

NO. 46072-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOEL MCANINCH,

Appellant.

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

The Honorable Marilyn Haan, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding there is no legal basis to change appellant's sentence.

2. The court erred in denying appellant's motion for relief from judgment.

Issue pertaining to assignments of error

Appellant pled guilty to felony DUI in March 2013. The sentencing statute in effect at that time limited prior offenses which can be included in the offender score for a conviction of felony DUI to "felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses[.]" Former RCW 9.94A.525(2)(e). Where the sentencing court included appellant's prior conviction for attempt to elude in his offender score, is appellant entitled to relief from the excessive sentence?

B. STATEMENT OF THE CASE

On March 7, 2013, appellant Joel McAninch pled guilty to felony driving under the influence and three gross misdemeanors. CP 9-19. He was sentenced on March 12, 2013. CP 21-35. The sentencing court calculated his offender score on the felony driving under the influence

conviction as 6, which included one point for a 2004 attempt to elude, one point for a 2011 felony driving under the influence, three points for driving under the influence convictions from 2004, 2007, and 2009, and one point for being on community custody at the time of the current offense. CP 23-24, 60. The court sentenced McAninch to 54 months, the top of the standard range based on an offender score of 6. CP 24, 27.

On January 23, 2014, McAninch filed a motion for relief from judgment under CrR 7.8(b)(5), arguing that the trial court miscalculated his offender score. CP 36-54. Specifically, McAninch argued that the court erred in including his 2004 attempt to elude conviction in the offender score because attempt to elude does not fall within the class of prior offenses for felony driving under the influence specified in Former RCW 9.94A.525(2)(e). He challenged the active community custody point on the same basis. CP 48-54.

Following a hearing on McAninch's motion, the Honorable Marilyn Haan concluded there was no legal basis to change McAninch's sentence. The court denied the motion for relief. CP 60-63.

C. ARGUMENT

THE SENTENCING COURT MISCALCULATED MCANINCH'S OFFENDER SCORE, AND HE IS ENTITLED TO RELIEF FROM THE RESULTING EXCESSIVE SENTENCE.

Upon timely motion, the court may relieve a party from a final judgment to correct mistakes in obtaining the judgment, when the judgment is void, or for any other reason justifying relief from the judgment. CrR 7.8(b). This Court reviews a ruling on a CrR 7.8 motion for abuse of discretion. State v. Gomez-Florencio, 88 Wn. App. 254, 258, 945 P.2d 228 (1997), review denied, 134 Wn.2d 1026 (1998). A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). In this case, the lower court abused its discretion when it denied McAninch's CrR 7.8 motion because the motion there is a legal basis for changing his sentence.

McAninch challenged the judgment and sentence on the basis that his offender score was miscalculated. To be valid, sentences must fall within the proper presumptive sentencing ranges set by the legislature. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). A sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. Moreover, a sentence

based on a miscalculated offender score is a fundamental defect that inherently results in a miscarriage of justice. This is true even where the sentence is part of a negotiated plea bargain, because a plea bargain agreement cannot exceed the statutory authority given to the courts. In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

McAninch was convicted of felony driving while under the influence of intoxicants and sentenced on March 3, 2013. CP 21-35; RCW 46.46.61.502(6). The sentencing statute in existence at that time provided as follows:

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered “prior offenses within ten years” as defined in RCW 46.61.5055.

Former RCW 9.94A.525(2)(e)(2011).

The judiciary interpreted this statute strictly, holding that the statute limited the prior convictions that could be included in the offender score for this offense to “felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while

under the influence of intoxicating liquor or any drug, and serious traffic offenses...” State v. Jacob, 176 Wn. App. 351, 357-58, 308 P.3d 800 (2013); State v. Morales, 168 Wn. App. 489, 493, 498, 278 P.3d 668 (2012). “Serious traffic offense” is defined by statute to mean “Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving (RCW 46.61.500), or hit-and-run an attended vehicle (RCW 46.52.020(5))...” RCW 9.94A.030(44) (formerly RCW 9.94A.030(43)).

When calculating the defendant’s offender score for felony DUI, the only relevant prior offenses are those listed in subsection (2)(e) of the statute. Morales, 168 Wn. App. at 497. Thus, in Jacob, this Court held that the defendant’s drug conviction should not have been included in his offender score because drug convictions are not among the statutorily specified prior convictions for offender score inclusion. Jacob, 176 Wn. App. at 360. And in Morales, Division One held that use of the defendant’s assault conviction in his offender score was error because assault is not one of the statutorily specified prior convictions that qualify for scoring. Morales, 168 Wn. App. at 497-98<sup>1</sup>.

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<sup>1</sup> The statute was amended, effective September 2013, to read as follows:



Similarly, in this case, the sentencing court erred in including McAninch's 2004 conviction for attempting to elude in his offender score, because that offense is not one of the statutorily specified prior offenses for offender score inclusion. The sentence imposed was in excess of the statutorily authorized sentence, and this fundamental defect inherently resulted in a miscarriage of justice. See Goodwin, 146 Wn.2d at 873-74. The lower court abused its discretion in denying McAninch's motion for relief from judgment. This Court should reverse and remand for resentencing.

D. CONCLUSION

The sentencing court miscalculated McAninch's offender score, resulting in an excessive sentence, and McAninch is entitled to relief from this miscarriage of justice. This Court should reverse the order denying

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If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)) shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section.

RCW 9.94A.252(2)(e). McAninch was sentenced in March 2013, before this amendment went into effect. The amendment cannot be applied retrospectively because it contravenes a construction placed on the original statute by the judiciary. State v. Dunaway, 109 Wn.2d 207, 216, n.6, 743 P.2d 1237 (1987); Johnson v. Morris, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976).

his motion for relief and remand for resentencing with the correct offender score.

DATED November 3, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski".

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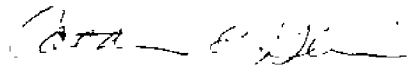
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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in  
*State v. Joel McAninch*, Cause No. 46072-6-II as follows:

Joel McAninch DOC# 875858  
Cedar Creek Corrections Center  
PO Box 37  
Littlerock, WA 98556-0037

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
Done in Port Orchard, WA  
November 3, 2014

**GLINSKI LAW FIRM PLLC**

**November 03, 2014 - 9:25 AM**

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