Supreme Court No. 92874-6
COA No. 72332-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICKY LEE LEWIS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Ricky Lee Lewis requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Lewis, No. 72332-4-I, filed January 19, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Principles of proportionality, equity and consistency underlying the Sentencing Reform Act (SRA) require that the same criminal conduct receive the same punishment regardless of whether the prior crime was committed in Washington or some other state. Here, the trial court included Mr. Lewis's prior Georgia conviction for "auto theft," received when he was only 17 years old, in his offender score. But if Mr. Lewis had committed that crime in Washington State as 17-year-old, the conviction would probably have been treated as a juvenile offense and would not have been includable in his offender score. Did the Court of Appeals misapply the SRA in affirming the decision to include the prior Georgia conviction in Mr. Lewis's offender score, warranting review by this Court? RAP 13.4(b)(4).

2. In State v. Brown, 47 Wn. App. 565, 736 P.2d 693 (1987), aff'd, 113 Wn.2d 520, 782 P.2d 1013 (1989), the Court of Appeals held

that Brown's prior federal conviction for auto theft, received when he was 21 years old, was properly included in his offender score. Although Brown was sentenced as a "youth offender" in federal court, the Court of Appeals held the conviction was properly treated as an adult offense because if Brown had been sentenced for the same crime in Washington, he would have been treated as an adult offender. Here, the Court of Appeals held that whether Mr. Lewis's prior Georgia conviction, received when he was 17 years old, should be included in his offender score was determined by reference to the law of Georgia and not the law of Washington State. Does the Court of Appeals' decision conflict with Brown, warranting review? RAP 13.4(b)(2).

3. In 2012, the Legislature legalized the possession of marijuana by adults in Washington State, pursuant to a citizens' initiative. Here, the trial court included Mr. Lewis's prior conviction for delivery of marijuana in his offender score. Does the trial court's decision conflict with the intent of Washington citizens that a person no longer be punished for possessing marijuana?

C. STATEMENT OF THE CASE

Mr. Lewis entered an Alford[1] plea to one count of second degree assault and two counts of unlawful imprisonment pursuant to a plea agreement with the State. CP 65-91. In his guilty plea statement and the plea agreement, Mr. Lewis agreed the prosecutor's statement of his criminal history was correct. CP 69, 86. The prosecutor's statement of criminal history included a prior conviction from Georgia, obtained in February 1976, for "theft by taking-auto theft." CP 89.

The 1976 Georgia conviction was obtained when Mr. Lewis was only 17 years old. His date of birth is March 10, 1958. CP 4, 67; 5/30/14RP 8.

At sentencing, the trial court calculated Mr. Lewis's offender score as a "nine," which included the prior Georgia conviction for auto theft. CP 95, 100. The court also included a prior 1990 conviction for delivery of marijuana in the offender score. CP 95, 100.

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals misapplied the sentencing statute by concluding that whether or not the Georgia offense should be classified as an adult or a juvenile offense is a factual and not a legal question.

The Court of Appeals held Mr. Lewis waived the right to challenge his offender score by stipulating to his criminal history as part of his plea agreement. Slip Op. at 1. Without explanation, the Court of Appeals concluded, "[w]hether Lewis was convicted as an adult or a juvenile is a factual question, not a legal one." Slip Op. at 3. The Court of Appeals misapplied the sentencing statute. Whether or not an out-of-state conviction should be included in the offender score is determined by looking to the law of Washington, not the law of the foreign jurisdiction. Thus, just because Mr. Lewis's prior conviction was classified as an adult offense in Georgia does not mean it would be classified as an adult offense in Washington. Mr. Lewis's stipulation to his criminal history does not answer the legal question of whether the prior conviction should have been classified as a juvenile offense under Washington law.

RCW 9.94A.525(3) provides: "Out-of-state convictions for offenses shall be classified according to the comparable offense

definitions and sentences *provided by Washington law*." (emphasis added).

This means that the determination of how a conviction from another jurisdiction should be treated when calculating the offender score is made by the law of Washington, not the law of the jurisdiction where the conviction occurred. David Boerner, Sentencing in Washington, §5.6(b), at 5-8 (1985). Determining the classification of crimes by reference to Washington law rather than the law of the foreign jurisdiction "insures that the policy decisions inherent in determining the relative seriousness of crimes are made by the Washington Legislature, and that all defendants being sentenced by Washington courts will have their prior criminal history determined by a single set of policy determinations." Id. This is consistent with the underlying policy of the SRA, which is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010(1). Allowing the classification of an offense to be determined by foreign law would be contrary to this policy because "the same conduct could be classified differently depending on the jurisdiction in which it occurred." Boerner, Sentencing in Washington, §5.6(b), at 5-9.

Thus, if an out-of-state prior offense would have been classified as a juvenile offense if it had been committed in Washington, it must be counted as a juvenile offense in calculating the current offender score. Here, whether or not Mr. Lewis was treated as a juvenile offender under Georgia law does not determine whether the offense should be classified as an adult or a juvenile offense for purposes of calculating his offender score in Washington. This is a *legal* determination, made by reference to Washington law.

In Washington, children under the age of 18 are prosecuted in juvenile court rather than adult court except under limited circumstances. A "juvenile" is a person under 18 years of age who was not previously transferred to adult court or who is not otherwise under adult court jurisdiction. RCW 13.40.020(15); State v. Sharon, 100 Wn.2d 230, 231, 668 P.2d 584 (1983). There are only two ways by which jurisdiction over a juvenile is transferred to an adult court: either by (1) the filing of specified charges which may automatically bring the juvenile under the jurisdiction of adult court, or (b) following a declination hearing by the juvenile court in which the court transfers the juvenile to adult court for adult criminal prosecution. State v.

Mora, 138 Wn.2d 43, 49, 977 P.2d 564 (1999); RCW 13.34.030(1); RCW 13.40.110.

Mr. Lewis was convicted in Georgia at the age of 17 of the crime of "auto theft." CP 89. He had no prior criminal convictions. CP 89-90. The crime of auto theft is not the kind of serious violent offense which would have automatically brought him under the jurisdiction of adult court in Washington. See RCW 13.04.030(1)(v).

Moreover, it is unlikely that a juvenile court in Washington would have exercised its discretion to transfer the case to adult court. The court would have been authorized to transfer the case to adult court only upon the filing of a motion by the prosecutor, the juvenile himself, or the court. RCW 13.40.110(1). In deciding whether to decline jurisdiction, the juvenile court would have been required to weigh various factors including Mr. Lewis's age, his criminal history, the seriousness of the offense, whether the offense was against persons or only property, and whether the protection of the community required declination. State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993); RCW 13.40.110(3). Given that Mr. Lewis had no prior criminal history, the offense was only against property, and auto theft is

not considered a serious offense, the juvenile court would most certainly have retained jurisdiction.

In short, had Mr. Lewis been convicted of this offense in Washington, it would have been a "juvenile offense." It should therefore be considered a "juvenile offense" when calculating his offender score for the current convictions in Washington. RCW 9.94A.525(3); Brown, 47 Wn. App. at 574; Boerner, Sentencing in Washington, §5.6(b), at 5-8 to 5-9.

Treating the prior conviction as a juvenile offense is consistent with the underlying purposes and policies of the SRA. In drafting the SRA, the Sentencing Guidelines Commission believed it was necessary to distinguish between adult and juvenile prior convictions. Boerner, Sentencing in Washington, § 5.11, at 5-23 to 5-24. Although the Commission wanted to treat convictions of violent crimes similarly whether committed by an adult or a juvenile, it believed that nonviolent juvenile convictions frequently represent significantly less serious conduct than that represented by an adult conviction for the same crime. Id. For this reason, the Commission decided to assign violent juvenile convictions the same weight as adult violent convictions but assign lower weights to nonviolent juvenile convictions than assigned

to adult nonviolent convictions. Id. Thus, the Commission assigned a score of one-half point to almost all juvenile nonviolent prior convictions, and provided that all total scores were to be rounded down to the next lower number. Id.

Mr. Lewis's prior Georgia conviction for "auto theft," which he received when he was only 17 years old, is a nonviolent offense. RCW 9.94A.030(34). Under the SRA, it is considered less serious than it would be had Mr. Lewis committed the offense as an adult. Boerner, Sentencing in Washington, § 5.11, at 5-23 to 5-24. The court should have assigned only one-half point to the conviction when calculating his current offender score. RCW 9.94A.525(8).

By stipulating to the prosecutor's understanding of his "criminal history," Mr. Lewis did not waive his right to raise the *legal* question of whether the prior conviction was properly classified as an adult offense under Washington law. The statute defines "criminal history" as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11). An offender who pleads guilty and stipulates to the State's list of his criminal convictions does not waive his right to challenge any *legal* error in the calculation of the offender score. In re

Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 60 P.3d 618 (2002). Here, by stipulating to the State's understanding of his criminal history, Mr. Lewis merely stipulated that the prior convictions listed by the prosecutor actually existed. He did not waive his right to challenge the legal error that occurred when the court determined the prior offense should be classified as an adult offense under Washington law.

The Court of Appeals concluded that an offender may waive his right to challenge the classification of his prior offense as a juvenile or an adult offense by stipulating to the prosecutor's list of his prior convictions. This is an erroneous interpretation of the sentencing statute which contravenes the underlying policy that offenders who commit the same crime should receive the same punishment regardless of whether the crime was committed in this state or elsewhere. This is an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4). This Court should grant review and reverse.

2. The Court of Appeals opinion conflicts with State v. Brown.

If an out-of-state prior offense would have been classified as a juvenile offense if it had been committed in Washington, it must be counted as a juvenile offense in calculating the current offender score. Cf. State v. Brown, 47 Wn. App. 565, 736 P.2d 69(1987), aff'd, 113

Wn.2d 520, 782 P.2d 1013 (1989). In Brown, Brown was convicted in federal court when he was 21 years old of automobile theft and sentenced as a "youth offender." Id. at 574. He argued the offense must be considered a "juvenile" offense when calculating his offender score for a later conviction he received in Washington State. The Court of Appeals disagreed. The court held, "it is Washington's designation of a felony and the sentence which Washington would impose that is the criterion in sentencing under the SRA." Id. Because Brown was 21 years old when he stole the automobile, he would have been convicted in adult court if he had committed the crime in Washington. "The mere fact that he was sentenced as a 'youth offender' under federal law does not make his crime a juvenile conviction under the Sentencing Reform Act." Id.

Contrary to Brown, the Court of Appeals held in this case that Mr. Lewis's prior Georgia conviction for auto theft, obtained when he was 17 years old, must be classified as an adult offense because that is how it was treated in Georgia. The Court of Appeals opinion directly conflicts with Brown, warranting review. RAP 13.4(b)(2).

3. Given the recent change in the law legalizing the possession of marijuana, Mr. Lewis's prior conviction for delivery of marijuana should not have been included in his offender score.

In his *pro se* statement of additional grounds for review, Mr. Lewis argued his prior conviction for delivery of marijuana, for which he was sentenced in 1990, should not have been included in his offender score. He argued the conviction was improperly used to impose additional punishment upon him "against the wishes of Washington Citizens."

The Court of Appeals erred in rejecting this argument. The possession of marijuana is now lawful in Washington State. Initiative 502, passed in November 2012, legalized possession of small amounts of marijuana for individuals over 21 years of age. See RCW 69.50.4013 (possession, by person twenty-one years of age or older, of useable marijuana in amounts not exceeding those set forth in RCW 69.50.360(3) is not a violation of any provision of Washington state law).

Initiative 502 demonstrates the intent of the citizens of Washington that adults not be punished for possessing marijuana. By including Mr. Lewis's prior conviction for delivery of marijuana in his present offender score, the trial court imposed additional punishment

upon Mr. Lewis in contradiction to the intent of the citizens of Washington. This Court should grant review and reverse.

E. CONCLUSION

For the reasons given, this Court should grant review. Mr. Lewis is entitled to be resentenced based upon a correct offender score.

Respectfully submitted this 17th day of February, 2016.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RICKY LEE LEWIS, Appellant.	)	DIVISION ONE No. 72332-4-I UNPUBLISHED OPINION FILED: January 19, 2016

DWYER, J. — Ricky Lewis challenges the sentence imposed following his guilty plea to assault in the second degree and two counts of unlawful imprisonment, asserting that the trial court miscalculated his offender score. Because Lewis waived the right to challenge his offender score when he stipulated to the factual basis of his criminal history, we affirm.

I

The State charged Lewis with indecent liberties, unlawful imprisonment with sexual motivation, and two counts of assault in the second degree with sexual motivation arising from two separate incidents in which Lewis assaulted women and forced them to engage in sexual intercourse. Lewis pled guilty to one of the assault charges and two counts of unlawful imprisonment in exchange for the State's agreement to dismiss another felony case and to not file additional charges related to another victim. In his statement of defendant on plea of guilty,

Lewis expressly agreed that the prosecutor's statement of his criminal history was correct and complete, and stipulated to an offender score of 9. The trial court imposed a standard range sentence. Lewis appeals.

II

For the first time on appeal, Lewis argues that the trial court miscalculated his offender score by erroneously counting a juvenile conviction as an adult conviction. Appendix B to Lewis's plea agreement lists the adult felony convictions included in Lewis's offender score, including a Georgia conviction for "theft by taking -- auto theft" committed on February 9, 1976. Lewis's date of birth is March 10, 1958. Lewis contends that because he was under the age of 18 at the time of the offense, the conviction must be scored as a juvenile conviction and assigned one-half point instead of one point.

A criminal defendant's standard sentence range is based upon the seriousness of the offense and the defendant's offender score. RCW 9.94A.530(1). RCW 9.94A.525 governs the calculation of an offender score. If the present conviction is for a violent offense, such as assault in the second degree, each prior adult nonviolent felony conviction counts one point and each prior juvenile nonviolent felony conviction counts one-half point. RCW 9.94A.525(8). We review a trial court's offender score calculation de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

If miscalculation of the offender score involves a legal error, a defendant may challenge his or her offender score for the first time on appeal because such a sentence lacks statutory authority. State v. Wilson, 170 Wn.2d 682, 688-89,

244 P.3d 950 (2010). However, if a defendant stipulates to the facts underlying a sentence, he or she waives any challenge based on those facts. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Waiver is found when, "[a]ssuming the stipulated fact, the sentence the defendant received was authorized and constitutional." Goodwin, 146 Wn.2d at 875 (alteration in original) (quoting In re Personal Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)).

Here, Lewis expressly agreed with the State's calculation of his criminal history and resulting offender score, including the fact that the 1976 conviction was an adult felony conviction. Whether Lewis was convicted as an adult or a juvenile is a factual question, not a legal one. Consequently, Lewis has waived the right to raise this issue for the first time on appeal.

Goodwin and Wilson, to which Lewis cites, are inapposite. In Goodwin, the defendant pled guilty and stipulated to an offender score containing juvenile convictions that could not be considered pursuant to a former version of RCW 9.94A.030(12)(b), which provided that such convictions "washed out" once the defendant turned 23. In Wilson, the defendant stipulated to a prior conviction for attempted possession of methamphetamine, which the trial court incorrectly scored as a felony instead of a gross misdemeanor. These cases both involved challenges to legal errors. They do not control here.

III

Lewis raises several claims in a statement of additional grounds. None are availing. Lewis contends that trial counsel was ineffective for failing to file

motions, adequately analyze the strength of the State's case, obtain a reasonable bail, or secure him a more generous plea offer. He also argues that the prosecutor committed misconduct by failing to make the victims available for interviews in a timely fashion. These allegations rest on matters outside the record and therefore cannot be raised on direct appeal. See State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Finally, Lewis contends that a 1988 VUCSA conviction was improperly included in his offender score. He appears to argue that the inclusion of this conviction is somehow inequitable because it added 20 months to his standard range, which far exceeded the sentence on the original conviction. Lewis fails to articulate how this constitutes legal error entitling him to relief, and we do not consider this claim further. See RAP 10.10(c) (appellate court will not consider statement of additional grounds for review unless it adequately informs the court of the nature and occurrence of alleged errors).

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72332-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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