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Supreme Court No. 102340-5

No. 57215-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ISAIAH SCHUBERT,

Petitioner.

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PETITION FOR REVIEW

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## I. INTRODUCTION

Isaiah Schubert has successfully rehabilitated himself since his guilty plea for burglary and related counts. He attempted to present the trial court with his unblemished disciplinary record and evidence of his steps toward self-improvement at his resentencing hearing.

Yet the trial court refused to consider the evidence presented by Mr. Schubert, stating it did not have the ability to reach the top count which controls the sentence.

Mr. Schubert was denied a full hearing because the court did not meaningfully consider evidence of rehabilitation. The denial of a full resentencing merits this Court's review.

## II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Mr. Schubert seeks review of the Court of Appeals decision affirming his judgment and sentence.

## III. ISSUE PRESENTED

When a case is remanded for resentencing, the court must conduct a de novo, plenary resentencing. This requires the court to meaningfully consider evidence of rehabilitation. At Mr. Schubert's resentencing, the trial court acknowledged Schubert's efforts to transform himself in prison, but did not take these efforts into account when it re-imposed the original sentence. The court failed to account for Schubert's rehabilitation and the reduction of his offender score and to provide a de novo resentencing. Is the Court of Appeals decision affirming the judgment and sentence in conflict with decisions of this Court, and with published decisions of the Court of Appeals, meriting review? RAP 13.4(b)(1), (2).

#### IV. STATEMENT OF THE CASE

1. *In 2017, the court sentenced Mr. Schubert, a man with no criminal record, to 176 months incarceration based on an incorrect offender score.*

Isaiah Schubert, a man with no criminal record, pleaded guilty to seven counts stemming from the violation of a no-

contact order in 2017. *State v. Schubert*, noted at 20 Wn. App. 2d 1073, 2022 WL 367405 at \*1 (2022). Mr. Schubert pleaded guilty to the top count of burglary in the first degree while armed with a firearm as a crime of domestic violence, as well as six related offenses. *Schubert*, 20 Wn. App. 2d at \*1. Mr. Schubert was sentenced to 176 months, which included a 60-month firearm enhancement. CP 19.

The trial court miscalculated Mr. Schubert's offender score on count 1, first degree burglary, as a score of 9. CP 19; *Schubert*, 20 Wn. App. 2d at \*1. The court also imposed discretionary legal financial obligations (LFOs), along with interest provisions – all of which were later prohibited. CP 19; *Schubert*, 20 Wn. App. 2d at \*1.

Mr. Schubert first filed a pro se personal restraint petition (PRP) arguing his offender score was incorrect and his plea was thus involuntary. *Schubert*, 20 Wn. App. 2d at \*1. The Court of Appeals agreed the offender score on the top count was

incorrect but did not correct his offender scores on the remaining counts. *Id.* The Court rejected Mr. Schubert's claim the scoring error rendered the plea involuntary, and this Court denied review, holding Mr. Schubert had not shown actual and substantial prejudice. *Id.*

Mr. Schubert then moved to withdraw his guilty plea under CrR 7.8, which the trial court denied. *Schubert*, 20 Wn. App. 2d at \*1. Mr. Schubert requested the court resentence him on counts 2-7, which had similar scoring errors to count 1, which the court had already addressed. *Id.* Mr. Schubert appealed the court's denial of his CrR 7.8 motion; the court's failure to correct the erroneous offender scores on counts 2-7; and the improper LFOs and interest provision. *Id.* at \*2.

In February 2022, the Court of Appeals issued an opinion in the second appeal, affirming the trial court's denial of the motion to withdraw the guilty plea. *Id.* at \*2. But the Court agreed with Mr. Schubert that the trial court abused its

discretion when it failed to resentence him on counts 2-7. *Id.* at \*3. The Court also agreed that the trial court improperly imposed discretionary LFOs and interest. The Court vacated the sentence on counts 2-7 and remanded again for resentencing. *Id.*

2. *Mr. Schubert attempted to discuss his rehabilitation and progress at resentencing hearing in 2022, but the superior court limited the scope of the hearing.*

In August 2022, Mr. Schubert appeared in the trial court for a resentencing hearing. RP 5-23. He attempted to explain how he had used his time in prison to change and improve himself. RP 13. Mr. Schubert told the court he had been attending college courses and other programming on nonviolent communication, and had remained infraction-free for five years. RP 13. In addition to gaining sobriety and obtaining an education, Mr. Schubert acknowledged the pain his actions had caused his former wife and daughter and said he was ashamed of his actions. RP 13.



Mr. Schubert has loving parents who form a strong support system for him outside of prison. RP 17-18. Mr. Schubert's defense counsel described him as "incredibly smart, ... incredibly pleasant" and "a model person in custody" with "zero infractions." RP 9-10.

Despite Mr. Schubert's progress and the change in the offender scores on counts 2-7, the trial court maintained the same sentence imposed five years earlier. RP 14. The trial court stated there was simply "nothing before me in terms of changing that sentence." RP 14.

The judge complimented Mr. Schubert's effort to better himself but refused to consider it during the hearing. Instead, the court simply told him to "continue doing all the positive things you're doing, try to keep that positive outlook..." while maintaining the same sentence. RP 15.

## V. ARGUMENT

This Court should grant review because a new sentencing hearing following a sentence vacated for a miscalculated offender score is not a ministerial correction or a limited hearing; instead, “a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Where a court exercises its discretion at a resentencing hearing, the proceeding is not “merely ministerial.” *State v. Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011).

“Remand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is appealable as a matter of right.” *State v. Delbosque*, 195 Wn.2d 106, 126, 456 P.3d 806 (2020) (internal citation omitted). This is distinguished from the correction of a scrivener’s error, which does not require a new final judgment. *Id.*

The Court of Appeals disagreed with Mr. Schubert's claim that the court should have conducted a de novo sentencing hearing. Slip op. at 4. The Court held the court did not err because the proceeding was a "limited resentencing on courts 2-7." *Id.* But Mr. Schubert was entitled to a full resentencing where the court exercises "independent discretion." *State v. Dunbar*, 532 P.3d 652, 656 (Wash. Ct. App., July 18, 2023) ("We hold that, unless the reviewing court restricts resentencing to narrow issues, any resentencing should be de novo").

The Court of Appeals found in the alternative that Mr. Schubert "doesn't show that the trial court failed to" consider "evidence of his rehabilitation." Slip op. at 4. This conclusion is not supported by the record. The trial court clearly stated several times that it could not consider Mr. Schubert's rehabilitation or his remorse. RP 12-15. The court made the following statements to Mr. Schubert when he attempted to discuss his rehabilitation at the proceeding:

COURT:

“The court is limited to what it can do.” RP 12.

“Mr. Schubert, understand there’s a real limitation to what can occur here today. RP 13.

“There’s nothing before me in terms of changing that sentence.” RP 14.

“[C]ontinue doing all the positive things you’re doing, try to keep that positive outlook, try to plan for when you do get out so you can then really reintegrate back into the community and be a successful person in the community...” RP 15.

The Court of Appeals’ conclusion that the trial court considered evidence of Mr. Schubert’s rehabilitation is not supported by the record.

Mr. Schubert was entitled to a de novo sentencing proceeding. Accordingly, the Court of Appeals decision affirming the judgment and sentence is in conflict with this Court’s own case law, as well as with *Dunbar*, a published decision of the Court of Appeals. This Court should grant review. RAP 13.4(b)(1), (2).

For the reasons set forth above, Mr. Schubert respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with a published decision of the Court of Appeals and with decisions of this Court. This Court should grant review. RAP 13.4(b)(1), (2).

This document is in 14-point font and contains 1,554 words, excluding the exemptions from the word count per RAP 18.17.

DATED this 31st day of August, 2023.

Respectfully submitted,



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## APPENDIX

August 1, 2023

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ISAAH JACOB SCHUBERT,

Appellant.

No. 57215-0-II

UNPUBLISHED OPINION

VELJACIC, J. — Isaiah J. Schubert appeals his sentence following resentencing based on our remand due to a miscalculated offender score. *See State v. Schubert*, No. 54597-7-II, (Wash. Ct. App. Feb. 8, 2022) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2054597-7-II%20Unpublished%20Opinion.pdf> (*Schubert II*), *review denied*, 199 Wn.2d 1021 (2022). Schubert argues that the trial court erred by not considering rehabilitation evidence when resentencing him. Because Schubert fails to show trial court error, we affirm his judgment and sentence.

**FACTS<sup>1</sup>**

In 2017, Schubert pled guilty to burglary in the first degree while armed with a firearm—domestic violence, violation of pretrial no-contact order—domestic violence, residential burglary—domestic violence, assault in violation of a pretrial no-contact order—domestic violence, unlawful imprisonment—domestic violence, unlawful possession of a firearm in the

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<sup>1</sup> The following facts rely in part on the facts set forth in this court’s opinion in *Schubert II*, No. 54597-7-II, slip op. at 1-2.

second degree, and criminal trespass in the first degree—domestic violence. The trial court sentenced Schubert based on an incorrect offender score on count 1, the burglary in the first degree conviction.

Schubert filed a personal restraint petition seeking relief based on the offender score error. *See In re Pers. Restraint of Schubert*, No. 51900-3-II (Wash. Ct. App. Jan 8, 2019) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2051900-3-II%20Unpublished%20Opinion.pdf> (*Schubert I*). We granted the petition and remanded for resentencing on count 1. During the resentencing hearing, Schubert requested the court resentence him on counts 2-7 in addition to count 1. The State agreed that there were errors in counts 2-7, but also argued that our mandate only addressed count 1. The trial court concluded that per our mandate, it was only authorized to resentence on count 1.

The trial court reduced Schubert’s sentence from 176 months to 162 months on count 1. All other sentences ran concurrently to count 1’s sentence.

Schubert appealed, arguing that his offender score was incorrect for counts 2-7 and that he should be resented on those counts as well. We agreed, holding that “[b]ecause Schubert’s sentence was based on an incorrect offender score, the sentence on counts 2-7 is invalid and must be vacated.” *Schubert II*, No. 54597-7-II, slip op. at 6. We remanded the matter to the trial court for resentencing consistent with our opinion. *Id.*, slip op. at 7.

During the 2022 resentencing hearing before us now, the State argued for the high end of the standard range “based upon the fact that the high end of those sentences is still well below the sentence that he is serving on Count 1” so the total time served would not change. Rep. of Proc. (RP) (Aug. 11, 2022) at 8. Defense counsel argued for the low end of the standard range because Schubert had been a model inmate, made significant progress, had supportive parents, and had a



residence waiting for him when he was released. But counsel recognized that it was all “academic” because Schubert’s new sentences would run concurrently with the higher sentence on count 1, which had already been ordered at 162 months. RP (Aug. 11, 2022) at 8. Counsel acknowledged that resentencing on count 1 was “simply not before the court, and it’s not much fun to tell a client that you really like working with that there’s no opportunity to ask the court for that.” RP (Aug. 11, 2022) at 10.

The trial court corrected Schubert’s offender score, resentenced Schubert to the high end of the newly determined standard ranges on counts 2-7, and ran all sentences concurrently to count 1. The court acknowledged Schubert’s progress but indicated that there was “nothing before [the court] in terms of changing [count 1’s] sentence,” stating that the court’s “role is to make sure that the other counts are done correctly.” RP (Aug. 11, 2022) at 14-15. Schubert appeals.

#### ANALYSIS

Schubert contends that the trial court erred in not considering rehabilitation evidence in resentencing him. He argues that the court had discretion to consider this evidence and resentence him on all counts, including count 1. We conclude that the trial court did not err.

We review sentencing decisions for abuse of discretion. *State v. Delbosque*, 195 Wn.2d 106, 116, 456 P.3d 806 (2020). “Discretion may be abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the law.” *State v. Hubbard*, 1 Wn.3d 439, 445, 527 P.3d 1152 (2023).

The scope of an appellate court’s mandate limits a trial court’s discretion to resentence on remand. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). When we remand for the trial court to enter only a ministerial correction of the original sentence, the court has no discretion to resentence. *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). But when we remand

more broadly for resentencing, the trial court may resentence on counts that were not the subject of the appeal. *Id.*

Here, we initially remanded on count 1 based on a miscalculated offender score. *Schubert I*, No. 51900-3-II, slip op. at 2. During the first resentencing hearing, Schubert requested that the court resentence him on counts 2-7 as well because the miscalculated offender score affected all counts. *Schubert II*, No. 54597-7-II, slip op. at 2. The trial court concluded that per our mandate, it was only authorized to resentence on count 1. On appeal, we held that this was incorrect because the trial court had independent authority to correct an erroneous sentence. *Id.*, slip op. at 6. We remanded for the trial court to resentence on counts 2-7 as well, even though the total length of the sentence would not be impacted. *Id.*, slip op. at 3.

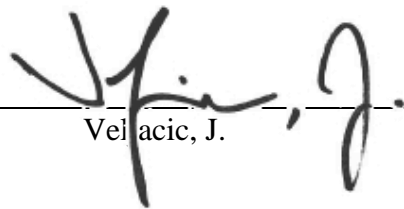
The second resentencing hearing was a limited resentencing on counts 2-7. The trial court could not resentence Schubert on count 1. Consistent with our mandate, the trial court resentedenced Schubert on counts 2-7. The court corrected Schubert's offender score. The State and Schubert argued respectively for the high and low end of the standard range. The trial court ordered a standard range sentence. We conclude the trial court did not err.

Schubert argues that the court should have considered evidence of his rehabilitation but he doesn't show that the trial court failed to do so. Accordingly, the trial court did not err in resentencing Schubert on counts 2-7 and not revisiting its sentence on count 1.

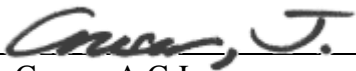
CONCLUSION


Because Schubert does not show that the trial court abused its discretion, we affirm Schubert's judgment and 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.

  
\_\_\_\_\_  
Velacic, J.

We concur:

  
\_\_\_\_\_  
Cruser, A.C.J.

  
\_\_\_\_\_  
Che, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 57215-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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