

No. 43523-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Whiteash,

Appellant.

Clark County Superior Court Cause No. 11-1-02061-4

The Honorable Judge Scott A. Collier

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The sentencing judge erred by sentencing Mr. Whiteash with an offender score of 8.
2. The prosecution failed to prove that any of Mr. Whiteash's 1977 federal drug convictions should be included in the offender score.
3. The sentencing judge erred by including four of Mr. Whiteash's 1977 federal drug convictions in his offender score.
4. The sentencing court erred by adopting Finding No. 2.2 of the Judgment and Sentence.
5. The sentencing court erred by adopting Finding No. 2.3 of the Judgment and Sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prior conviction may not be included in the offender score if it washed out prior to sentencing. Here, the court included in Mr. Whiteash's offender score four 1977 federal drug convictions that had washed out. Did the trial court err by including Mr. Whiteash's washed-out federal drug convictions in his offender score?
2. The SRA's washout provisions apply only to certain listed crimes and to class A, B, and C felonies (including their federal equivalents). No crimes in Washington were so classified until 1976, and some crimes outside of RCW Title 9A were not classified in this way until 1996. Must the SRA be interpreted to allow a 5-year washout period for unclassified felonies?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Robert Whiteash with six controlled substance felonies. CP 1-2. As part of a plea deal, he pled guilty to four and the state dismissed the other two. RP 1-3. The parties agreed that at sentencing the state would recommend 84 months, which was the bottom of the standard range as calculated by the state. Statement of Defendant on Plea of Guilty with Attachments, Supp. CP; RP 2-3. The court accepted the plea. RP 4-8.

The state alleged that Mr. Whiteash had six federal convictions from 1977.¹ RP 22-30, 58-59, 61; Copies of Certified Convictions, Supp. CP.

Two of the prior convictions were for conspiracy charges—conspiracy to import heroin (Count I) and conspiracy to distribute heroin (Count II). Copies of Certified Convictions, Supp. CP. The court found that these charges had a 5-year washout period, concluded that Mr. Whiteash had satisfied the washout period, and excluded Counts I and II from the offender score calculation. RP 60, 62; CP 10-15.

Another two of the federal convictions from 1977 were for Possession of Heroin with Intent to Deliver. Copies of Certified

¹ Additional prior convictions were not contested at sentencing.

Convictions, Supp. CP. The state alleged that these should be considered class B felonies, with a 10-year washout period. RP 23, 26-27, 58-59.

Mr. Whiteash objected to their inclusion in the offender score. RP 11, 30, 37-42, 57, 59. The trial court concluded that the two offenses did not wash out, and included them in the offender score. RP 60, 62; CP 10-15.

Two of the 1977 federal convictions (Counts V and VI) were for importing heroin from Thailand. Copies of Certified Convictions, Supp. CP; RP 26. The parties agreed that there was no state equivalent crime for scoring purposes, but argued over the import of that conclusion. RP 57, 61. The prosecutor claimed that the closest state charge was drug distribution, a class B felony, with a wash-out period of 10 years. RP 26-27, 30, 58-59. The defense countered that there was no state equivalent, and that the washout period should be 5 years. RP 37, 41, 57. The court included the two offenses in the offender score. RP 60, 62; CP 10-15.

The court found that Mr. Whiteash had four additional points,² and sentenced him with an offender score of eight. RP 60, 62; CP 10-15. The court imposed 84 months in prison, and Mr. Whiteash timely appealed. CP 10-23, 6-7.

² Mr. Whiteash did not dispute his other prior convictions.

ARGUMENT

I. MR. WHITEASH’S SENTENCE MUST BE VACATED BECAUSE HIS 1977 FEDERAL CONVICTIONS SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE.

A. Standard of Review

An offender score calculation is reviewed de novo. *State v.*

Moern, 170 Wash.2d 169, 172, 240 P.3d 1158 (2010). The interpretation of a statute is also subject to de novo review. *Ruvalcaba v. Kwang Ho Baek*, 175 Wash.2d 1, 6, 282 P.3d 1083 (2012).

B. The prosecution is required to prove the existence and comparability of any federal convictions.

At sentencing, a person’s offender score is calculated based on the number of existing felony convictions. RCW 9.94A.525(1). Prior offenses that are class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

Federal convictions are governed by RCW 9.94A.525(3), which reads (in relevant part) as follows:

Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges a defendant's criminal history contains federal convictions, the prosecution bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999).

To determine whether a federal conviction is comparable to a Washington offense, the court must compare the federal offense to analogous Washington statutes in effect when the federal crime was committed. *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998). The goal under the SRA is to match the federal crime to the comparable Washington crime and "to treat a person convicted [of a federal crime] as if he or she had been convicted in Washington." *State v. Berry*, 141 Wash.2d 121, 130-31, 5 P.3d 658 (2000).

C. Mr. Whiteash's two federal convictions for importing heroin should not have been included in his offender score.

The importation of controlled substances is a federal offense, criminalized by 21 U.S.C. 952. It is an offense "that is usually considered subject to exclusive federal jurisdiction;" thus "there is no clearly comparable offense under Washington law." RCW 9.94A.525(3). Accordingly, "the offense [must] be scored as a class C felony equivalent." RCW 9.94A.525(3).

Because Mr. Whiteash's two 1977 convictions for importing heroin are class C felony equivalents, they washed out of his offender score along with all of his other class C felonies. RCW 9.94A.525(2)(c), (3). Because the trial court erroneously included these two offenses in the offender score, the sentence must be vacated and the case remanded for resentencing with an offender score of four.

D. Mr. Whiteash's two federal convictions for possession with intent should not have been included in his offender score.

If a criminal statute is ambiguous, the rule of lenity requires that the ambiguity be interpreted in favor of the defendant. *State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011); see also *Seattle v. Winebrenner*, 167 Wash.2d 451, 462, 219 P.3d 686 (2009); *State v. Failey*, 165 Wash.2d 673, 677, 201 P.3d 328 (2009). A statute is ambiguous when the language is susceptible to multiple interpretations. *Davis*, at 477.

RCW 9.94A.525(2) describes when each class of felony washes out of the offender score. It provides that class A felonies are always to be included, class B felonies wash out after 10 years, and class C felonies wash out after 5 years.

In this case, the court found that Mr. Whiteash spent five crime-free years in the community. RP 27, 62. The prosecution established that

Mr. Whiteash had two federal convictions for possession with intent to distribute heroin, with offense dates in November of 1976. Copies of Certified Convictions, Supp. CP. At the time, however, drug offenses in Washington were not divided into separate classes.³ Instead, for example, RCW 69.50.401 provided that any person who possessed heroin with intent to deliver “[was] guilty of a crime and upon conviction [could] be imprisoned for not more than ten years, or fined not more than twenty-five thousand dollars, or both.” Former RCW 69.50.401(a)(1)(i) (1976) (emphasis added).

Possession with intent was not designated a class B felony until 1996, when the legislature enacted RCW 9.94A.035. See Laws 1996, Ch. 44, §1. That statute, captioned “Classification of felonies not in Title 9A RCW,” reads (in relevant part) as follows:

For a felony defined by a statute of this state that is not in Title 9A RCW, unless otherwise provided: ... If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is eight years or more, but less than twenty years, such felony shall be treated as a class B felony for purposes of this chapter.

³ Historically, no felony crimes were divided in that manner. The separation of felony crimes into three separate classes did not occur until the enactment of the criminal code in 1975 (effective July 1, 1976). Laws 1975, Ch. 260.

RCW 9.94A.035.⁴ Thus, the federal crimes of which Mr. Whiteash was convicted in 1977 were not equivalent to class B Washington felonies, and should not have scored as class B felonies.

But RCW 9.94A.525 did not instruct sentencing courts how to determine the washout periods for unclassified crimes—that is, offenses that are not designated as A, B, or C felonies. This creates an ambiguity: such offenses might be treated the same as class A felonies (which never wash out), or they might wash out after 5 or 10 years, as with the other classes. Applying the rule of lenity, the statute must be interpreted to apply the shorter 5-year wash-out period to unclassified crimes. Davis, at 477.

Accordingly, the two 1977 convictions for possession with intent should not have been included in Mr. Whiteash’s offender score. His sentence must be vacated and the case remanded for resentencing with an offender score of four.

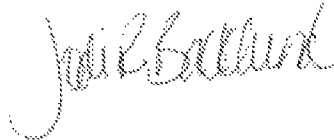
⁴ See also Laws 2003, Ch. 53, §4, which amended RCW 69.50.401 by inserting the phrase “a class B felony” in place of the phrase “a crime.”

CONCLUSION

For the foregoing reasons, Mr. Whiteash's sentence must be vacated and the case remanded for resentencing with an offender score of four.

Respectfully submitted on November 19, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Whiteash, DOC #746900
Stafford Creek Corrections Center
191 Constantine Way
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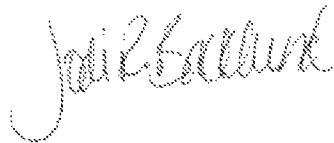
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 19, 2012.



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BACKLUND & MISTRY

November 19, 2012 - 9:22 AM

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