

FILED
 SUPREME COURT
 STATE OF WASHINGTON
 2/14/2024 8:00 AM
 BY ERIN L. LENNON
 CLERK

SERVICE	
Jan Trasen 1511 3rd Ave, Ste 701 Seattle WA 98101 jan@washapp.org ; wapofficemail@washapp.org	Service was electronic, or if no email address appears at left, via U.S. Mail. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 14, 2024. Port Orchard, WA <hr/> Original to Court of Appeals; Copy as listed at left.

IN THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 102663-3
)	
Respondent,)	STATE’S RESPONSE
)	TO MOTION FOR
v.)	STAY
)	
MELVIN ANTONIO XAVIER,)	
)	
Appellant.)	
_____)	

I. IDENTITY OF MOVING PARTY

The respondent, STATE OF WASHINGTON, asks this Court for the relief designated in Part II of this motion.



II. STATEMENT OF RELIEF SOUGHT

The State respectfully asks that Xavier's motion to stay be denied.

III. FACTS RELEVANT TO MOTION

After plea negotiations, Xavier was charged, via a third amended information, with second-degree robbery (domestic violence)(DV), first-degree unlawful possession of a firearm felony harassment DV, fourth-degree assault DV, tampering with a witness, and violation of a court order DV. CP 30-37. The next day Xavier entered pleas of guilty to the charges in the third amended information. CP 38.

As a result of the plea, the State dropped charges of first degree assault (DV), one counts of first degree unlawful possession of a firearm. *See* CP 23-25. As originally charged, Xavier risked life without parole as a persistent offender, having two prior strikes on his record. RP 41.

In his plea, Xavier acknowledged that the prosecutor



would make the sentencing recommendation stated in the plea agreement. CP 41. Xavier was advised that the judge does not have to follow recommendations. Id. Xavier acknowledged that

(i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.

(ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.

(iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

(iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

CP 41.



Xavier acknowledged these same provisions on colloquy with the trial court. RP 54-55. The trial court, pre-plea, advised Xavier that it was likely to impose the recommended sentence, seeing the agreement as “very thorough agreement between counsel.” RP 54. The trial court reemphasized to Xavier its discretion to impose that agreement or not. RP 55.

In in exchange for the pleas, the state agreed to forego additional charging including:

NO FURTHER CHARGES-The State agrees to file no further charges or sentence enhancements for this incident that are in the exclusive jurisdiction of Kitsap County based on the discovery issued by the State for this cause number, including but not limited to the following uncharged offense(s): Assault 1, aggravator on other charges, Firearm enhancements, additional UPFIs, additional VNCO counts, additional counts of tampering.

Supplemental CP (App. A, at 3).¹ The joint sentencing

¹ The plea agreement is here referred to from the trial court’s file and is attached as App. A. The State filed a supplemental designation of clerk’s papers on April 14, 2023, App. B, and for reasons unknown it does not appear that the superior court ever forwarded the designated document to the Court of Appeals.



recommendation was for a total of 236 months. App. A, at 3. Xavier agreed that an appeal of the agreed sentence breached the plea agreement. *Id.* Xavier further stipulated to the exceptional sentence:

The parties stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, that they will recommend the following exceptional sentence provisions, and that a factual basis exists for this exceptional sentence, predicated upon *In re Breedlove*, 138 Wn.2d 298 (1999) and *State v. Hilyard*, 63 Wn. App. 413 (1991), *review denied* 118 Wn.2d 1025 (1992), RCW 9.94A.421(3) and RCW 9.94A.535: Count I to be served consecutive to all other counts

App. A, at 4. Further, Xavier agreed to waive the right to have facts supporting an agreed exceptional sentence found by a jury.

App. A, at 7. Xavier's counsel clearly articulated the agreement for the proposed exceptional sentence in open court. RP 44.

The trial court found that the parties jointly recommended an exceptional sentence where the presumptive range was 63-84 months on count 1 and 87-116 months on count 2. CP 61. The trial court found that the parties stipulated



that justice is best served by the exceptional sentence, citing RCW 9.94A.535(2)(a). *Id.* The trial court found that the aggravator on count one, intimate partner domestic violence, was sufficient alone to support an exceptional sentence. *Id.* The proposed sentence was consistent with and in furtherance of justice. *Id.* The trial court concluded, citing *In re Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999), that the agreement of the parties provided substantial and compelling reasons for the exceptional sentence. CP 61.

A prior conviction for unlawful possession of controlled substance was included in the offender score at Xavier's original sentencing. CP 49. Pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), the trial court held a resentencing. As a result of striking the possession offense, Xavier's offender score was reduced from 16 to 15 on Count I. CP 71.

The trial court again imposed an exceptional sentence



based on the stipulation “by the Prosecutor and the Defendant.” CP 72. Count I was again ordered to run consecutive to the other offenses but this time the addition equated to a total sentence of 144 months. CP 72.

At the resentencing Xavier again articulated that his settlement with the state resulted from his exposure to a third strike. RP 106-07. The state considered that one of Xavier’s prior strikes was committed as a juvenile and the state considered Ms. Xavier’s position in arriving at a recommendation “less than the original judgment and sentence.” RP 110-11. Thus the state recommended consecutive 72 month terms on counts I and II. *Id.*

Xavier agreed with this “joint agreement.” RP 112. Xavier asked the trial court about family sentencing alternatives, RP 119, but he was statutorily ineligible for that program because of the violent offense. RP 121; RCW 9.94A.655(1)(c).



The trial court's findings and conclusion on the second exceptional sentence largely mirrored the previous document. CP 83-85. The ranges were adjusted downward and the total sentence was 92 month shorter. *Id.*

Other than the changed occasion by *State v. Blake*, Xavier did not question the accuracy of his offender score in either sentencing. In the plea agreement, Xavier stated that

The Defendant declares, under penalty of perjury as provided by RCW 9A.72.020 or .030, that the felony criminal history listed in this agreement is true, correct and complete ...

App. A, at 6.

On appeal from the resentencing, Xavier claimed that the trial court failed to exercise its discretion and fully consider circumstances in mitigation of the sentence. Xavier did not claim that the trial court lacked authority to impose an exceptional sentence in the matter. Xavier did not assign error to any of the trial court's finding in support of the exceptional



sentence. Xavier paid scant attention to the fact that he agreed to the exceptional sentence the trial court imposed. There was no abuse of discretion.

The Court of Appeals accordingly rejected his claim:

Xavier argues that the trial court erred by resentencing him “without meaningful consideration of mitigation, including [his] evidence of rehabilitation” and his wife’s request for a lower sentence. Br. of Appellant at 13. We decline to reach this argument.

A trial court may impose an exceptional sentence where the defendant and the State stipulate that justice would be best served by an exceptional sentence and the court finds such a sentence “to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.” RCW 9.94A.535(2)(a). When a defendant knowingly, intelligently, and voluntarily agrees to an exceptional sentence, they waive their right to review of the sentence. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

Here, *Breedlove* is controlling. Xavier waived his right to challenge the exceptional sentence because he agreed to it. The trial court imposed exactly the sentence that Xavier requested. He does not argue, and the record does not suggest, that his decision was not knowing, intelligent, and voluntarily. We therefore decline to



reach his argument that the trial court erroneously resentenced him by failing to consider evidence of rehabilitation.

Opinion (App. C), at 4.

IV. GROUNDS FOR RELIEF AND ARGUMENT

The Court of Appeals here followed established law that a defendant may agree to an exceptional sentence, and that by doing so, waives his right to appeal the exceptional sentence. Opinion, at 4 (*citing Breedlove*, 138 Wn.2d at 311). His present contention that his case is any way impacted by the issue in *State v. Vasquez*, 26 Wn. App. 2d 1032, 2023 WL 3197346 (2023)² borders on frivolous.

Vasquez is distinguishable on several grounds. First, the issue presented in that case was the scope of the appellate court's remand order, and whether the trial court therefore had discretion to consider the defendant's youthfulness at resentencing. *Vasquez*, 2023 WL 3197346, at *1. Here, the trial



court was not resentencing Xavier following a remand, but on its own discretion pursuant to a CrR 7.8 motion. And it did indeed exercise discretion to impose a lesser sentence based on the fact that one of his priors was a juvenile offense.

Regardless, and again unlike in *Vasquez*, on resentencing, Xavier agreed to the exceptional sentence that the trial court imposed. In doing so, Xavier avoided a POAA sentence. This was the basis of the decision of the Court of Appeals.

Whatever this Court's disposition of *Vasquez* will be thus has no bearing whatsoever on the issues presented in this case. It thus appears that the sole reason for the motion to stay is delay finality in the present case. It should be denied.

V. CONCLUSION

For the foregoing reasons the State respectfully requests

² Unpublished, *see* GR 14.1(a).



that Xavier's motion to stay be denied.

VI. CERTIFICATION

This document contains 1704 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 14th day of February 2024.

CHAD M. ENRIGHT
PROSECUTING ATTORNEY



RANDALL SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney
kcpa@kitsap.gov



APPENDIX A

RECEIVED AND FILED
IN OPEN COURT

JUL - 7 2020

KITSAP COUNTY CLERK
ALISON H. SONNTAG

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 20-1-00507-18
Plaintiff,)	
)	PLEA AGREEMENT
v.)	
)	
MELVIN ANTONIO XAVIER, III,)	
Age: 36; DOB: 11/27/1983,)	
)	
Defendant.)	

The State and the Defendant enter into this Plea Agreement, consistent with the interests of justice. The State may withdraw this plea agreement at any time prior to the court's acceptance of a plea of guilty. Unless otherwise agreed, this plea offer expires at the Omnibus Hearing. All prior offers, whether oral or written, are hereby withdrawn.

2.1 CURRENT OFFENSE(S) <i>Asterisk (*) denotes same criminal conduct (RCW 9.94A.525).</i>		RCW	Date(s) of Crime from to		Special Allegations*
I	Robbery in the Second Degree	9A.56.210			DV
I	Domestic Violence - General 10.99 Definition	10.99.020 - Intimate Partner (on or after 3-18-2020)	05/10/2020	05/10/2020	
I	Special Allegation-Aggravating Circumstance-Domestic Violence	9.94A.535.3 H			
II	Unlawful Possession of a Firearm in the First Degree	9.41.040.1A	05/10/2020	05/10/2020	
III	Harassment [Felony] - Threat to Kill	9A.46.020.2 Bii	05/10/2020	05/10/2020	DV



1	III	Domestic Violence - General 10.99 Definition	10.99.020 - Intimate Partner (on or after 3-18-2020)			
2	IV	Assault in the Fourth Degree	9A.36.041	05/10/2020	05/10/2020	DV
3	IV	Domestic Violence - General 10.99 Definition	10.99.020 - Family or Household Member (after 7-28-19)			
4	V	Tampering With a Witness	9A.72.120	05/21/2020	05/21/2020	
5	VI	Violation of a Court Order [Gross Misdemeanor]	26.50.110.1	05/21/2020	05/21/2020	DV
6	VI	Domestic Violence - General 10.99 Definition	10.99.020 - Intimate Partner (on or after 3-18-2020)			

2.2 CRIMINAL HISTORY (RCW 9.94A.525) <i>Asterisk (*) denotes prior convictions that were same criminal conduct.</i>	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
VUCSA	5/6/98	5/27/98	Kit 988006068	X
Rob 2	10/18/98	11/18/98	Kit 988012211	X
Rob 2	02/21/01	3/12/01	Kit 011004032	
Assault 2				
Elude	9/15/02	11/18/02	Kit 021011614	
Rob 1 (released 1/13/15)	1/19/07	7/30/07	King 071013489	
VUCSA (attempt)	10/11/15	9/26/16	Kit 151042396	

2.3 SENTENCING DATA									
Count	Offender Score	Seriousness Level	Standard Range	Days (x)	Mo. (x)	Special Allegations Type*	Mo.	Total Standard Range (Mo.)	Maximum Term
I	16	IV	63-84	-	X	DV			10 years
II	9	VII	87-116	-	X				10 years
III	11	III	51-60	-	X	DV			5 years
IV/VI	NA	GM				DV			364 days
V	9	III	51-60	-	X				5 years



Defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

*SPECIAL ALLEGATION KEY (RCWs)- DV=Domestic Violence (10.99.020); IP=Intimate Partner (10.99.020); P=Predatory (9.94A.836); DD=Victim is developmentally disabled, etc. (9.94A.838, 9A.44.010); the following pursuant to 9.94A.533: F=Firearm (.825), DW=Deadly Weapon (.825); SZ=School Zone (+69.50.435); SM=Sexual Motivation (.835); VH=Vehicular Homicide Prior DUI (+46.61.520,5055); CF=drug crime at Corrections Facility; JP=Juvenile Present at Manufacture (+.827); <15=Victim Under 15 (.837); CSG=Criminal Street Gang Involving a Minor (.833); AE=Endangerment While Eluding (+.834); VUI=Vehicular Homicide/Assault while DUI; LE=Assault of Law Enforcement with Firearm (+.831); RX=Robbery of Pharmacy (+.832); CSF=Sexual Conduct with a Child for a Fee (+.839).

NO FURTHER CHARGES—The State agrees to file no further charges or sentence enhancements for this incident that are in the exclusive jurisdiction of Kitsap County based on the discovery issued by the State for this cause number, including but not limited to the following uncharged offense(s): Assault 1, aggravator on other charges, Firearm enhancements, additional UPF1s, additional VNCO counts, additional counts of tampering

NOTICE—Any RCW 69.50 felony offense with a firearm or deadly weapon special verdict is a Level III offense (e.g. 0 to 6 month range converts to 51 to 60 month range). RCW 9.94A.518.

FACTS OF HIGHER/MORE SERIOUS AND/OR ADDITIONAL CRIMES (RCW 9.94A.530)—The parties stipulate that the sentencing court may consider the discovery and/or certification(s) for probable cause as the material facts.

SENTENCING RECOMMENDATIONS AND AGREEMENTS

X **236 months** to be served in the Kitsap County Corrections Center (term 365 days or less) or the Department of Corrections (term more than 365 days).

No objection to **Jail Alternatives/Partial Confinement** if available and defendant is found eligible at the discretion of the Kitsap County Jail (may include electronic home monitoring, supervised community service, work crew and work release).

X **Straight Time**—Confinement to be served in the Kitsap County Jail.

Any sentence within the standard range.

X **Joint Agreement**— The sentence recommendation included herein, including incarceration, probation, probation conditions, and all affirmative conditions, is a joint agreement between the defendant and the State, unless written elsewhere in this agreement. Failure to abide by this agreement will constitute a breach of the plea agreement.

X **Credit for Time Served**—The Defendant shall receive credit for any time served prior to sentencing solely for this cause number as computed by the jail, unless specifically set forth—_____ days.

X **Community Custody**—The State will recommend supervision and crime-related conditions to be ordered by the Court and DOC as follows:

For Offenders Sentenced to the Custody of DOC (sentences of a-year-and-a-day or more)

36 months for: Serious Violent Offenses; Sex Offenses not sentenced under 9.94A.507 or SSOSA, (including felony Failure to Register as a Sex Offender if the defendant has at least one prior felony failure to register conviction);

18 months for Violent Offenses

12 months for: Crimes Against Persons; felony offenses under chapter 69.50 or 69.52 RCW; felony Failure to Register as a Sex Offender (if the defendant has no prior convictions for failure to register)

Duration required by law for SSOSA, DOSA or Work Ethic sentence

Motor vehicle taking/theft/possession crimes (6 – 12 months): _____

For Offenders Sentenced to a term of one year or less (to be served in the Kitsap County Jail)

12 months for: violent offenses; crimes against persons; felony offenses under chapter 69.50 or 69.52 RCW; sex offenses; or felony Failure to Register as a Sex Offender (regardless of the number of prior felony failure to register convictions)



SENTENCING RECOMMENDATIONS AND AGREEMENTS

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	<p>For Offenders Sentenced for a misdemeanor or gross misdemeanor conviction <input type="checkbox"/> 12 months <input checked="" type="checkbox"/> 24 months supervised probation for misdemeanor or gross misdemeanor convictions</p>
	<p>First Offender—Waiver of standard range pursuant to RCW 9.94A.650.</p>
	<p>DOSA- <input type="checkbox"/> Residential DOSA: If a PSI ordered by the court in this case recommends Defendant enter into a drug offender sentencing alternative program the State will join the Defendant in recommending entry therein. Defendant agrees and understands that Defendant will be taken into custody upon entry of a plea of guilty and will remain in custody until Defendant’s bed date with ABHS, and Defendant stipulates to remain in custody until that bed date, understanding that the court could not otherwise hold Defendant in custody beyond the date of sentencing absent Defendant’s agreement, pursuant to <i>State v. Bergen</i>, 186 Wash.App. 21 (2015). Defendant shall not make a record that undermines Defendant’s agreement to be held in custody. <input type="checkbox"/> Prison DOSA: If DOC recommends Defendant enter into a prison based DOSA program the State will join with DOC’s recommendation that defendant enter such program.</p>
X	<p>Substance Use Disorder Evaluation/Treatment—Defendant agrees to submit to a substance use disorder evaluation, comply with any and all treatment recommended, and submit proof of completion to the court.</p>
X	<p>Domestic Violence Perpetrators Program—The Defendant agrees to successfully complete a certified domestic violence perpetrators treatment program, pursuant to RCW 9.94A.505(11).</p>
X	<p>Forfeiture Agreement—The Defendant agrees to forfeit all seized property referenced in the discovery to the originating law enforcement agency unless otherwise stated.</p>
X	<p>Agreed Exceptional Sentence— The Parties stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, that they will recommend the following exceptional sentence provisions, and that a factual basis exists for this exceptional sentence, predicated upon <i>In re Breedlove</i>, 138 Wn.2d 298 (1999) and <i>State v. Hilyard</i>, 63 Wn.App. 413 (1991), <i>review denied</i>, 118 Wn.2d 1025 (1992), RCW 9.94A.421(3) and RCW 9.94A.535: <u> </u>Count 1 to be served consecutive to all other counts <u> </u></p>
X	<p>Plea to Lesser Uncommitted Crime—Defendant admits that the State has sufficient evidence to convince a jury that he or she committed the offense(s) of <u> </u> Assault in the First Degree <u> </u>. Defendant wishes to plead guilty to the lesser, related offense(s) listed above in the “Current Offenses” to avoid greater punishment. The Defendant understands that the court will accept the guilty plea if it finds that a factual basis exists for the greater charge(s), pursuant to <i>In re Barr</i>, 102 Wn.2d 265 (1984). Further, Defendant waives any claim that the statute of limitations has run on the lesser offense, pursuant to <i>In re Swagerty</i>, 186 Wn.2d 801 (2016).</p>
	<p>Cooperation Agreement—:Defendant agrees: (1) to fully cooperate with law enforcement in the investigation of co-participants; (2) to honor all subpoenas and testify fully and truthfully at any hearings regarding this incident despite any privileges the Defendant believes the Defendant may possess; (3) to be sentenced on a date selected by the State; and, (4) that in the event of rescission of the Defendant's guilty plea in this action for any reason, the Defendant affirmatively waives any privileges contained in Evidence Rule 410 to the extent that ER 410 would bar admission of the Defendant's testimony given in any judicial proceeding related to this incident. In addition, [check one of the following]: <input type="checkbox"/> Defendant agrees that his or her statements provided to law enforcement and described in discovery are truthful and accurate and a deviation from those facts in future testimony would be a breach of the plea agreement; <input type="checkbox"/> Defendant agrees to provide the State with a written summary of expected testimony that is truthful and accurate and which will be the basis of the cooperation agreement, and to provide this summary to the State before the entry of a guilty plea, subject to ER 410.</p>
	<p>Juvenile Declination—The Defendant understands that he or she has a right to appeal the juvenile court's decision to transfer this case to adult court. As part of this plea agreement, the Defendant knowingly, intelligently, and voluntarily waives the right to appeal the juvenile court's decline decision.</p>



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SENTENCING RECOMMENDATIONS AND AGREEMENTS

X	Other Agreement – The State will request a 1 year NCO w/ victim ANX and will defer to the Court with regard to NCO w/ victim Kristina Xavier
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FINANCIAL OBLIGATIONS

The Defendant agrees to pay costs, fees and fines for this action (RCW 9.94A.760, 9.94A.030(27), 10.01.160, 10.46.190), including the costs set out in the table below. Witness fees, sheriff service/subpoena fees, and additional court costs will be ordered when ascertainable.

X	\$500 Victim Assessment, RCW 7.68.035 [PCV]		
X	\$100 DNA / Biological Sample Fee	X	\$200 Filing Fee
	\$500 Court-appointed attorney fees [PUB]	X	\$500 Contribution–Kitsap Co. Special Assault Unit
	\$100 Contribution–Kitsap County Expert Witness Fund [Kitsap County Ordinance 139.1991]	X	\$100 Domestic Violence Assessment, RCW 10.99.080 <input checked="" type="checkbox"/> Kitsap Co. YWCA <input type="checkbox"/> Kitsap Sexual Assault Ctr.
	<input type="checkbox"/> \$1,000 <input type="checkbox"/> \$2,000 Mandatory fine for drug crimes, RCW 69.50.430 (court must impose unless indigent)		\$250 DUC-DUI/DP Account Fee – Imposed on any DUI, Physical Control, Vehicular Homicide, or Vehicular Assault. RCW 46.61.5054.
	\$100 Crime Lab fee, RCW 43.43.690(1)		

RESTITUTION

The Defendant understands that restitution may be ordered in this case up to double the amount of any victim’s loss. Defendant agrees to pay restitution for the charged crime(s), if timely sought by the State. Defendant agrees not to oppose any timely request by the State to continue the restitution hearing pursuant to RCW 9.94A.753(1). Defendant also agrees to pay restitution arising out of or relating to uncharged crimes contained in the discovery in this case where a nexus exists between the defendant’s conduct and the restitution sought. Defendant agrees that, unless convicted of felony DUI, a claim for DUI emergency response cost recovery under RCW 38.52.430 is a form of restitution under RCW 9.95.210(2)(f). The Defendant agrees that his or her presence is hereby waived at any restitution hearing(s) in this action, even absent any further indication of waiver on the judgment and sentence.

The Defendant agrees not to contest restitution except on one of the following basis:

1. The Defendant disputes the sum total of the restitution sought
2. The Defendant asserts that there is no reasonable basis for estimating loss as to any particular claim for restitution
3. The Defendant asserts that there is no authority of law to order restitution in this case, including where no nexus exists between Defendant’s conduct and the restitution being sought or where restitution arises out of uncharged crimes not attributable to Defendant



1 The Defendant understands that the State's failure to enforce any provision regarding restitution,
2 either in this case or in another case, does not constitute a waiver of such provision, and the
3 Defendant agrees not to make any such claim of waiver.

4 **DEFENDANT UNDERSTANDS BY SIGNING THIS AGREEMENT—**

- 5 1. The Defendant hereby declares, under penalty of perjury as provided by RCW 9A.72.020 or
6 .030, that the felony criminal history listed in this agreement is true, correct and complete,
7 that the Defendant has no additional criminal convictions or adjudications that would count
8 toward the offender score, and that the Defendant's community custody/placement status at
9 the time of the current offense(s) is correctly noted herein.
- 10 2. The Defendant understands and agrees to the following:
- 11 a. The Defendant agrees that any attempt to withdraw the Defendant's guilty plea(s), or any
12 attempt to appeal or collaterally attack any conviction or agreed sentence entered under
13 this cause number constitutes a material breach of this agreement.
- 14 b. The Defendant agrees that any violation of any cooperation agreement associated with
15 this plea agreement constitutes a material breach of this agreement
- 16 c. The Defendant agrees that any misstatement of his or her criminal history constitutes a
17 material breach of this agreement.
- 18 d. The Defendant agrees that commission of any new crimes after acceptance of this
19 agreement but before the time of sentencing or before the time the Defendant commences
20 actual service of the sentence ordered by the court constitutes a material breach of this
21 agreement.
- 22 e. The Defendant agrees that any violation of release conditions pending sentencing,
23 including a failure to appear for sentencing, constitutes a material breach of this
24 agreement.
- 25 f. The Defendant agrees that any failure to report to the jail or correctional facility after
26 sentencing as required by the court's commitment order or warrant of commitment
27 constitutes a material breach of this agreement. Note: failure to report to the jail or
28 correctional facility as required by the court is also a crime. See RCW 9A.76.170.
- 29 g. The Defendant agrees that any violation of the terms and provisions of this agreement
30 relating to the assessment, imposition and/or collection of restitution in this case
31 constitutes a material breach of this agreement.
- h. The Defendant agrees that the following requests will constitute a material breach of this
agreement: (1) For the Court or the State to make arrangements for, and be responsible
for, the Defendant's presence at any restitution hearing; or (2) For the Court to continue
any restitution hearing solely for the purpose of permitting the Defendant to attend the
restitution hearing, such a request constitutes a material breach of this agreement.
- i. Upon a finding by the Court that the Defendant has materially breached any term of this
agreement, the Defendant agrees that:
- (i) That the State will be released from its obligations under this agreement, but that the



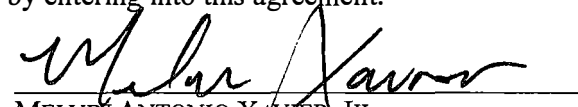
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Defendant will still be bound by the guilty plea(s); and

- (ii) That the State will be authorized to file any additional charges, any greater offenses based on the same conduct, and/or any statutory enhancements that were not filed or were dismissed as part of this plea agreement, and that neither double jeopardy nor mandatory joinder rules will be cause for dismissal of the new and/or additional charges or enhancements; and
- (iii) That the Defendant may be sentenced anew; and
- (iv) That the State's exercise of any of its rights under this agreement shall not be grounds to vacate any guilty plea, conviction or sentence entered under this cause number.

- 3. The Defendant understands that if the Court orders a pre-sentence investigation (PSI), it will be conducted by a person who is an agent of the Court, not of the State. The PSI writer will have access to all police reports and to this plea agreement, but will not be bound by the agreement of the parties in this case.
- 4. The Defendant understands that if the PSI writer, victim, or other interested party does not agree with the State's sentencing recommendations, it will not be grounds for the Defendant to withdraw from this agreement.
- 5. The Defendant understands that if the parties agree to an exceptional sentence, the Defendant is waiving the right to have facts supporting such a sentence decided by a jury.
- 6. The Defendant understands that if the court either finds that any one of the charged crimes is a felony and that a motor vehicle was used in the commission of the crime or makes findings relating to the crimes of Driving Under the Influence or Actual Physical Control of a Motor Vehicle Under the Influence, then the court will direct the clerk to forward an Abstract of Court Record to the Department of Licensing, which, in turn, must revoke the Defendant's driver's license. RCW 46.20.285; 46.61.5055.

DEFENDANT'S ACKNOWLEDGEMENT—I enter into this agreement freely and voluntarily. No one has threatened me or any other person to cause me to enter into this agreement. My attorney has explained the above paragraphs to me and we have fully discussed them. I understand them all, and understand that I waive substantial rights by entering into this agreement.



 MELVIN ANTONIO XAVIER, III
 Defendant



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Goodell

EMILY J. GOODELL, WSBA NO. 44349
Deputy Prosecuting Attorney
Plea Agreement Prepared June 23, 2020

[Signature]
_____, WSBA NO. _____
Attorney for Defendant

COURT'S APPROVAL—In the above entitled cause, I find that the Defendant knowingly, voluntarily and intelligently entered into this plea agreement, and the Defendant understands the consequences of the agreements, recommendations and waivers therein.

PLEA AGREEMENT APPROVED this 7 day of July, 2020.

[Signature]

JUDGE **JEFFREY P. BASSETT**
Prosecutor's File Number—20-121659-31

Prosecutor Distribution—Original (Court Clerk); 1 copy (Prosecutor); 1 copy (DOC); 1 copy (Defense Atty); 1 copy (Pros Stat Keeper)



APPENDIX B

ORIGINAL

FILED
KITSAP COUNTY CLERK

2023 APR 14 PM 4:11

DAVID T. LEWIS III

SERVICE	Service was electronic, or if no email address appears at left, via U.S. Mail. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 14, 2023, Port Orchard, WA <i>Elizabeth Allen</i> Original filed at the Superior Court. Copies as listed at left.
COPY TO COURT OF APPEALS and to Jan Trasen 1511 3rd Ave, Ste 701 Seattle, Wa 98101 jan@washapp.org; wapofficemail@washapp.org	

IN THE SUPERIOR COURT OF WASHINGTON
KITSAP COUNTY

THE STATE OF WASHINGTON,) No. 20-1-00507-18
))
) Plaintiff,) Court of Appeals
)) No. 57060-2-II
))
) v.) STATE'S
MELVIN ANTONIO XAVIER, III,) SUPPLEMENTAL
) DESIGNATION OF
) Defendant.) CLERK'S PAPERS
))
))

Plaintiff, STATE OF WASHINGTON, requests, pursuant to
RAP 9.6(a), that the Kitsap County Clerk certify and file with

STATE'S SUPPLEMENTAL
DESIGNATION OF CLERK'S PAPERS;
PAGE 1 OF 2



Chad M. Enright, Prosecuting Attorney
Appeals Unit
614 Division Street, MS-35
366-4681
0) 337-4949
m/pros

20-1-00507-18
DSGCKP 98
Designation of Clerks Papers
14321820



Division II of the Court of Appeals, Tacoma, Washington, the following clerk's papers:

SUB	DATE	DOCUMENT
	July 7, 2020	Plea Agreement Recommendation Sentence

DATED this 13th day of April, 2023.

CHAD M. ENRIGHT
PROSECUTING ATTORNEY



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us



APPENDIX C

November 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MELVIN ANTONIO XAVIER III,

Appellant.

No. 57060-2-II

UNPUBLISHED OPINION

GLASGOW, C.J. — Melvin Antonio Xavier III shot his wife in the leg. The State charged Xavier with first degree assault and several other offenses. To avoid a persistent offender designation, Xavier pleaded guilty to second degree robbery instead of first degree assault. At sentencing, the parties jointly recommended an exceptional sentence and the trial court imposed the recommended sentence.

Xavier later moved for resentencing pursuant to *State v. Blake*.¹ The parties jointly recommended a lower exceptional sentence. The trial court again imposed the sentence both parties requested.

Xavier now appeals, arguing that the resentencing court erred by failing to consider evidence of rehabilitation and failing to find that his prior 2001 convictions for second degree robbery and second degree assault constituted the same criminal conduct. In a statement of

¹ 197 Wn.2d 170, 481 P.3d 521 (2021).

additional grounds for review (SAG), Xavier also argues that the trial court miscalculated his offender score because his prior conviction for attempting to elude had washed out. We affirm.

FACTS

I. BACKGROUND AND FIRST SENTENCING HEARING

In 2020, Xavier threatened to kill his wife and shot her in the leg. As a result, the State charged Xavier with first degree assault, felony harassment, and two counts of first degree unlawful firearm possession. The State later added charges of fourth degree assault, tampering with a witness, and violating a court order.

Xavier ultimately pleaded guilty to second degree robbery with a domestic violence aggravator, felony harassment, unlawful firearm possession, fourth degree assault, tampering with a witness, and violating a no contact order. As part of his plea, he agreed that the prosecutor's statement of his criminal history was correct and complete.

At a combined plea and sentencing hearing, Xavier's defense attorney discussed the negotiations that led to Xavier's plea. He explained that Xavier had previously been convicted of two strike offenses. First degree assault was also a strike offense, and if Xavier were convicted of this third strike offense, he would have been designated a persistent offender and sentenced to life in prison without the possibility of parole. Former RCW 9A.36.011(2) (1997); former RCW 9.94A.030(33)(a), (38)(a) (2019); RCW 9.94A.570. Xavier instead pleaded guilty to second degree robbery, which was not a strike offense, under *In re Personal Restraint of Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). RCW 9A.56.210; former RCW 9.94A.030(33) (LAWS OF 2019, ch. 187, § 1). *Barr* allows a trial court to "accept a guilty plea to an amended charge not supported by a factual basis as long as there is a factual basis for the original charge." *State v. Wilson*, 16 Wn.

App. 2d 537, 538, 481 P.3d 614, *review denied*, 197 Wn.2d 1018 (2021). The trial court recited Xavier's offender score for each count and Xavier said he understood; he did not offer corrections or object to the trial court's recitation.

The trial court accepted Xavier's guilty plea and proceeded to sentencing. The defense and the State jointly recommended an exceptional sentence of 236 months in prison. Xavier's wife asked for leniency, stating that "if drugs hadn't been involved," the incident "wouldn't have happened." Verbatim Rep. of Proc. (VRP) at 63. The trial court nevertheless imposed the sentence the parties recommended. The trial court found that the parties had stipulated that justice would be "best served by the imposition of an exceptional sentence," and it concluded that the parties' stipulation provided "a substantial and compelling reason for an exceptional sentence." Clerk's Papers (CP) at 61. The trial court further concluded that the domestic violence aggravator provided a "sufficient independent basis" for the sentence. *Id.*

II. RESENTENCING HEARING

After *Blake*, Xavier moved for resentencing because the trial court had calculated his sentencing range using a conviction that *Blake* had invalidated.

At the resentencing hearing, the State said Xavier's offender score for the second degree robbery conviction was 15, and Xavier did not object. The defense and the State jointly recommended a lower exceptional sentence of 144 months in prison. Xavier's wife asked for leniency again, stating that she "strongly [believed]" 12 years was "too much time." VRP at 113. Xavier asked about getting help with reentry into the community through the parent sentencing alternative, although the State explained that he was not eligible. Once again, the trial court imposed the sentence the parties recommended, finding that the parties had stipulated that justice

would be “best served by the imposition of an exceptional sentence” and concluding that the stipulation provided “a substantial and compelling reason for an exceptional sentence.” CP at 84.

Navier appeals his judgment and sentence.

ANALYSIS

I. CONSIDERATION OF MITIGATION EVIDENCE

Navier argues that the trial court erred by resentencing him “without meaningful consideration of mitigation, including [his] evidence of rehabilitation” and his wife’s request for a lower sentence. Br. of Appellant at 13. We decline to reach this argument.

A trial court may impose an exceptional sentence where the defendant and the State stipulate that justice would be best served by an exceptional sentence and the court finds such a sentence “to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.” RCW 9.94A.535(2)(a). When a defendant knowingly, intelligently, and voluntarily agrees to an exceptional sentence, they waive their right to review of the sentence. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

Here, *Breedlove* is controlling. Navier waived his right to challenge the exceptional sentence because he agreed to it. The trial court imposed exactly the sentence that Navier requested. He does not argue, and the record does not suggest, that his decision was not knowing, intelligent, and voluntarily. We therefore decline to reach his argument that the trial court erroneously resentenced him by failing to consider evidence of rehabilitation.

II. SAME CRIMINAL CONDUCT

Navier argues that the trial court calculated his offender score incorrectly because his “2001 convictions for second degree robbery and second degree assault [constituted] the same criminal

conduct and may not be scored separately.” Br. of Appellant at 14. He notes that while he did not raise this argument during the post-*Blake* resentencing hearing, he raised it in a 2007 sentencing hearing. We decline to reach this argument.

For purposes of calculating a defendant’s offender score, if the sentencing court enters a finding that some or all of the defendant’s “current offenses encompass the same criminal conduct[,] then those current offenses shall be counted as one crime.” Former RCW 9.94A.589(1)(a) (2015). Crimes constitute the same criminal conduct when they involve the “same criminal intent, same time and place, and same victim.” *State v. Westwood*, No. 100570-9, slip op. at 5 (Wash. Sept. 7, 2023).² Given that “application of the same criminal conduct statute involves both factual determinations and the exercise of discretion,” a defendant who does not argue below that their offenses encompass the same criminal conduct waives this challenge to their offender score on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002).

Here, Xavier waived the argument that his convictions for second degree robbery and second degree assault constituted the same criminal conduct. During his 2007 sentencing hearing, Xavier withdrew this argument to take advantage of a plea agreement. *State v. Xavier*, noted at 147 Wn. App. 1026, slip op. at 4 (2008). Xavier did not raise the argument again in his 2020 and 2021 sentencing hearings in this case.

Even if Xavier had not waived the issue, our record does not contain the information necessary to determine whether the two offenses constituted the same criminal conduct. “The party presenting an issue for review has the burden of providing an adequate record to establish such error.” *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *see also* RAP 9.2(b). And

² <https://www.courts.wa.gov/opinions/pdf/1005709.pdf>.

Xavier has the burden of proving that his prior 2001 offenses were the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). The criminal history section of Xavier's most recent judgment and sentence simply lists the offenses as "Rob 2" and "Assault 2." CP at 71. The preceding judgment and sentence lists the offenses the same way. Neither our record nor the unpublished decision addressing Xavier's 2007 sentencing hearing allows us to determine whether the offenses involved the same intent, time, place, and victim.³ We therefore decline to address the merits of this issue.

III. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Xavier argues that the trial court calculated his offender score incorrectly because he was convicted for attempting to elude in 2002 and that conviction washed out. We decline to reach this argument.

With exceptions that do not apply here, a trial court must not include prior class C felony convictions other than sex offenses in a defendant's offender score if, since the defendant's last date of release from confinement for "a felony conviction, if any, or entry of judgment and sentence," the defendant "had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(c) (2017). Attempting to elude was a class C felony in 2002. Former RCW 46.61.024 (1983).

Here, like the same criminal conduct argument, Xavier waived the argument that his conviction for attempting to elude washed out. As part of his plea, Xavier agreed that the prosecutor's statement of his criminal history was correct and complete. During the resentencing

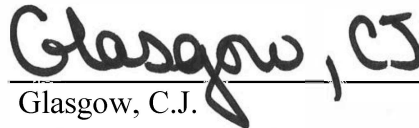
³ Although the State's Brief of Respondent mentions a supplemental designation of clerk's papers, that document does not appear in our record, nor have the clerk's papers been supplemented.

hearing, the State said Xavier’s offender score for the most significant crime was 15, and Xavier did not object. Again, Xavier received the exact sentence he requested. And even if the conviction had washed out, the 1 point change would not have made a difference in Xavier’s sentence, because his offender score was well above 9 for the most significant crime and the trial court adopted the exceptional sentence both parties requested. *See* former RCW 9.94A.525(8) (stating that if “the present conviction is for a violent offense,” a “prior adult nonviolent felony conviction” counts for one point).

CONCLUSION

We affirm Xavier’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.


Glasgow, C.J.

We concur:


Cruser, J.


Price, J.

KITSAP CO PROSECUTOR'S OFFICE

February 13, 2024 - 6:00 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 102,663-3
Appellate Court Case Title: State of Washington v. Melvin Antonio Xavier III
Superior Court Case Number: 20-1-00507-8

The following documents have been uploaded:

- 1026633_Answer_Reply_20240213180000SC293959_6321.pdf
This File Contains:
Answer/Reply - Answer to Motion
The Original File Name was Xavier resp to stay mot.pdf

A copy of the uploaded files will be sent to:

- jan@washapp.org
- jcross@kitsap.gov
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Comments:

Response to Motion to Stay

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