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SUPREME COURT
STATE OF WASHINGTON
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No. 101208-0

Court of Appeals No. 54435-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

DUSTEN JAMES OWENS,

Defendant / Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO,
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
PIERCE COUNTY

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# PETITION FOR REVIEW

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A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Dusten J. Owens, Petitioner, asks the Court to grant review of the decision of Division Two of the Court of Appeals terminating review in this case, *State v. Owens*, __ Wn. App.2d ___, __ P.3d ___ (2022), issued July 26, 2022. A copy is attached as Appendix A.

B. *ISSUES PRESENTED FOR REVIEW*

1. Where the appellant raises a *corpus delicti* argument, is it error for the reviewing court to fail to apply the standards this Court has set forth for such claims and instead convert the arguments to *non-corpus* "sufficiency" claims and affirm even though reversal would be required with proper application of the *corpus delicti* rule?

2. Should review be granted under RAP 13.4(b)(2), because Division Two's decision is inconsistent with holdings such as that in *State v. Echeverria*, 85 Wn. App. 777, 934 P.3d 1214 (1997), regarding the proper application and scope of the doctrine of knowing "constructive possession" to cars?

3. Should review be granted under RAP 13.4(b)(1), because Division Two's decision here is in direct conflict with *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004)?

   Further, should review be granted under RAP 13.4(b)(3), because the lower appellate court decision relieved the State of the full weight of its due process burden of proof?

4. Is it ineffective assistance to fail to impeach an officer witness who was previously found by a trial

court to have been "not credible" in his testimony about whether he had searched someone before or after arrest where that officer is the sole witness to the alleged confession which formed the bulk of the State's case?

5. Did the court of appeals err in holding that remand for resentencing is not required under this Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021)?

6. Should review be granted on the issues presented in Petitioner's *pro se* RAP 10.10 Statement of Additional Grounds for Review?

## C. *STATEMENT OF THE CASE*

Dusten J. Owens was driving a car which a deputy saw commit a traffic offense. RP 162-68. The officer activated lights and sirens but the car ahead did not stop. RP 162-68. At one point during the very short chase which ensued, when the cars were making a sharp turn at fast speed, the pursuing deputy saw a backpack thrown from the passenger front side of the car ahead. RP 176-81.

After just a few minutes, Mr. Owens stopped the car in the middle of a street and put his hands out the window. RP 180-86. Police ordered everyone out of the car gunpoint, and both Mr. Owens and the woman in the front passenger seat, Cassandra Armstrong, were handcuffed and searched. RP

180-85. Ms. Armstrong had five grams of suspected drugs in her sweatshirt pocket and her baby and a puppy in the back seat. RP 195-96, 230. Mr. Owens told the officers the drugs were his. *See* RP 195-96, 230.

A deputy asked Mr. Owens about Ms. Armstrong throwing the backpack out of the window. RP 197-98. Mr. Owens knew nothing about it. RP 197-98. The deputy who was involved in the brief chase admitted that it took all the officer's attention and both hands on the wheel to make the same turn that Mr. Owens had been making at the time Ms. Armstrong threw the backpack. RP 217.

Mr. Owens admitted that he had "run" from the pursuing police car because he had an outstanding felony warrant. RP 230-31.

Mr. Owens was not accused of any crimes related to the drugs in Ms. Armstrong's pocket. Instead, he was accused of crimes related to items found in a backpack police found and which they believed was the one Ms. Armstrong had thrown. CP 59-61. Inside the backpack, deputies found a black holster, a handgun, some ammunition, some keys, and three separate plastic bags of suspected drugs. RP 191-92, 198, 227-28, 246-

50.

Nothing in the backpack identified to whom it belonged. RP 228. The State did not fingerprint the bags, gun, holster, or backpack, and never linked the keys to any person or place. RP 157-355. The gun was registered to a man with whom police never spoke. RP 118, 302-309.

A police expert testified that drug dealers commonly possess items like money, packaging such as "baggies," pre-weighed drugs, "cutting" materials, scales, notes or ledgers showing sales, "burner" or temporary phones, and, he said, "[t]he majority of the time," "some sort of firearm" to protect the "business." RP 293-94.

There was no money, packaging, cutting material, scales, notes or sales ledgers, and no "burner" phones in the backpack. RP 228-29. Or in the car. RP 226. Or on Mr. Owens. RP 226.

The State did not present evidence of who owned the car or in whose name it was registered, but an officer said some years earlier Mr. Owens had been arrested "out of" the same car. RP 188, 226.

A forensic scientist with the Crime Lab tested only one

of the three bags and found it contained a little less than an ounce of a substance which included methamphetamine. RP 349-53. She did not test the other bags but thought they looked the same. RP 350.

A detective testified that methamphetamine was inexpensive and users who would buy up to 8 ounces at a time, although the typical addict used between a gram and a "quarter ounce" a day. RP 287-92. An ounce was about $250. RP 362-63.

At some point when Mr. Owens was handcuffed in the back of a police car, a Pierce County Sheriff's Department Deputy, Chris Olson, questioned him. RP 267. According to Deputy Olson, Mr. Owens confessed. RP 267. In a short conversation, the deputy said, Mr. Owens admitted having just gotten out of prison for the same thing i.e. running from police with a gun and some drugs, but said the prior incident involved less drugs. RP 280-81. The deputy also testified that Mr. Owens admitted buying the gun and said where and how much he paid. RP 282-83. According to the deputy, Mr. Owens conceded he was both "using" and "dealing." RP 273, 283.

Mr. Owens was charged with, *inter alia*, unlawful possession of the methamphetamine in the backpack with intent to deliver and of being "armed" at the time of that crime (count I) and first-degree unlawful possession of the gun in the backpack (count II). CP 59-61. The prosecutor's theory was that Mr. Owens was in constructive possession of everything that had been in the car - even in the closed backpack Ms. Armstrong had discarded, because as the driver by definition he had "dominion and control" of the whole car. RP 357, 364.

The prosecutor relied on the statements Deputy Olson said Mr. Owens had made as proving that Mr. Owens was possessing the drugs in the backpack and that the possession was with intent, as well as for possession of the gun. RP 364-65. In rebuttal closing argument the prosecutor admitted that it was the statements Deputy Olson said Mr. Owens had made which "provide the link" between Mr. Owens and the backpack. RP 413-14.

In the bench trial "Conclusions of Law," the judge entered findings of fact that there were "3 separately packaged baggies of methamphetamine" involved. CP 137-38.

## D. *ARGUMENT*

### 1. DIVISION TWO ERRED IN REFUSING TO APPLY THE STATE'S *CORPUS DELICTI* RULE, IN FINDING THE EVIDENCE SUFFICIENT, AND IN FAILING TO FOLLOW *GOODMAN* AND THUS RELIEVING THE STATE OF ITS DUE PROCESS BURDENS

Both the state and federal constitutions require the State to bear the full weight of proving every essential element of the crime, beyond a reasonable doubt. *See State v. W.R.,Jr.*, 181 Wn.2d 757, 761, 336 P.3d 1134 (2014); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (170); Fourteenth Amend.; Art. 1, § 9. The standards of review, however, differ depending upon the challenge to the evidence on appeal. This Court has carefully crafted standards where the issue a *corpus delicti* claim based on the State's use of the defendant's confession at trial, but the Court of Appeals failed to use those standards, instead adopting a new blend of *corpus* analysis and *non-corpus* analysis. Applying that new standard, Division Two then failed to follow the holding of this Court in *Goodman*. The result was that the State was relieved of the full weight of its due process burden. This Court should grant review on these issues under RAP 13.4(b)(1), (2), and (3).

To prove unlawful possession of the firearm in the backpack, the State had to show the possession was "knowing." *Echeverria*, 85 Wn. App. at 783. To prove possession with intent to deliver methamphetamine, the State had to show that the substance possessed was a "controlled substance," that the defendant had knowing "possession" of the substance, and that the possession was with the required intent. *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994).

Here, Mr. Owens argued that there was insufficient evidence to support the convictions for constructive possession of the gun or the drugs *and* for the "intent to deliver" element of the drug crime without the confession to Deputy Olson, under our state's *corpus delicti* rule. Brief of Appellant ("BOA") at 12-30. This Court has established the proper analysis for such claims. Under our state's unique rule, the reviewing court considers the evidence below *without* the confession, asking if "the independent evidence supports a 'logical and reasonable inference'" that the charged crime occurred. *State v. Aten*, 130 Wn.2d 640, 660-61, 927 P.2d 210 (1996) (*quotations omitted).* The independent evidence need

not prove the charged crime beyond a reasonable doubt, but that evidence is sufficient to corroborate the confession *only* if the evidence supports a logical and reasonable inference of guilt for the charged crime, without also being consistent with innocence or guilt for another crime. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2007).

The purpose of our state's *corpus delicti* rule is to guard against convictions based unjustly on confession alone. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The rule recognizes a judicial mistrust of confessions. *Id.* The requirements of the rule are "rooted in traditional notions of justice and ha[ve] become a settled principle of the administration of criminal justice" in Washington. 168 Wn.2d at 250-51. Under our long history of *corpus delicti* cases, courts "have always required sufficient evidence independent of a defendant's confession to support a conviction." 168 Wn.2d at 254.

A *corpus delict* issue is reviewed *de novo*, taking the evidence in the light most favorable to the State, drawing all reasonable inferences therefrom. *See State v. Hotchkiss II*, 1 Wn. App. 2d 275, 279, 404 P.3d 629 (2017), *review denied*, 190

Wn.2d 1005 (2018); *Aten*, 130 Wn.2d at 660-61.

Instead of applying the holdings and standards this Court has set for *corpus delicti* cases in *Brockob*, *Aten*, and other cases, however, Division Two declined. App. A at 6-11. It did not address Mr. Owens' *corpus delicti* arguments; it reframed them to the different factual circumstance where the issue is straight insufficiency of the evidence to support a verdict, when no confession or *corpus delicti* issues are involved. App. A at 6-11.

This Court should grant review. The Court has chosen the standards to be used when the question is whether the defendant's confession was properly admitted under the *corpus delicti* rule. *See State v. Cardenas-Flores*, 189 Wn.2d 243, 401 P.3d 19 (2017). The Court has recognized the different purpose of the *corpus delicti* rule as not just a sufficiency rule but a "corroboration rule," relating to the defendant's confession. 189 Wn.2d at 254. In addition, the rule in our state is different than federal and other states, which have relaxed the requirements for corroboration. 189 Wn.2d at 260-61.

After converting the questions presented to exclude the *corpus delicti* issues, Division Two then did not actually apply

the correct standard even for the incorrect straight "sufficiency" claim. That standard has also been set by this Court. *See, e.g.*, *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Such a claim admits the State's evidence, taking it in light most favorable to the State, asking if any rational trier of fact could have found guilt. *Id*. Here, the Court of Appeals did not conduct that analysis; it excluded the confession, then declared the evidence sufficient to prove Mr. Owens had "constructive possession" over the items in the backpack thrown from the car by Ms. Armstrong because Mr. Owens was driving, had driven the same car at some point in the past, and had tried to elude police - without mentioning that Mr. Owens had a warrant out for his arrest at the time of the crime. App. A at 8-9. The trial court similarly concluded that Mr. Owens had "dominion and control" over everything in the car simply because he was driving it. CP 136-37.

Having dominion and control over a car is not by iself enough to prove knowing possession of things inside that car, however. *See, e.g.*, *State v. Tadeo-Mares*, 86 Wn. App. 813, 817, 939 P.2d 220 (1997); *Echeverria*, 85 Wn. App. at 783 (non-owner driver of a car is not in "constructive possession" of everything

hidden inside absent evidence the driver saw it).

Even applying the incorrect modified standard as Division Two here did, the evidence was insufficient to prove that Mr. Owens knowingly possessed the items that were in a closed backpack that Ms. Armstrong threw out of the car. *Compare*, *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010) (accused was the sole owner, driver, and occupant of the truck, gun was in a nylon bag beside the driver's seat); *State v. Turner*, 103 Wn. App. 515, 13 P.3d 324 (2000) (accused owned the truck he was driving, could reach the gun in the backseat and knew it was there). But this was not just a case about sufficiency; it was a case about a confession which formed the bulk of the State's case. The Court of Appeals erred in failing to apply the standards this Court has established for such cases.

The Court of Appeals committed this same error not just in holding there was sufficient evidence of "constructive possession" but also regarding the proof of "intent to deliver." App. A at 9-12. In addition, the decision below directly conflicts with this Court's holding in *Goodman.* In *Goodman*, six bags of suspected drugs were found with a total weight of 2.8 grams. 150 Wn.2d 782. Although only three were tested, the

trial court entered a finding citing the weight of the methamphetamine as 2.8 grams. *Id.* This Court held that the finding was improper, because, "the State proved only three of those baggies contained methamphetamine." *Id*.

Here, the forensic scientist testified that she tested only one bag of suspected drugs. RP 349-50. Yet in conclusion of law IV, the trial court found that the backpack contained "3 separately packaged baggies of methamphetamine," and that the crime was committed while "armed" because the gun was in the same backpack as "three separately packaged baggies of methamphetamine[.]" CP 136-37.

Although mentioning *Goodman*, Division Two did not follow it, instead upholding a trial court finding of "fact" that all three bags contained methamphetamine even though only one was tested. App. A at 11. The incorrect "fact" that there were three separate bags of actual drugs, however, was a crucial part of the State's very thin claim that Mr. Owens was guilty of possessing drugs with intent to deliver. This Court should grant review under RAP 13.4(b)(1).

Further, review should be granted under RAP 13.4(b)(3). Due process required the State to prove its case beyond a

reasonable doubt. The State failed to test more than one bag of suspected drugs; it thus failed to meet its burden of proving that all three bags contained methamphetamine under *Goodman*. The "fact" that there were three bags of drugs, however, was a crucial part of the very sparse evidence upon which the State relied in arguing that the possesion was with intent to deliver. By failing to follow *Goodman*, Division Two here relieved the State of the full weight of its burden of proof, in violation of the mandates of due process.

This Court should grant review on the *corpus delicti* issues. Division Two improperly refused to apply this Court's holdings on how *corpus delicti* claims raised are to be addressed by our state's appellate courts in order to honor the unique purposes and nature of our rule. This Court has granted review repeatedly in an effort to ensure proper application of the state's *corpus delicti* rule. *See, e.g.*, *Cardenas-Flores*, 189 Wn.2d at 254; *Brockob*, 159 Wn.2d at 328; *Aten*, 130 Wn.2d at 660. Further, the decision below is in conflict with this Court's decision in *Goodman* and holdings in cases like *Echeverria* which require more than just "dominion and control" over a car to prove knowing possession of items inside. Finally, review

should be granted the Court of Appeals decision relieved the State of the full weight of its constitutionally mandated due process burden of proof.

### 2. REVIEW SHOULD BE GRANTED TO ADDRESS COUNSEL'S INEFFECTIVE ASSISTANCE

In affirming, Division Two also held that counsel was not ineffective in failing to impeach Deputy Olson, the only officer who claimed that Mr. Owens had confessed. App. A at 12-13. This Court should grant review under RAP 13.4(b)(3), because the failure to impeach the only witness who claims your client confessed was constitutionally ineffective assistance of counsel.

Both the Sixth and 14th Amendments and our state's Article I, § 22, guarantee the accused effective assistance of appointed counsel. *See State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deputy Olson had been found to have given testimony which was "not credible" and to have given conflicting testimony about a search he claimed had occurred "incident to arrest." RP 20, 24. Here, counsel asked to inquire briefly and the court said it would be allowed and the State could then elicit some bolstering

rebuttal. RP 21. But counsel did not impeach the deputy at the suppression hearing or trial. RP 23-37, 265-87.

In concluding there was not ineffective assistance, the Court of Appeals speculated that counsel "may have decided against impeachment" because he knew the State would "inevitably rehabilitate the officer" with evidence of commendations. App. A at 12-13. Division Two did not address the bolstering in which the State engaged. App. A at 12-13. Nor did it discuss that the deputy was the only witness who heard the incriminating statements which the judge then relied on in finding guilt for counts I and II. App. A at 12-13; *see* CP 129-39.

This Court should grant review. In a bench trial, a judge is presumed to rely only on the evidence admitted, not on evidence discussed in pretrial rulings. *See State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). By failing to raise the issue and impeach Deputy Olson with the available information, counsel left the deputy's credibility unchallenged, even though the deputy was the only witness to the alleged confession. The Court of Appeals decision was in error.

### 3. REVIEW SHOULD BE GRANTED ON THE *BLAKE* ISSUE

Review should also be granted on Division Two's decision that there is no need to order resentencing despite a *Blake* issue removing a point for a 2012 conviction for unlawful possession of methamphetamine and a point for being on "community custody," apparently for that offense, at the time of the current crimes. CP 73-74, 108.

The statutory maximum for count I was usually 120 months but the State applied a "doubler" which increased the firearm enhancement from 36 months to ten years of flat time *and* doubled the statutory maximum to 240 months. *See* CP 74. At sentencing, Mr. Owens sought leniency, asking the court to impose an exceptional sentence below the standard range and a Drug Offender Sentencing Alternative (DOSA) of 120 months total, half of the new statutory maximum. RP 439-41, 443, 449.

In arguing for the doubling and a sentence of 230 months, the prosecutor relied on Mr. Owens having previously been convicted of drug crimes, including the 2012 conviction. CP 74. The State also relied on that conviction and argued that Mr. Owens should not receive leniency in part because he had

been on community custody at the time of the crimes. RP 441-43. The prosecutor asked for 230 months (10 less than the statutory maximum after doubling) and the judge imposed a sentence of 220 months for count I. RP 454-44.

On review, Division Two agreed that the two points were included in error. App. A at 14-16. But the majority then held that resentencing was "unnecessary" because Mr. Owens was sentenced at the low end of the standard range. App. A at 16. The decision depended on an unpublished opinion which had concluded that error in calculating the offender score under *Blake* did not require resentencing if the accused was given a sentence at the low end and a reduction in the offender score did not change the range. App. A at 16, *quoting*, *State v. Weekly*, __ Wn. App. 2d __ (2022 WL 2719518) (unpublished), *review denied*, 199 Wn.2d 1023 (2022).

This Court should grant review. In *State v. McCorkle*, 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997), the Court of Appeals found an error in miscalculating an offender score was reversible error even when that error did not affect the standard range, because the record did not clearly indicate that the lower court would have imposed the same sentence absent

the error. In *State v. LaBounty*, 17 Wn. App. 2d 576, 487 P.3d 221 (2021), the Court recognized that a change in the prior criminal history by removing a void conviction does not just affect the sentencing range but also can require resentencing when the existence of that conviction was part of the reason for the State's recommendation and the lower court decision - so that the reviewing Court should not presume those recommendations would be the same when those facts change. *Weekly* itself ordered resentencing because the record did not clearly indicate the same sentences would be imposed absent the error. *See Weekly*, 21 Wn. App.2d 1002. Below, both the prosecutor and the court discussed the existence of the prior conviction and the fact that Mr. Owens was on community custody as relevant to the sentence imposed - a sentence which was a rejection of the leniency for which Mr. Owens pled. This Court should grant review.

### 4. REVIEW SHOULD BE GRANTED ON THE ISSUES RAISED IN THE *PRO SE* RAP 10.10 STATEMENT

Mr. Owens filed a *pro se* RAP 10.10 Statement of Additional Grounds ("SAG") for review. The Court of Appeals did not appoint counsel for any of the issues contained in the SAG. *See*, *e.g.*, RAP 10.10(f). The opinion rejected all of Mr.

Owens' *pro se* claims. App. A at 16-17.

Pursuant to RAP 13.7(b), and to raise all the issues in the Petition with the understanding that counsel has not been appointed to assist on these issues, and because it appears the Court only accepts one Petition per side in each case, undersigned counsel submits the following:

When he posted bail, Mr. Owens was not released but was instead transferred to DOC for an outstanding warrant. He was still being detained in Shelton on April 30 when he did not appear for omnibus. 2RP 5. Although the prosecutor knew that Mr. Owens was "[s]erving DOC sanction in Shelton," she asked for a warrant and later charged Mr. Owens with "bail jumping" for his absence. 2RP 5; *see* CP 59-61.

In his SAG, Mr. Owens argued that he was not given proper notice of the bail jumping charge, that counsel had a duty to object based on lack of probable cause because the prosecutor was aware that Mr. Owens was not voluntarily absent from court, that it was prosecutorial vindictiveness when the prosecutor continued to pursue the improper charge in an effort to bias the proceedings, and that it was an abuse of judicial discretion for the judge to allow the charge to go

forward in violation of due process. SAG at 1-6. He also argued that counsel was ineffective for failing to object to the bail jumping charge, failing to get a material witness warrant for Ms. Armstrong, failing to subpoena Mr. Owens' DOC officer, failing to object to testimony of an officer who talked about the usual practices of drug deals, and failing to move for suppression based on a "*Terry* stop." SAG at 7-8.

The Court of Appeals rejected each of these arguments in turn. *See* App. A at 16-17. In doing so, Division Two applied the wrong standard, dismissing Mr. Owens' SAG claims in part because, "[a]ssertions given passing treatment, or that are unsupported by argument, will not be considered." App. A at 17, *citing, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). App. A at 17.

RAP 10.10 provides that a SAG should "identify and discuss" the issues the *pro se* defendant feels have not been adequately addressed in appointed counsel's brief on direct appeal. RAP 10.10(a). "Reference to the record and citation to authorities *are not necessary or required*[.]" RAP 10.10(c) (emphasis added). *Cowiche* did not involve a SAG; it was a civil case in which plaintiffs' counsel failed to present argument in

their opening brief on an assignment of error they presented. 118 Wn.2d at 809. Division Two appears to have held Mr. Owens to an improperly high standard; more than the rule requires. This Court should grant review to address the issues presented in the SAG, applying the correct standard of RAP 10.10.

E. *CONCLUSION*

For the reasons stated herein, the Court should grant review.

DATED this 25th day of August, 2022.

ESTIMATED WORD COUNT: 4387

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. Dusten Owens, DOC 809688, WSP, 1313 N 13th Avenue, Walla Walla, WA. 99362.

DATED this 25th day of August, 2022.

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Filed
Washington State
Court of Appeals
Division Two

July 26, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| STATE OF WASHINGTON, Respondent, v. DUSTEN JAMES OWENS, Appellant. | No. 54435-1-II UNPUBLISHED OPINION |
|---|---|

VELJACIC, J. — One afternoon in January 2019, Dustin Owens fled from an officer attempting to make a traffic stop, accelerating away from the officer at a high speed. During the chase, the officer noticed a backpack fly out of the car Owens was driving. Eventually, Owens stopped his car, and the officer arrested him and his passenger. The backpack was recovered, and the officer discovered it contained methamphetamine and a gun. Owens confessed to buying the gun and selling methamphetamine. The backpack contained nothing to identify its owner. During a bench trial, the State argued that Owens constructively possessed the backpack. The court convicted Owens of possession of methamphetamine with intent to deliver, possession of a firearm, attempting to elude a police vehicle, and bail jumping.

During sentencing, the trial court calculated Owens's offender score and added a felony point for a prior conviction for unlawful possession of a controlled substance. The court also added a point because Owens was on community custody for the unlawful possession of a controlled substance conviction at the time he committed his current offenses. The trial court appended Owens's criminal history statement to its judgment and sentence.

Owens appeals, arguing that the evidence was insufficient to establish the corpus delicti of his possession of the methamphetamine and the gun and the intent element of his intent to deliver methamphetamine charge. He also argues his counsel was ineffective for failing to impeach a witness. Finally, Owens requests resentencing due to the court's erroneous calculation of his offender score.

We affirm Owens's convictions and conclude his counsel was not ineffective. We also hold that under *Blake*,[1] the trial court's calculation of Owens's offender score is incorrect. Because Owens's standard range would be unchanged, and he was sentenced to the low end of his standard range, we do not order resentencing, but instead remand to the trial court to correct his criminal history statement.

## FACTS

The State charged Owens with unlawful possession of a controlled substance with intent to deliver—methamphetamine, unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and bail jumping. The charges arose from the trial testimony and evidence set out here in relevant part.

An officer pulled Owens over after seeing him turn his car without using a signal. The officer activated his lights and siren, and Owens accelerated his car and fled. During the ensuing chase, Owens sharply turned right down a street, and the officer saw a backpack fly out of the car's passenger side window. The pursuing officer notified dispatch of the backpack, which was later recovered by another officer. After approximately two minutes, Owens stopped his vehicle and surrendered to the officer.

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

The officer removed the passenger from the car, searched her, and found a small plastic baggie in her sweatshirt pocket containing a white, crystalline substance. The officer weighed the bag, which came in at five grams with packaging. The other officer who retrieved the backpack took it to the location of the stop and showed the contents to the first officer.

The officer testified that the backpack contained a black gun holster, a handgun, a gun magazine, ammunition, keys, and a "large quantity of [a] white crystalline substance." 2 Report of Proceedings (RP) at 198. The officer determined that there were three baggies containing a crystalline substance, weighing one ounce each. The backpack did not contain any identifying materials. The gun was not registered to Owens, and it had not been reported stolen.

The officer removed Owens from the car and read him his *Miranda*[2] rights. Post *Miranda*, and absent questioning, Owens stated that the baggy found on the passenger contained methamphetamine and belonged to him. He added that he gave the passenger the methamphetamine to hide it. When the officer questioned Owens about the backpack, he denied any knowledge of it.

A gang taskforce officer also responded to the scene, and separately questioned Owens. The officer asked Owens how much he had paid for the gun, and Owens answered that he had paid $150 for it. He also asked Owens if he was dealing methamphetamine; Owens answered that he was. The officer did not ask Owens about the drugs in the backpack.

A narcotics detective testified that methamphetamine is usually sold in amounts of an ounce or more, and that drug dealers normally carry a firearm. The State introduced evidence that Owens was arrested several years prior while driving the same car that he was driving in this incident.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

A forensic scientist who analyzed the contents of the baggies in the backpack also testified. The scientist stated that she tested the baggie found on Owens's passenger and one of the plastic bags from the backpack. The baggie recovered from the passenger weighed 3.6 grams without packaging and tested positive for methamphetamine. Consistent with the officer's testimony, the scientist testified that one baggie from the backpack weighed approximately one ounce and tested positive for methamphetamine. The scientist explained that she only tested one of the bags found in the backpack because all three baggies were grouped together and appeared to contain the same substance. Other testimony at trial established that the three baggies were contained together in a larger bag, each weighed a similar amount, each was a similarly sized baggie, and their contents appeared to be the same substance

In its closing argument, the State argued that Owens constructively possessed the backpack because he had dominion and control over the car's interior and was able to exert actual control by grabbing the backpack. The State also argued that, while Owens did not own the car, he was arrested while driving the same car a few years before this case. The State argued that this showed that Owens had dominion and control over the car.

Prior to trial, the State moved to exclude potential impeachment evidence against one of the officers who questioned Owens. The evidence involved the officer's testimony in a prior case. The trial court in the prior case determined the officer had provided inconsistent testimony, and that the officer had lacked probable cause to search a suspect incident to arrest. The court in this case denied the State's motion to exclude the potential impeachment evidence and stated it would allow an inquiry into the prior court's finding. The court reminded Owens that if he did impeach the State's witness, the State would be able to provide rehabilitation evidence.

The trial court found Owens guilty of unlawful possession of a controlled substance with intent to deliver—methamphetamine, unlawful possession of a firearm in the first degree, and attempting to elude a pursuing police vehicle. The court acquitted Owens on bail jumping. The court issued two factual findings relevant here, both of which are mislabeled as conclusion of law IV.

The first conclusion of law IV states:

> During the pursuit, [the pursuing officer] saw a gray/black backpack come flying out of the vehicle passenger side window. The backpack was recovered by [a backup officer] in the exact location where [the pursuing officer] saw it come out of the window and within three minutes of [the pursuing officer] reporting it and broadcasting the location. The backpack contained a firearm and 3 separately packaged baggies of methamphetamine each weighing approximately one ounce.

Clerk's Papers (CP) at 136.

The second conclusion of law IV states:

> During the commission of the crime of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methamphetamine) defendant was armed with a .45 caliber handgun. The handgun was located in the same backpack as the three separately packaged baggies of methamphetamine each weighing approximately one ounce and was readily available and easily accessible for offensive or defensive purposes.

CP at 137.

At sentencing, the State provided the court with Owens's criminal history. The statement of criminal history included a conviction for unlawful possession of a controlled substance. Owens was serving a term of community custody for the unlawful possession of a controlled substance conviction when he committed the current offenses. That resulted in an additional point being added to his offender score under RCW 9.94A.525(19).[3] The trial court calculated Owens's

[3] RCW 9.94A.525(19) states, "If the present conviction is for an offense committed while the offender was under community custody, add one point."

offender score as 14, or 9+,[4] for the purposes of establishing the standard range sentence for his charges according to the sentencing grid at RCW 9.94A.510. With an offender score above 9, Owens's standard range for his sentence was 220-240 months. The trial court sentenced Owens to 220 months, the low end.

Owens appeals his unlawful possession of a controlled substance with intent to deliver—methamphetamine, and unlawful possession of a firearm in the first degree charges. He also appeals the calculation of his offender score and requests resentencing.

## ANALYSIS

Owens challenges both his possession of methamphetamine with intent to deliver conviction and his unlawful possession of a firearm conviction on the basis that there was insufficient evidence to prove that he constructively possessed the backpack in which those items were found. Furthermore, he contends that the State could not rely on his statements to prove that he constructively possessed the backpack because the State did not establish the corpus delicti of either crime such that his statements could be admitted into evidence.

Owens additionally challenges his possession of methamphetamine with intent to deliver conviction on the basis that the State presented insufficient evidence that all three of the baggies, which contained a crystalline substance, found in the backpack contained methamphetamine. Thus, he contends, the evidence is insufficient to establish that he had the intent to deliver the methamphetamine.

[4] The trial court also listed Owens's offender score on the judgment and sentence order as "9+." While the standard range is the same for scores 9 and above, it is proper to list the actual score for reasons made evident by this opinion.

We hold that the evidence is sufficient to establish Owens's constructive possession of the backpack even without the admission of his statements. Thus, we need not separately analyze his corpus delicti argument. We further hold that the evidence is sufficient to establish Owens's intent to deliver the methamphetamine. Finally, we hold that the trial court erred by including a felony point for a prior possession of a controlled substance conviction, and by including a felony point for being on community custody arising from the unlawful possession of a controlled substance conviction, at the time he committed the current offenses.

## I. CONSTRUCTIVE POSSESSION

To determine whether the evidence is sufficient to support a conviction, we consider whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). When a defendant challenges their conviction based on the sufficiency of the evidence, the defendant admits the truth of the State's evidence, and we must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the State. *Id*. at 265-66. Circumstantial evidence and direct evidence are considered equally reliable. *Id*. at 266. We will not review the finder of fact's credibility determinations. *Id*.

Possession may be actual or constructive. *State v. Listoe*, 15 Wn. App. 2d 308, 326, 475 P.3d 534 (2020). Actual possession requires a defendant to have physical custody of an item. *Id*. By contrast, constructive possession must be proven by showing a defendant had dominion and control over an item. *Id*. Constructive possession need not be exclusive possession, and multiple people may have dominion and control over the same item. *Id*.

We consider the totality of the circumstances to determine whether a defendant had dominion and control over an item. *Id*. Whether a person could readily exert actual possession over an item and a person's physical proximity to the item are circumstances that show constructive possession. *Id*. at 327. "Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession." *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014).

When findings of fact on a bench trial are challenged, we review the trial court's findings of fact to determine whether they are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. *State v. Pratt*, 11 Wn. App. 2d 450, 457, 454 P.3d 875 (2019). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Id*.

Owens argues that nothing connects him to the backpack containing the gun and the methamphetamine except his confession and the State's theory of constructive possession. Owens attacks the State's constructive possession theory by arguing that a reasonable inference supports the conclusion that both he and his passenger had the same level of dominion and control over the car's interior. According to Owens, because his possession was not exclusive there is an equal inference that Owens did not possess the backpack and was therefore innocent.

But as we stated above, our inquiry is not whether there is an interpretation of the evidence that may support Owens's theory, but rather whether there is sufficient evidence supporting the court's findings. We conclude the evidence is sufficient here. Moreover, Owens's argument misunderstands constructive possession. It is true that both Owens and his passenger had dominion and control of the interior of the vehicle, and both constructively possessed the backpack. But

constructive possession need not be exclusive possession. *Listoe*, 15 Wn. App. 2d at 326. Owens's conduct, therefore, supports an inference that he constructively possessed the backpack, even if he did not do so exclusively. Owens's maneuvering the vehicle in an apparent attempt to elude the police and dispose of the backpack, in light of his previously driving the same car, strongly implies he possessed the backpack and knew what it contained. We conclude that the State submitted sufficient evidence to prove that Owens constructively possessed the backpack in which the gun and methamphetamine were found. Owens's argument fails.

## II. EVIDENCE OF INTENT TO DELIVER

Owens next argues that the evidence does not support the trial court's factual findings that he possessed multiple baggies of methamphetamine and therefore its conclusion that he had the intent to deliver methamphetamine is not supported by substantial evidence. We disagree.

Owens challenges parts of two mislabeled conclusions of law IV,[5] arguing the court erroneously stated three baggies of methamphetamine were recovered when only one baggie tested positively as methamphetamine. Thus, he argues, the State only proved that he possessed one baggie of methamphetamine and this is insufficient to prove that he had the intent to deliver. We disagree, and hold that the trial court's finding that Owens possessed three baggies of methamphetamine is supported by substantial evidence.

[5] "'If a determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact.'" *Goodeill v. Madison Real Estate*, 191 Wn. App. 88, 99, 362 P.3d 302 (2015) (quoting *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197 n.5, 584 P.2d 968 (1978)). Conclusions of law IV in this matter contain a summary of the police pursuit and lists the contents of the backpack, this information would be considered findings of fact. *See Id*.

When error is assigned to a specific factual finding by the trial court, we review the challenged findings to determine whether they are supported by substantial evidence in the record and, if so, whether the trial court's conclusions of law are supported by the challenged findings of fact. *Pratt*, 11 Wn. App. 2d at 457. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Id*.

"The statutory elements of possession of [a] controlled substance with intent to deliver are (1) unlawful possession of (2) a controlled substance with (3) intent to deliver." *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004). A large amount of a controlled substance is not necessary for the State to prove intent to deliver. *Id*. at 782-83 ("[I]t has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver.").

Owens challenges two of the trial court's findings of fact. The first challenged finding states:

> During the pursuit, [the pursuing officer] saw a gray/black backpack come flying out of the vehicle passenger side window. The backpack was recovered by [a backup officer] in the exact location where [the pursuing officer] saw it come out of the window and within three minutes of [the pursuing officer] reporting it and broadcasting the location. *The backpack contained a firearm and 3 separately packaged baggies of methamphetamine each weighing approximately one ounce.*

CP at 136 (emphasis added).

The second challenged finding states:

> During the commission of the crime of Unlawful Possession of a Controlled Substance with Intent to Deliver (Methamphetamine) defendant was armed with a .45 caliber handgun. The handgun was located in the same backpack as *the three separately packaged baggies of methamphetamine each weighing approximately one ounce* and was readily available and easily accessible for offensive or defensive purposes.

CP at 137 (emphasis added).

As to these challenged findings, Owens specifically objects to the trial court's finding that there were three separately packaged baggies of methamphetamine. Owens argues that because the State only tested one of the baggies containing crystalline substance, all three were not proved to be methamphetamine. Owens contends that at most, the State proved that he possessed only one baggie of methamphetamine, and that possession of a single baggie of methamphetamine is insufficient to prove the intent to deliver element of his possession with intent to deliver charge.

We reject Owens's contentions. First, we conclude that the trial court's finding of fact that all three baggies contained methamphetamine is supported by substantial evidence. The State tested one of three baggies containing a white crystalline substance, and the baggie tested positive for methamphetamine. The three baggies were contained together in a larger bag, each weighed a similar amount, and each was a similarly sized baggie. Their contents appeared to be the same substance. Such evidence is enough to convince a reasonable person that all three baggies contained methamphetamine, and therefore the trial court's finding is supported by substantial evidence.

Moreover, even if there had been only one baggie of methamphetamine, the evidence would be sufficient to satisfy the intent to deliver element of his charge. Owens acknowledges that intent to deliver may be inferred from possession of methamphetamine in combination with other facts that suggest such an intent. But he argues that a single baggie of methamphetamine weighing one ounce is insufficient to establish intent to deliver, because the amount may be for personal use. But there was ample evidence that the amount supports the intent element.

The narcotic detective's testimony at trial unequivocally established that possession of methamphetamine in a one ounce quantity combined with possession of a firearm suggests possession of methamphetamine with intent to deliver. The State produced evidence that a baggie

filled with methamphetamine, weighing approximately one ounce, and a firearm were recovered from the backpack. The trial court's finding is supported by substantial evidence and its conclusion that Owens had the intent to deliver flows from its finding. Accordingly, we affirm.

III. ASSISTANCE OF COUNSEL

Defendants have a constitutional right to effective assistance of counsel. *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015). The defendant that challenges the effectiveness of their counsel must show (1) that their "'counsel's performance fell below an objective standard of reasonableness,'" and (2) that he was prejudiced by such performance. *Id.* (quoting *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010)). The defendant must establish prejudice by demonstrating that within a reasonable probability that, but for counsel's errors, the trial would have resulted in a different outcome. *Id.* We engage in a "strong presumption" that counsel's performance was reasonable. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). We do not address both prongs of the test when the defendant's showing on one prong is insufficient. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Owens argues that his counsel was ineffective for failing to impeach an officer during his testimony. We disagree.

Owens fails to establish that his counsel's performance fell below an objective standard of reasonableness. He claims that his counsel should have impeached the officer who testified about Owens's confession because the court relied on the testimony in its ruling. Owens further argues that there was no tactical reason for failing to impeach. However, during a hearing on the impeachment issue, the court reminded Owens's counsel that if he impeached the officer the State could offer evidence to rehabilitate him. Owens's counsel may have decided against impeachment because he knew the State would inevitably rehabilitate the officer by introducing evidence of his

commendations and other accolades. Owens's counsel's decision is not objectively unreasonable, so Owens's ineffective assistance of counsel claim fails.

## IV. OFFENDER SCORE CALCULATION

Owens argues that he is entitled to resentencing because the trial court erroneously included a felony point for his prior conviction for possession of a controlled substance—methamphetamine, which is now void under *Blake*. Owens also argues that the court erroneously included a point for his being subject to community custody at the time of his commission of the current offenses. That point derived from his now void possession of a controlled substance conviction. We hold that the trial court erred in including a felony point for a void conviction and in including a felony point for a void term of community custody.

### A. *Blake* Point

RCW 9.94A.525 empowers a trial court to calculate a defendant's offender score by examining their criminal history and assigning a score based on the type of prior offense. The highest possible score that impacts a sentence is 9 or higher. RCW 9.94A.510.

When calculating an offender score, the trial court may not consider "a conviction based on an unconstitutional statute." *State v. LaBounty*, 17 Wn. App. 2d 576, 581-82, 487 P.3d 221 (2021). In *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021), our Supreme Court ruled that unlawful possession under former RCW 69.50.4013(1) was unconstitutional and convictions based on the statute were void.[6] Therefore, a prior unlawful possession conviction, which has now been

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[6] Indeed, "[i]f a statute is unconstitutional, it is and has always been a legal nullity." *State ex. rel Evans v. Bhd. of Friends*, 41 Wn.2d 133, 143, 247 P.2d 787 (1952).

voided, cannot be used to calculate a defendant's offender score. *See LaBounty*, 17 Wn. App. 2d at 581-82. Inclusion of a point for Owens's now void unlawful possession conviction was erroneous.

B. Community Custody Point.

In addition to points calculated under RCW 9.94A.525, a defendant's offender score calculation is increased by one point under RCW 9.94A.525(19) when they commit a crime while on community custody. We are presented with the question of whether this "community custody point" still applies when the community custody term arises from a void conviction.

The State asks us to interpret RCW 9.94A.525(19) so that it operates to add a point even if the community custody arises from a void conviction. To support its argument the State references authority examining whether a defendant must comply with a trial court's contempt order when such order is erroneous or unconstitutional. *See e.g. Walker v. City of Birmingham*, 388 U.S. 307, 317, 320-21, 87 S. Ct. 1824, 18 L. Ed. 2d 1210 (1967) (party's remedy is to challenge court order not to disregard or violate the order); *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 278, 280, 534 P.2d 561 (1975) (examining whether a trial court's invalid contempt order must be followed); *State v. Noah*, 103 Wn. App. 29, 46, 9 P.3d 858 (2000) (examining when a defendant may collaterally attack a contempt order).

But Division One of this court recently disapproved of inclusion of a community custody point arising from a void conviction. *State v. French*, ___ Wn. App. ___, 508 P.3d 1036, 1038 (2022). The *French* court also rejected the very same contempt analogy that the State argues here.

*Id*. We agree with the reasoning in *French* and hold that inclusion of the community custody point in Owens's offender score was erroneous.[7]

We typically only remand for resentencing due to an inaccurate offender score when either the standard range of the challenged sentence would have been lower had the score been accurate, or when, even if the standard range remains the same, the trial court could have imposed a lower sentence than the one it imposed and we cannot know the impact of the inclusion of the improper convictions on the trial court's ultimate decision as to the sentence. *State v. Kyllo*, No. 55176-4-II (Wash. Ct. App. Feb. 1, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2055176-4-II%20Unpublished%20Opinion.pdf; *State v. Weekly*, No. 53583-1-II (Wash. Ct. App. Feb. 23, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2053583-1-II%20Unpublished%20Opinion.pdf, *review denied*, No. 100771-0, 2022 WL 2719518 (2022).[8]

*Kyllo*, while unpublished, is instructive. In that case, Kyllo's criminal history included a conviction for unlawful possession of a controlled substance in violation of former RCW 69.50.4013(1) that was included in his offender score, but had been rendered void pursuant to *Blake*, 197 Wn.2d 170. Slip op. at 1. This court explained that removing this conviction from

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[7] While we recognize the difference between void and voidable judgments, we refrain from engaging in that discussion here.

[8] In *Weekly*, we explained "[o]ur cases have been inconsistent in determining when a reduced offender score warrants resentencing. This court has explained that "a reduced standard range, not a reduced offender score, requires resentencing on remand." Slip op. at 14 (*State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007) (emphasis omitted) (footnote omitted)). But in *State v. McCorkle*, the State failed to prove comparable foreign convictions, resulting in a miscalculation of the offender score that did not affect the standard range. 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997). We held the error was not harmless because "the record does not clearly indicate that the sentencing court would have imposed the same sentence without the [unproved] prior convictions and the resultant change in offender score." *Id*.

Kyllo's offender score would still result in an offender score higher than 9, but that "we cannot presume that the trial court may not choose to impose a lower sentence within the standard range given the lower offender score." *Kyllo*, slip op. at 3. We remanded *Kyllo* for resentencing. Slip op. at 4. But in *Weekly*, we explained that "we also consider whether the defendant was sentenced at the bottom of the standard range. If the trial court imposed a low-end sentence and a reduction of the offender score could not result in a lower sentence within the standard range, then resentencing would not be necessary." Slip op. at 15.

Here, Owens was sentenced at the low end of the standard range, making resentencing unnecessary. Instead, we remand only for correction of Owens's criminal history statement appended to his judgment and sentence. We do so because the State is allowed to utilize a prior criminal history statement that a trial court relied on in sentencing as proof of criminal history in a later sentencing. *See State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (stating that transcripts of prior proceedings may be used as evidence to support the State's burden of proving criminal history by a preponderance of the evidence), *superseded by statute on other grounds*, LAWS OF 2008, ch. 231, § 4, *as recognized in State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

## IV. STATEMENT OF ADDITIONAL GROUNDS

Owens argues that four additional grounds warrant reversal of his convictions. The additional grounds one through three address his bail jumping charge. Owens's fourth additional ground claims his trial counsel was ineffective for: failing to object to his bail jumping charge; failing to issue a material witness warrant for his passenger and his Department of Corrections officer; failing to object to the detective's testimony that established the intent element of his

possession of methamphetamine with intent to deliver charge; and failing to move to suppress evidence from an illegal *Terry*[9] stop.

Owens's bail jumping arguments are moot because the trial court acquitted him of that charge. Accordingly, we refuse to address his first, second, and third grounds. For the same reason, we refuse to address Owens's argument that his counsel was ineffective for failing to object to the bail jumping charge.

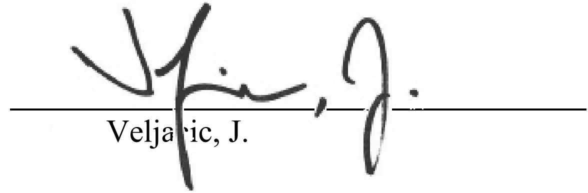
Owens does not provide argument supporting his assertion that his counsel's failure to issue material witness warrants was deficient or prejudicial. Owens also fails to provide argument supporting his assertion that his counsel should have objected to the detective's testimony. Owens's *Terry* stop argument fails because his traffic stop was not a *Terry* stop; rather he was stopped after failing to signal while turning. Concerning these assertions of ineffective assistance of counsel, Owens fails to satisfy his burden. *See Khan*, 184 Wn.2d at 688. Assertions given passing treatment, or that are unsupported by argument, will not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

CONCLUSION

We affirm Owens's convictions and conclude his counsel was not ineffective. We also hold that under *Blake*, Owens's offender score as determined by the trial court is incorrect. Because Owens's standard range would be unchanged, we do not order resentencing, but instead remand to the trial court to correct his criminal history statement.

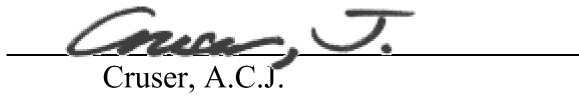
[9] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

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.



Veljacic, J.

I concur:



Cruser, A.C.J.

PRICE, J. (concurring) — I agree with the majority's result and most of its well-reasoned opinion. I write separately, however, to disagree with the majority's position on resentencing when the defendant's offender score changes as a result of an appeal, but the standard range remains the same.

Citing two recent unreported decisions, *State v. Weekly*, No. 53583-1-II (Wash. Ct. App. Feb. 23, 2022) (unpublished)[10], *review denied*, ___ Wn.2d ___ (2022) and *State v. Kyllo*, No. 55176-4-II (Wash. Ct. App. Feb. 1, 2022) (unpublished)[11], the majority states:

> We typically only remand for resentencing due to an inaccurate offender score when either the standard range of the challenged sentence would have been lower had the score been accurate, *or when, even if the standard range remains the same, the trial court could have imposed a lower sentence than the one it imposed and we cannot know the impact of the inclusion of the improper convictions on the trial court's ultimate decision as to the sentence.*

Majority at 15 (emphasis added). Although I concede that *Weekly*'s holding supports the majority, that case also acknowledged that our opinions have been inconsistent on this issue.[12] No. 53583-1-II, slip op. at 14-15. And *Kyllo*'s support for this point is somewhat weakened because, in that case, resentencing was conceded by the State. No. 55176-4-II slip op. at 2.

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[10] https://www.courts.wa.gov/opinions/pdf/D2%2053583-1-II%20Unpublished%20Opinion.pdf.

[11] https://www.courts.wa.gov/opinions/pdf/D2%2055176-4-II%20Unpublished%20Opinion.pdf.

[12] The *Weekly* court stated:

> Our cases have been inconsistent in determining when a reduced offender score warrants resentencing. This court has explained that "a reduced standard range, not a reduced offender score, requires resentencing on remand." *State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007) (emphasis omitted) (footnote omitted). But in *State v. McCorkle*, the State failed to prove comparable foreign convictions, resulting in a miscalculation of the offender score that did not affect the standard range. 88 Wn. App. 485, 499-500, 945 P.2d 736 (1997). We held the error was not harmless because "the record does not clearly indicate that the sentencing court would have imposed the same sentence without the [unproved prior convictions] and the resultant change in offender score." *Id*.

No. 53583-1-II, slip op. at 14-15 (alteration in original).

Fundamentally, I do not agree with the majority's premise that resentencing should be freely ordered any time an offender score changes on appeal and we "cannot know the impact" on the trial court's ultimate sentencing decision. Majority at 15. This conclusion exaggerates the importance of merely one element of a sentencing decision at the expense of hardships resulting from resentencing.

Of all of the difficult tasks superior courts undertake, sentencing may be among the most challenging. A thoughtful sentencing decision requires trial court judges to balance many conflicting interests. The Sentencing Reform Act[13] sets out seven different considerations:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
>
> (4) Protect the public;
>
> (5) Offer the offender an opportunity to improve himself or herself;
>
> (6) Make frugal use of the state's and local governments' resources; and
>
> (7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010.

Not uncommonly, these considerations point sentencing courts in different directions—some toward leniency, others toward stern accountability. Notably, only the first consideration involves the defendant's criminal history, while several others require the trial court to look outside the individual defendant and evaluate instead the future and present impact on the community.

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[13] Ch. 9.94A RCW.

The criminal history of a defendant is obviously critical to a defendant's standard range, and the standard range is, without question, a fundamental component of the sentence. But beyond dictating the scope of the standard range, the actual number of past offenses is but one piece of the holistic picture of a defendant—and this holistic picture is a far more important consideration for the trial judge as they assess the possibility for a defendant "to improve" themselves. RCW 9.94A.010(5).

Meanwhile, the sentencing hearing is also frequently one of the most dramatic and demanding hearings held by the trial court. Lengthy criminal processes exact a toll on the participants of the criminal justice system. And it is not until the sentencing hearing that these participants all have an opportunity for closure. Even when the result is an unhappy one, defendants, victims, and related family members, witnesses, as well as the community as a whole receive a sense of finality at a sentencing hearing.

Of course, the value of this closure, by itself, can never be a barrier to resentencing in the appropriate case. But we should pause with this value in mind as we decide what those appropriate cases are.

Here is where I part with the majority. In the context of a changing offender score, the majority instructs that we should send back every case in which we "cannot know the impact" of a different offender score, even if the range is the same. I would urge a different approach—resentencing should be limited to only those cases where either the standard range changes, or where there is an *overt* indication that the change in an offender score *would* impact the sentencing decision. Examples might include where the trial court gives an indication on the record that either the offender score itself or the specific crime that was removed from the offender score was

unusually impactful, or perhaps where the appeal resulted in a dramatic reduction in the offender score.[14] This case has none of these features.

I respectfully concur in the result.

PRICE, J.

[14] One might imagine, for example, a more compelling case for resentencing if an offender score dropped from 20 to 9 as opposed to an offender score dropping from 15 to 12.

## RUSSELL SELK LAW OFFICE

## August 25, 2022 - 1:33 PM

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| **Appellate Court Case Title:** | State of Washington, Respondent v. Dusten J. Owens, Appellant |
| **Superior Court Case Number:** | 19-1-00305-9 |

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