

FILED
MAR 24 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

FILED
March 18, 2015
Court of Appeals
Division I
State of Washington

Supreme Court No. 91460-5
No. 71033-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND ELLIOTT,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Lucas, Judge

PETITION FOR REVIEW

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	page
A. <u>IDENTITY OF PETITIONER/DECISION BELOW</u>	1
B. <u>ISSUE PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	1
D. <u>REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT</u>	3
THIS COURT SHOULD GRANT REVIEW BECAUSE THERE ARE CONFLICTING AUTHORITIES IN WASHINGTON ABOUT WHETHER RESENTENCING IS REQUIRED WHEN AN OFFENDER SCORE ERROR DOES NOT AFFECT THE STANDARD RANGE BUT IT IS NOT CLEAR THE SAME SENTENCE WOULD BE IMPOSED BASED ON THE CORRECT SCORE.	
E. <u>CONCLUSION</u>	6

Table of Authorities

Page

WASHINGTON CASES

In re Pers. Restraint of Goodwin,
146 Wn.2d 861, 50 P.3d 618 (2002).....5

State v. Argo,
81 Wn. App. 552, 915 P.2d 1103 (1996).....3, 5

State v. Lillard,
122 Wn. App. 422, 93 P.3d 969 (2004).....4, 5

State v. Parker,
132 Wn.2d 182, 937 P.2d 575 (1997).....4, 5

State v. Priest,
147 Wn. App. 662, 196 P.3d 763 (2008).....3, 5

State v. Tili,
148 Wn.2d 350, 60 P. 3d 1192 (2003).....3, 4, 5

RULES, STATUTES, AND OTHER AUTHORITIES

RAP 13.4.....1, 5, 6

A. IDENTITY OF PETITIONER/DECISION BELOW

Raymond Elliott requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Elliott, No. 71033-8-I, filed February 17, 2015. A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

The State conceded Elliott's offender score should be 12, instead of 13 as calculated at sentencing. The sentencing court imposed a sentence of 63 months, roughly the upper third of the standard range of 51 to 68 months. The Court of Appeals remanded to correct the judgment and sentence but denied Elliott's request for resentencing. Must Elliott be resentenced because it is not certain the court would have imposed the same sentence had it known Elliott's offender score was 12, not 13?

C. STATEMENT OF THE CASE

The Snohomish County prosecutor charged appellant Raymond Elliott with one count of second-degree burglary. CP 71. Elliott's girlfriend Jennifer Grichuhin testified she and Elliott found what they believed to be scrap metal in the parking lot of the Eagles Lodge. 4RP¹ 52-54. After enlisting help, they loaded it into Elliott's car. 4RP 57, 67. Officer Alan

¹ There are six volumes of Verbatim Report of Proceedings, referenced as follows: 1RP – Feb. 28, 2013; 2RP – Sept. 16, 2013; 3RP – Sept. 16, 2013 (Supplemental); 4RP – Sept. 17, 2013; 5RP – Sept. 18, 2013; 6RP – Oct. 4, 2013.

Correa noticed them leaving the parking lot. 3RP 6. Correa testified they were coming not from the Eagles parking lot, but from the lot belonging to Central Welding Supply, located next door. 3RP 6. Officer Mau noticed a hole in Central Welding's fence and contacted an employee who identified Central Welding's pressure washer in Elliott's trunk. 3RP 39; 4RP 38, 39.

The jury found Elliott guilty. CP 36. Elliott's offender score was based on the following criminal history:

Crime	Date of Sentence	Sentencing Court
VUCSA-Possession	1/13/05	Cowlitz County, WA
2 nd Deg. Burglary	1/13/05	Cowlitz County, WA
VUCSA – Possession (2 Counts)	1/13/05	Cowlitz County, WA
2 nd Deg. Possession of Stolen Property	5/6/05	Cowlitz County, WA
3 rd Deg. Rape of a Child	9/1/05	Cowlitz County, WA
VUCSA- Possession	9/8/05	Cowlitz County, WA
2 nd Deg. Burglary (2 Counts)		Columbia County, OR

CP 15. Elliott's attorney agreed his offender score was 13. 2RP 22; 6RP 4.

On appeal, the State agreed the correct offender score should have been 12. The Court of Appeals accepted the State's concession and remanded to correct the score on the judgment and sentence. However, it

found the scoring error harmless and declined Elliott's request to remand for resentencing. Elliott asks this Court to grant review.

E. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THERE ARE CONFLICTING AUTHORITIES IN WASHINGTON ABOUT WHETHER RESENTENCING IS REQUIRED WHEN AN OFFENDER SCORE ERROR DOES NOT AFFECT THE STANDARD RANGE BUT IT IS NOT CLEAR THE SAME SENTENCE WOULD BE IMPOSED BASED ON THE CORRECT SCORE.

The Court of Appeals cited State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996), and State v. Priest, 147 Wn. App. 662, 673, 196 P.3d 763 (2008), for the proposition that the error in Elliott's offender score is harmless. Under both Argo and Priest, remand is unnecessary where a standard range sentence was imposed and the error does not impact that range. Priest, 147 Wn. App. at 673; Argo, 81 Wn. App. at 569.

But Argo and Priest are inconsistent with State v. Tili, 148 Wn.2d 350, 358, 60 P. 3d 1192 (2003), where the court declared, "A correct offender score must be calculated before a *presumptive* or exceptional sentence is imposed." (emphasis added). Tili's reference to not only exceptional but also presumptive sentences indicates that a standard range sentence must also rest on a correct understanding of the offender score.

In State v. Lillard, 122 Wn. App. 422, 432-33, 93 P.3d 969 (2004), the court held a sentencing court need not calculate a precise offender score that exceeds 9 points unless it is considering an exceptional sentence. The court explained that remand for resentencing is unnecessary when it is apparent the sentencing court would simply impose the same sentence again. Id. (citing State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

This case, presents a scenario not directly addressed by Lillard. While the court need not continue calculating the offender score beyond 9 under Lillard, in this case, it did. And its sentence is, therefore, based on the erroneous conclusion that Elliott's score was 13. Applying the principle from Parker, it is not clear the sentencing court would impose the same sentence again. The sentence imposed was within the upper third of the standard range. This may have been because the offender score was so far beyond the top of the scale. With a slightly lower score, it is at least possible the court would have imposed a slightly lower sentence within that standard range.

Elliott requests this Court grant review on the question of whether an offender score error is necessarily harmless when it does not affect the standard range but might, nonetheless, affect the sentence actually imposed. This is an issue of substantial public interest that involves a conflict between the guiding principles of two lines of cases. On the one hand, Tili requires a

correct determination of the offender score, even for presumptive, rather than exceptional sentences. 148 Wn.2d and 358. And Parker requires considering whether it is clear the court would have imposed the same sentence if it had known the correct score. 132 Wn.2d at 189. On the other hand, Lillard declares the precise score is immaterial if over 9. And Argo and Priest declare any error that does not affect the standard range to be automatically harmless. Priest, 147 Wn. App. at 673; Argo, 81 Wn. App. at 569

The conflict arises because Parker acknowledges the harm that may occur: namely, a longer sentence than the court would otherwise have imposed. 132 Wn.2d at 189. The Argo and Priest line of cases also conflicts with In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002), where this court also recognized the harm of an incorrect offender score and declared, “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence imposed is actually within the correct standard range.” (internal citations omitted). To resolve this conflict, both for Elliott and for those similarly situated, Elliott requests this Court grant review under RAP 13.4(b)(1), (2), and (4).

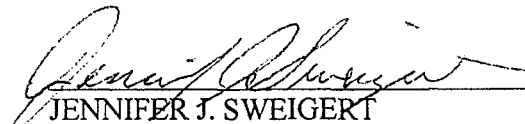
E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of public interest. Elliott, therefore, requests this Court grant review under RAP 13.4 (b)(1), (2), and (4).

DATED this 18th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

Appendix A

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington
Seattle*

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

February 17, 2015

Nielsen Broman Koch PLLC
Attorney at Law
1908 E Madison St
Seattle, WA, 98122
Sloanej@nwattorney.net

Jennifer J Sweigert
Nielsen Broman & Koch PLLC
1908 E Madison St
Seattle, WA, 98122-2842
SweigertJ@nwattorney.net

Mara J. Rozzano
Snohomish County Prosecuting Attorneys
3000 Rockefeller Ave
Everett, WA, 98201-4046
mrozzano@co.snohomish.wa.us

CASE #: 71033-8-1
State of Washington, Respondent v. Raymond Allan Elliot, Appellant
Snohomish County, Cause No. 12-1-01124-3

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Remanded for correction of the judgment and sentence."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

Enclosure

c: The Honorable Eric Lucas
Raymond Elliott

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 71033-8-1
v.)	
)	UNPUBLISHED OPINION
RAYMOND ELLIOTT,)	
)	
Appellant.)	FILED: FEB 17 2015

PER CURIAM – Raymond Elliott appeals the sentence imposed following his conviction for second degree burglary. He contends, and the State concedes, that his offender score should have been 12 instead of 13. The parties also agree that the standard range is the same whether the score is 12 or 13. In such circumstances, the scoring error is harmless. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996) (error in calculating offender score was harmless where standard range would be the same under proper score); State v. Priest, 147 Wn. App. 662, 673, 196 P.3d 763 (2008). Nevertheless, because the incorrect judgment and sentence should be corrected, we remand solely for the court to correct the offender score on the judgment and sentence.

Remanded for correction of the judgment and sentence.

FOR THE COURT:

Specina, C.J.
Becker, J.
COX, J.

2015 FEB 17 AM 9:36
COURT OF APPEALS
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

vs.)

RAYMOND ELLIOT,)

Petitioner.)

SUPREME COURT NO. _____
COA NO. 71033-8-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] RAYMOND ELLIOT
4822 S 252nd PL, #210
KENT, WA 98052

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH 2015.

X *Patrick Mayovsky*