentenced based upon a correct offender score, he has been treated unequally because he has been sentenced based upon an offender score other than zero. As discussed above, the facts of this case do not warrant sentencing Mr. Butler using an offender score of zero. Mr. Butler's right to equal protection was not violated.

We affirm the sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

_____ _____

Brown, J. Korsmo, C.J.