NO. 32545-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN A. BAILEY,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

1. The trial court erred when it denied Appellant's motion to strike his 1998 Second Degree Robbery convictions from offender score.
2. The trial court erred when it determined that prior convictions for Attempting to Elude and Taking a Motor Vehicle Without Permission convictions should be included in Appellant's offender score as separate crimes.
3. The trial court erred when it determined the Bailey's offender score was 9.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no error by the court when it refused to strike the prior convictions from Appellant's offender score.
2. The trial court properly included the previous convictions.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT

RESPONSE TO ALLEGATION ONE

The error in Bailey's analysis is that he attempts to make the words "sentence" and "conviction" synonymous. They are not. This court stated in Bailey "Accordingly, we reverse the robbery **sentence**." State v Bailey, 179 Wn. App. 433, 435, 335 P.3d 942 (2014).(Emphasis mine.) The court then went on to state "By failing to establish a valid waiver of juvenile court jurisdiction, the State cannot use Mr. Bailey's 1998 conviction to sentence him as a persistent offender under the POAA." Id at 443. This is a clear statement from the court that the conviction for the stands, the only thing that the court changed was the ability of the State to sentence Bailey to life in prison under POAA. This court had no ability to "overturn" the robbery conviction. That was not a matter that was even before it at the time Bailey II was decided. The question was could a prior conviction be used within the sentencing structure of the SRA to impose a life sentence under the POAA, this court ruled that the State could not. But there was no reversal of the **conviction** only the **sentence** two completely separate issues.

Under RCW 9.94A.030. Definitions a "conviction" is defined as follows;

> Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

> (9) "Conviction" means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

The State could find no definition of the term "sentence" in the Revised Code of Washington however it was addresses in, In the Matter of the Personal Restraint of Well, 133 Wn.2d 433, 440, 946 P.2d 750 (1997) the Washington State Supreme court addressed it in the following manner; "The Court's Order of Commitment also satisfies the "1 b" definition of sentence: "a decision or judicial determination of a court or tribunal: DECREE: as ... (2): the judgment passed by a court or judge on a person on trial as a criminal or offender[.]" Webster's at 2068." Quoting from Webster's Third New International Dictionary 1223 (1986).

This court adopted the Well definition of "sentence" in City of Spokane v. Wilcox 143 Wn.App. 568, 179 P.3d 840, 844-5 (2008) "And a "sentence" is a decision of a court or a tribunal. In re Pers. Restraint of Well, 133 Wash.2d 433, 439, 946 P.2d 750 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2068 (1986))."

Merriam-Webster's online dictionary defines sentence as follows;

> sentence
> noun sen•tence \ˈsen-tən(t)s, -tənz\: a group of words that expresses a statement, question, command, or wish
> law: the punishment given by a court of law
> …
> 2a: judgment 2a; specifically: one formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the

> convict b: the punishment so imposed <serve out a sentence>
> http://www.merriam-webster.com/dictionary/sentence

State v. Glas, 27 P.3d 216, 221, 106 Wn.App. 895 (2001), reversed on other grounds, State v. Glas, 54 P.3d 147, 147 Wn.2d 410 (2002);

> Undefined terms in a statute take their regular dictionary meaning. State v. Yokley, 91 Wash.App. 773, 959 P.2d 694 (1998), aff'd sub nom. In re Personal Restraints of Yim, 139 Wash.2d 581, 989 P.2d 512 (1999); State v. McDougal, 120 Wash.2d 334, 350, 841 P.2d 1232 (1992); S. Martinelli & Co. v. Dep't of Revenue, 80 Wash.App. 930, 938, 912 P.2d 521 (1996). Washington courts use WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY in the absence of other authority. In re Personal Restraint of Well, 133 Wash.2d 433, 438, 946 P.2d 750 (1997).

The common meaning of "sentence" is clearly and completely different than "conviction." This court struck the sentence not the conviction. The basis for determining the offender score of a defendant is not the previous "sentence" it is the "conviction." This is set forth in RCW 9.94A.525 Offender score

> The offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:
> The offender score is the sum of points accrued under this section rounded down to the nearest whole number.
> (1)A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589 .

The rest of this section of the RCW sets forth the means to determine what points are to be assessed against an offender for various crimes and criminal history. None of these subsections indicate that this section is dependent on the "sentence" of the conviction, they do, in almost every subsection, discuss the "convictions" that can count towards history which can and will be used to determine an offender's score and thereby his or her "standard sentence range."

There was never a challenge of the actual underlying conviction. This court merely addressed the sentencing aspect of original criminal act. When Bailey stated on the record at his second sentencing that he wanted to challenge the prior robbery conviction the trial court correctly addressed this "THE COURT: Alright. Yeah. There's a way to do that but I'm not sure -- you -- you can't collaterally attack it in this proceeding." (RP 46) The same was true at the second review conducted by this court that issue was simple not before the court.

The trial court and the State addresses the question as to whether the robbery conviction was to be considered in Bailey's sentence;

> THE COURT: Now, as I understand, and correct me if I'm wrong Mr. Chen, is your -- your position in regard to the first strike, which the Court said it wasn't, is that that should be treated as a juvenile conviction as opposed to an adult conviction? Is that your position?
> MR. CHEN: Yes Your Honor, as a juvenile conviction as opposed to an adult conviction, yes.

THE COURT: Okay.
MR. CHEN: But nevertheless --
THE COURT: Prior conviction?
MR. CHEN: Yes.
THE COURT: Okay.
MR. CHEN: But nevertheless it is a conviction that counts and according to the --
THE COURT: Well, it didn't count as a -- on a POAA --
MR. CHEN: Right.
THE COURT: But it counts as criminal history for this.
MR. CHEN: That's correct Your Honor. (RP 10-11)
…
THE COURT: Isn't the question whether it's invalid or on its face?
MR. KLEIN: Yes.
THE COURT: Is it invalid on its face?
MR. KLEIN: Yes. Of course.
THE COURT: I don't think so but go ahead.
RP 14-15

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ALLEGATION TWO.

It must be noted that the document upon which this allegation is based is, to the best of the State's knowledge, a portion of the record. The only information that would substantiate the argument by Bailey that the original sentencing court did not determine that the crimes were or were not same course and conduct is from the statements of counsel. Bailey did not even address this issue in his sentencing memorandum in the trial court (CP 36-52) nor was this issue raised at this first sentencing or his direct appeal. It would not appear from the verbatim report of

proceedings of the re-sentencing that Bailey even presented those documents to the court.

THE COURT: Well, it -- the Judgment and Sentence on that one is not part of the record in this case and won't be. And doesn't the -- in order for them to be the same course of criminal conduct don't they have to share the same intent?
MR. KLEIN: Well, the -- the --
THE COURT: And the intent to steal is not the same as the attempt to elude.
MR. KLEIN: Well, I -- I think it -- I mean, obviously it's supposed -- it -- it should be same time, same place and typically same victim and -- and obviously the victim of a theft is not the same as the victim of an elude necessarily; but I need to make the argument that --
THE COURT: Well, unless it's a police car I guess so --
MR. KLEIN: Well, the -- I've read the statement of probable cause and it says that Stephen was not apprehended that night but two people that were say Stephen was driving the vehicle with a punched ignition that was fleeing from the police. And based upon that an -- an Alford plea was entered in Juvenile Court where the Court left the boxes unchecked way back when. RP 17-18

Bailey has not presented this court with any record upon which a determination may be made. RAP 9.2 VERBATIM REPORT OF PROCEEDINGS and RAP RULE 9.6 DESIGNATION OF CLERK'S PAPERS AND EXHIBITS clearly set forth what must be done and what must be sent to this court if it is to be used as a record on appeal.

The document that is now being challenged by Bailey is not before this court therefore this court should refuse to consider this allegation. State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986), "[a] party seeking review has the burden of perfecting the record so that the appellate

court has before it all the evidence relevant to the issue. State v. Jackson, 6 Wn. App. 510, 516, 676 P.2d 517, aff'd, 102 Wn.2d 689, 689 P.2d 76 (1984)." This court cannot review matters outside the record. State v. Rienks, 46 Wash.App. 537, 544-45, 731 P.2d 1116 (1987), remanded, 110 Wash.2d 1021, 755 P.2d 173 (1988); and see RAP 9.2(b).

The State will address Bailey's challenge of his offender score even though the State firmly believes that was before the trial court at the time of this resentencing and the record before this court is insufficient to support Bailey's allegation and is sufficient to support the actions of the actions of the trial court. As this court is well aware the trial court generally calculates an offender score by adding together the current offenses and prior convictions. RCW 9.94A.589(1)(a); State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007) If the court determines that some of the prior offenses encompass the same criminal conduct, those offenses count as only one crime. RCW 9.94A.525(5)(a)(i); Bergstrom, 162 Wn.2d at 92-93. Multiple crimes encompass the same criminal conduct if they involve the same criminal intent and were committed against the same victim at the same time and place. State v. Young, 97 Wn.App. 235, 240, 984 P.2d 1050 (1999). Bailey relies upon RCW 9.94A. 589 were the statute states the following, "Prior offenses which were found, under RCW 9.94A.589(1)(a), to

encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score." But his argument ignores the circumstances when a trial court makes this determination under RCW 9.94A.589(1)(a). This statute applies only to a trial court finding for *current* offenses for which a defendant is being sentenced. RCW 9.94A.589(1)(a) provides in its relevant language, "Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime."

This means that a court considering whether multiple prior convictions constitute the same criminal conduct is bound by a decision of the trial court that convicted the defendant of the prior offenses. The State can only surmise that the legislature determined that the court convicting a defendant of a crime has the most complete information about the facts and circumstances of that crime. However, because decisions made later by other courts in the context of deciding whether prior convictions constitute the same criminal conduct are not made under RCW

9.94A.589(1)(a), the first sentence of RCW 9.94A.525(5)(a)(i) does not apply here. That sentence would only apply if the original sentencing trial court had found that the offenses on which it sentenced Bailey constituted the same criminal conduct.

Bailey's counsel during argument in the resentencing hearing makes a record, the only record, regarding the fact that the original court had not made a decision regarding this issue;

> Mr. Klein:…I would point out that the taking a motor vehicle and the attempting to elude on November 7th of 2000 were what we would argue same course of conduct and my review of that Judgment and Sentence, neither box, meaning that it is or is not same course of conduct was checked. (RP 15)
>
> … And so where the State is indicating that it should not be considered the same we would dispute that and I have looked at the Judgment and Sentence on that one and there was no finding either way. I think that works against the State. (RP 16)

This court has addressed this issue, at length, in State v. Mehaffey, 125 Wn.App. 595, 599-601, 105 P.3d 447 (Wash.App. Div. 3 2005);

> We review a challenge to the offender score de novo. State v. Roche, 75 Wn.App. 500, 513, 878 P.2d 497 (1994).
>
> Mr. Mehaffey's argument here is the same one we answered in State v. Lara -the sentencing court abuses its discretion by not exercising discretion. State v. Lara, 66 Wn.App. 927, 931-32, 834 P.2d 70 (1992). The question in Lara was whether some prior convictions should be labeled "the same criminal conduct" and count for fewer points.
>
> An offender score quantifies criminal history for sentencing purposes. It reflects the total of the defendant's prior felony

convictions. State v. Ford, 137 Wash.2d 472, 479, 973 P.2d 452 (1999). The State has the burden to establish on the record the existence and the classification of the convictions relied on in calculating the score. *Id.* at 480, 973 P.2d 452.

Sentencing is governed by the version of the Sentencing Reform Act of 1981(SRA) that was in effect when the current offense was committed. RCW 9.94A.345; State v. Smith, 144 Wash.2d 665, 672, 30 P.3d 1245, 39 P.3d 294 (2001).

Mr. Mehaffey has eight prior convictions. He committed his current offense on March 18, 2000. On that date, the applicable statute was former RCW 9.94A.360(5)(a) (1999). It remained in effect until July 1, 2001.

The applicable offender score provisions instruct the current sentencing court that prior offenses that were previously found under former RCW 9.94A.400(1)(a) (1999) to encompass the same criminal conduct "shall" be counted as one offense. That is, the previous court's same criminal conduct determination is final: Prior offenses which were found, under RCW 9.94A.400(1)(a), to encompass the same criminal conduct, shall be counted as one offense.... The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently ... whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.400(1)(a)....
Former RCW 9.94A.360(5)(a)(i).

In 1999, multiple offenses comprised same criminal conduct if the sentencing court found they involved the same criminal intent and were committed at the same place and time against the same victim. There was also a second class of multiple offenses: those that were sentenced on the same date but were not determined to be same criminal conduct. In sentencing these, the court counted them separately for offender score purposes, but imposed concurrent sentences. Former RCW 9.94A.400(1)(a).

The rule applicable to Mr. Mahaffey's March 2000 offenses labels these as "other" prior offenses. The current court is required to determine independently whether other concurrently sentenced prior convictions, not previously determined to be same criminal conduct under former RCW 9.94A.400(1)(a), are nevertheless

same criminal conduct under former RCW 9.94A.400(1)(a). Former RCW 9.94A.360(5)(a)(i).

Our decision in Lara is helpful, although the rule has since been changed slightly. There, we held that the current court must determine whether prior convictions not previously defined as same criminal conduct are indeed the same criminal conduct. Lara, 66 Wash.App. at 931, 834 P.2d 70. Said another way, the court must exercise the discretion vested by the statute. State v. Wright, 76 Wn.App. 811, 828-29, 888 P.2d 1214 (1995). (Footnotes omitted.)

Bailey agreed to his criminal history.

MR. KLEIN: But -- but I need to do so, again, what the State has listed are convictions that would have Stephen's name and fingerprints associated with them. We're not disputing that. Clearly we're disputing the -- the -- the Court of Appeals decision regarding the strike offense and -- and I have to dispute the taking a motor vehicle and the elude being considered separate course of conduct.

And so where the State is indicating that it should not be considered the same we would dispute that and I have looked at the Judgment and Sentence on that one and there was no finding either way. I think that works against the State.

THE COURT: Well, it -- the Judgment and Sentence on that one is not part of the record in this case and won't be. And doesn't the -- in order for them to be the same course of criminal conduct don't they have to share the same intent?

MR. KLEIN: Well, the -- the --

THE COURT: And the intent to steal is not the same as the attempt to elude.

MR. KLEIN: Well, I -- I think it -- I mean, obviously it's supposed -- it -- it should be same time, same place and typically same victim and -- and obviously the victim of a theft is not the same as the victim of an elude necessarily; but I need to make the argument that --

THE COURT: Well, unless it's a police car I guess so --

MR. KLEIN: Well, the -- I've read the statement of probable cause and it says that Stephen was not apprehended

> that night but two people that were say Stephen was driving the vehicle with a punched ignition that was fleeing from the police. And based upon that an -- an *Alford* plea was entered in Juvenile Court where the Court left the boxes unchecked way back when. (RP 16-17)

Bailey's claim is not supported by the record before this court nor was it supported in the trial court. It is the State's position that the trial court in this instance made the correct decision. There may perhaps be cases were this court would properly remand for determination of facts from a previous case which was the basis for criminal history allowing determination of whether the crimes were same course and conduct or not. In this instance clearly they are not.

There is no conceivable set of facts which would allow a Theft of a Motor Vehicle and an Attempt to Elude a Pursuing Police Vehicle to be some course and conduct. The "victim" of a Attempt to Elude is the State of Washington, the victim of an automobile theft is the legal owner of that vehicle. The only information before the trial court and this court are that Bailey was convicted of two counts TVMWOP and Attempt to Elude with the date of the crime and the date of sentencing being the same. (CP 7) The only actual information before this is that "[t]he Court finds the above-listed concurrent prior convictions (indicated by *) are not the same criminal conduct under RCW 9.94A.360(5)(a)(i), and shall count separately." (CP 7)

This was the decision of the court regarding the sentence imposed;

> THE COURT: Alright. Well, the -- the -- the calculation of the standard range, even counting the -- '97 second degree robbery as a juvenile offense as opposed to an adult offense still results in a nine. So I think that his offender score is -- is and remains nine as to Count I, seven as to Count -- I think it's seven as to Count II, I didn't really look at that but -- so the calculus is going off in Mr. Bailey's favor.
> I've -- I've read the -- the sentencing memorandum. I've read the previous sentencing hearing and all -- and all of the Court of Appeals' decisions that -- people are entitled to a -- to a fair trial, not necessarily a perfect trial. And clearly there were imperfections in Mr. Bailey's trial.
> RP 41
> …
> So -- the matter is back before the Court for the imposition of the sentence, not necessarily within the standard range. There is a request to mitigate the sentence but I can't find a basis to -- to mitigate Mr. Bailey's sentence. It seems to me that a sentence within the standard range is -- is the appropriate sentence to impose in this particular matter.
> RP 42
> …
> THE COURT: Okay. I found five non-violent adult felony convictions. If you want to hand me that paperwork -- and those are the third degree rape; the meth; the taking a motor vehicle -- the taking the motor vehicle and the eluding. So that's five adult felony convictions. And then two juvenile violent convictions which count for -- so the -- the -- the adult history is five points and the juvenile are two -- two apiece so that's four.
> RP 45

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal. This action of the trial court at the time of the resentencing was a discretionary act. The law is clear that there must be a record upon which

a court of review can make the finding asked by an appellant. The record before the trial court at the time of the resentencing was sufficient to allow that court to make the discretionary ruling regarding the use of the prior conviction of Appellant. That discretionary ruling should not be overturned. The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 7th day of April 2015,

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on April 7, 2015, I emailed a copy, by agreement of the parties, of the Motion on the Merits, to Mr. David Gasch at gaschlaw@msn.com and deposited a copy in the United States mail on this date to

Stephen A. Bailey DOC#777393
PO Box 7002
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of April, 2015 at Spokane, Washington,

s/David B. Trefry_____
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