

FILED
Court of Appeals
Division I
State of Washington
8/19/2019 4:41 PM

Supreme Court No. 97560-4
(COA No. 78099-9-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN JOHNSON,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT 3

This Court should accept review of whether Mr. Johnson should have been scored as an eight point offender on remand, when his original sentence was reversed because of the trial court’s error, even though Mr. Johnson subsequently pleaded guilty to a new offense. 3

 1. This Court and the United States Supreme Court have crafted remedies to correct sentencing errors that occurred in the trial court. 3

 2. The trial court failed to merge two charges at Mr. Johnson’s original sentencing hearing, resulting in a miscalculation of Mr. Johnson’s offender score. 4

 3. The trial court’s error in failing to recognize Mr. Johnson’s right to merger of his sentence should have been remedied by the Court of Appeals. 6

 4. Mr. Johnson asks this Court to accept review of whether he should have been resentenced as an eight point offender, to correct the trial court’s original error. .. 8

F. CONCLUSION 9

TABLE OF AUTHORITIES

United States Supreme Court

Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)..... 4, 7, 8

Missouri v. Frye, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)..... 4, 7, 8

Washington Supreme Court

State v Maynard, 183 Wn.2d 253, 351 P.3d 159 (2015).....
..... 6, 7, 8

State v. Collicott, 118 Wn.2d 649, 827 P.2d 263 (1992)..... 7

State v. Posey, 174 Wn.2d 131, 272 P.3d 840 (2012)
..... 4, 7, 8

Rules

RAP 13.3..... 1

RAP 13.4..... 1, 3, 9

Constitutional Provisions

Const. art. I, § 9 4

U.S. Const. amend. V 4

A. IDENTITY OF PETITIONER

Ryan Johnson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Johnson seeks review of the Court of Appeals decision dated July 22, 2019, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's error in failing to apply the merger doctrine at Mr. Johnson's original sentencing hearing required a meaningful remedy at his subsequent sentencing hearing, when Mr. Johnson had subsequently pleaded guilty to a theft in the second degree charge, raising his score back to nine points?

D. STATEMENT OF THE CASE

This is a second appeal of Mr. Johnson's sentence. APP

1. In its first decision, the Court of Appeals held the trial

court erred by incorrectly interpreting the rule on merger.

APP 2. The Court of Appeals held the double jeopardy and merger violation required resentencing. *Id.*

After his trial in this case, Mr. Johnson pleaded guilty to a pending theft in the second degree charge. APP 2. When he returned for resentencing, the trial court included this additional offense in his offender score, sentencing him as a nine point offender, rather than as an eight point offender as he would originally been, but for the trial court's error. APP 2-3.

Mr. Johnson appealed his new sentence. The Court of Appeals struck an LFO the court imposed at his second sentencing hearing, but upheld the trial court's original sentence. APP 6. Mr. Johnson now seeks review with this Court.

E. ARGUMENT

This Court should accept review of whether Mr. Johnson should have been scored as an eight point offender on remand, when his original sentence was reversed because of the trial court's error, even though Mr. Johnson subsequently pleaded guilty to a new offense.

In its second opinion in this case, the Court of Appeals held that even though the trial court erred when it sentenced Mr. Johnson at his original sentencing hearing, because Mr. Johnson subsequently pleaded guilty to a new offense, no error occurred when the trial court again sentenced him as a nine point offender. APP 1. Mr. Johnson asks this Court to take review of this issue, which is in conflict with cases from this Court, involves a significant question of constitutional law, and is of substantial public interest. RAP 13.4.

1. This Court and the United States Supreme Court have crafted remedies to correct sentencing errors that occurred in the trial court.

This Court and the United States Supreme Courts have ordered remedies to correct violations of a defendant's constitutional rights, even when those remedies are not available by statute or otherwise.

This Court, for example, has allowed sentencing courts to sentence adults as if they were juveniles, even when juvenile court jurisdiction has lapsed. *State v. Posey*, 174 Wn.2d 131, 141, 272 P.3d 840 (2012).

The United States Supreme Court has applied this rule to require prosecutors to extend plea offers that they had revoked. *Lafler v. Cooper*, 566 U.S. 156, 170, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 151, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

Mr. Johnson asks this accept review of whether a violation of his right to be free from double jeopardy at sentencing should require resentencing for the standard range he was eligible for at the time of sentencing.

2. The trial court failed to merge two charges at Mr. Johnson's original sentencing hearing, resulting in a miscalculation of Mr. Johnson's offender score.

The double jeopardy clause of the United States and Washington constitutions prohibit multiple prosecutions or punishments for the same offense. U.S. Const. amend. V, Const. art. I, § 9.

The Court of Appeals recognized this principle when it held that the trial court erred at Mr. Johnson's original sentencing hearing when it did not merge his convictions for robbery in the first degree and assault in the second degree. APP 2. Had the trial court properly applied the merger rules when Mr. Johnson was originally sentenced, he would have had an offender score of 8, instead of as a 10 point offender. *Id.*

While this case was pending on appeal, Mr. Johnson resolved a charge that had been pending when he went to trial in this case, resulting in his conviction for theft in the second degree. APP 2. As a result, when the Court of Appeals remanded his case, Mr. Johnson no longer had an offender score of 8 but instead scored as a 9 point offender. *Id.* at 2-3.

As a result, Mr. Johnson faced the same standard range he faced when the court erred, rather than the reduced standard range he should have faced at his original sentencing hearing. *Id.* Had the trial court calculated Mr. Johnson's score properly at the original sentencing hearing,

his standard range would have been 108-144 months, instead of 129-171 months. CP 32.

Offender Score										
	0	1	2	3	4	5	6	7	8	9+
Level	36m	42m	47.5m	53.5m	59.5m	66m	89.5m	101.5m	126m	150m
IX	31-41	36-48	41-54	46-61	51-68	57-75	77-102	87-116	108-144	129-171

CP 32, RCW 9A.56.200.

When Mr. Johnson returned for resentencing, the trial court imposed the same sentence he originally received, other than the deadly weapon enhancement that the jury found connected to the merged charge. APP 3.

3. The trial court’s error in failing to recognize Mr. Johnson’s right to merger of his sentence should have been remedied by the Court of Appeals.

This Court has ordered remedies for sentencing errors when the court acts outside of its authority. In *State v Maynard*, this Court held that the trial court could impose a juvenile sentence for a defendant who lost juvenile court jurisdiction because of the ineffective assistance of his lawyer. 183 Wn.2d 253, 256, 351 P.3d 159 (2015). Mr. Johnson would have received a different sentence at his first sentencing

hearing had the trial court properly applied the law. App 2. His subsequent guilty plea would have had no effect on his sentence.

The Court of Appeal relies on *State v. Collicott* to hold no remedy was required to correct the trial court's original error. APP 4 (citing *Collicott*, 118 Wn.2d 649, 664, 827 P.2d 263 (1992)). But *Collicott* pre-dates this Court's rulings in *Posey* and *Maynard*, along with the United States Supreme Court's rulings in *Lafler* and *Frye*. In *Posey*, this Court recognized that the trial court had the authority to impose a juvenile sentence for an adult offender, even though jurisdiction lapsed in order to correct a court's error. 174 Wn.2d at 141. This Court ruled likewise in *Maynard* in order to preserve the defendant's rights. 183 Wn.2d at 256. The Court of Appeals decision to let Mr. Johnson's sentence stand despite authority provided to it by this Court is in conflict with this Court's opinions.

The decision of the Court of Appeals to hold that no remedy is available for the trial court's error is also in conflict

with the decisions of the United States Supreme Court. While *Lafler* and *Frye* are ineffective assistance cases, they order remedies for the defendants who were deprived of their Sixth Amendment rights that are not authorized by statute or otherwise apparent in case law. In *Lafler*, the Court ordered the plea vacated and required the government to reoffer a plea agreement recognizing this was the remedy in *Frye* as well. 566 U.S. at 170; *see also Frye*, 566 U.S. at 151. These decisions, like those of this Court, recognize the need for a remedy when defendants are deprived of their rights in our trial courts.

4. *Mr. Johnson asks this Court to accept review of whether he should have been resentenced as an eight point offender, to correct the trial court's original error.*

Mr. Johnson asks this Court to accept review of whether the trial court's error at his original sentencing hearing required a meaningful remedy, as this Court has done with *Maynard* and *Posey*. *Maynard*, 183 Wn.2d at 261; *Posey*, 174 Wn.2d at 141. For Mr. Johnson, a meaningful remedy would be achieved by ordering the trial court to

sentence him as if he had an offender score of 8. Mr. Johnson asks this Court to accept review.

F. CONCLUSION

Based on the foregoing, petitioner Ryan Johnson respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 16th day of August, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion APP 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RYAN BRETT JOHNSON,

Appellant.

DIVISION ONE

No. 78099-9-I

UNPUBLISHED OPINION

FILED: July 22, 2019

DWYER, J. — An offender sentenced for a felony conviction is sentenced based on the offender score the offender has accumulated as of the day of sentencing. The sentencing court correctly applied this rule in resentencing Ryan Johnson. However, the sentencing court erred by requiring Johnson to pay a \$200 criminal filing fee. Thus, we remand the matter to the superior court to strike the imposition of the filing fee. We affirm in all other respects.

I

The underlying facts of this case are set forth in our prior decision, State v. Johnson, No. 74262-1-I (Wash. Ct. App. May 1, 2017) (unpublished), <http://www.courts.wa.gov/opinions/pdf/742621.pdf>, review denied, 189 Wn.2d 1013 (2017), but will be briefly summarized here. In 2015, Ryan Johnson and Billy Jo Arnold entered Anthony Williams's home and forced him to hand over money that he had won at a casino. Arnold also struck Williams on the head with

a blunt instrument that Johnson had handed to him before they entered the house, leaving a gaping wound that required stitches.

Johnson was charged by amended information with robbery in the first degree, burglary in the first degree, and assault in the second degree with a deadly weapon enhancement. After a trial, a jury convicted Johnson on all charges. At sentencing, his offender score was calculated as 10 for the robbery and burglary counts.¹ The trial court imposed standard range sentences of 129 months for the robbery conviction, 116 months for the burglary conviction, and 6 months for assault. The robbery and burglary sentences were to be served concurrently, while the assault sentence was to run consecutively to both of these, for a total of 135 months' confinement.

Johnson appealed his convictions and sentences. While we affirmed his convictions, we held that Johnson's robbery and assault convictions merged and that the trial court violated double jeopardy when it entered judgment and imposed sentences for both. Thus, we ordered dismissal of the assault charge and remanded the matter for resentencing. Johnson anticipated being resentenced with an offender score of 8 based on our decision.

During the pendency of his appeal, however, Johnson was convicted of theft in the second degree in an unrelated case. Johnson's offender score was thus a 9 when he appeared for resentencing on the robbery and burglary

¹ Offender scores in excess of 9 are treated as a score of 9 pursuant to statute. RCW 9.94A.510.

convictions. This resulted in his being sentenced with the same standard ranges as before.

The trial court denied Johnson's request for a sentence below the standard range and imposed a total term of 129 months' confinement—the same as the original term of confinement, less the six months' sentence for assault. Crying foul—but blind to the irony of his plight—Johnson again appeals.

II

Johnson avers that the trial court erred by sentencing him based on an offender score that accounted for a conviction entered after his original sentencing. This is so, he asserts, because the later conviction would not have modified his offender score but for the trial court's error in imposing the first sentence. We disagree. The court correctly calculated his offender score as of the date of resentencing.

A standard range sentence is determined through a mathematical formula, the inputs for which are a defendant's offender score and the offense seriousness score of the crime(s) of which he or she was convicted. RCW 9.94A.530(1). The offender score is a sum of points, representing past and current offenses, accrued by the defendant as determined by the trial court at the date of the sentencing hearing pursuant to RCW 9.94A.525. The first subsection of that statute provides:

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.

RCW 9.94A.525(1).

Barring certain exceptions not applicable herein, “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.” RCW 9.94A.589(1)(a).

The applicability of these statutes when a defendant has accrued new convictions between a sentencing and a resentencing has been previously challenged and upheld. State v. Collicott, 118 Wn.2d 649, 664, 827 P.2d 263 (1992). In Collicott, a defendant’s sentence had been remanded for re-determination of his offender score and resentencing. 118 Wn.2d at 651-52. In the time between his original sentencing hearing and the resentencing, however, he had been convicted of burglary in the first degree—a crime that he had committed before the original sentencing but to which he did not plead guilty until after the sentencing. Collicott, 118 Wn.2d at 652-53. On remand, the sentencing court did not consider this conviction in re-determining the defendant’s offender score. Collicott, 118 Wn.2d at 654.

The Supreme Court reversed, holding that this resulted in an erroneous calculation of the defendant’s offender score. On resentencing, the court explained, the sentencing court must include the subsequent burglary conviction as required by the language of the statute. Collicott, 118 Wn.2d at 668-69.

We, along with the other divisions of our court, have applied Collicott’s holding in subsequent cases. See, e.g., State v. Bryan, 145 Wn. App. 353, 360,

185 P.3d 1230 (2008); State v. Clark, 123 Wn. App. 515, 517-18, 94 P.3d 335 (2004); State v. Shilling, 77 Wn. App. 166, 173-75, 889 P.2d 948 (1995). As stated in Clark, an “offender score includes *all* prior convictions (as defined by [former] RCW 9.94A.030(9)) existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology.” 123 Wn. App. at 519 (alteration in original) (quoting Shilling, 77 Wn. App. at 175).

Johnson views his situation as a type of perverse, dirty trick. After his appellate victory, he expected to be sentenced with a score of 8 and receive a lower sentence. Instead, his intervening conviction left him back where he started. Surely, he argues, he must have a remedy. But this equitable argument fails. “Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.” Dep’t of Labor & Indus. v. Dillon, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981) (citing Norlin v. Montgomery, 59 Wn.2d 268, 273, 367 P.2d 621 (1961)). Further, “[i]t is well settled that a party with unclean hands cannot recover in equity.” Miller v. Paul M. Wolff Co., 178 Wn. App. 957, 965, 316 P.3d 1113 (2014). Resort to equity cannot rescue Johnson from the simple arithmetic that designates his offender score as 9.

III

Upon resentencing, the trial court also imposed a \$200 mandatory criminal filing fee. However, after resentencing, our legislature amended RCW 36.18.020(2)(h) to proscribe imposition of such a filing fee “on a defendant who is

indigent as defined in RCW 10.101.010(3)(a) through (c).” RCW 36.18.020(2)(h). Our Supreme Court has clarified that this amendment applies to defendants with appeals pending at the time of its enactment. State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). Johnson contends, and the State concedes, that Johnson meets the statutory definition of indigency, and both parties request that we remand for striking of the criminal filing fee. Thus, we remand this matter to the sentencing court for entry of a ministerial order striking the filing fee. In all other respects, Johnson’s sentence is affirmed.

Affirmed in part, reversed in part, and remanded.

WE CONCUR:

Chun, J.

Dryden, J.

Ortiz, J.

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. 78099-9-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:

respondent Mary Kathleen Webber
[kwebber@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 19, 2019

WASHINGTON APPELLATE PROJECT

August 19, 2019 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78099-9
Appellate Court Case Title: State of Washington, Respondent v. Ryan Brett Johnson, Appellant
Superior Court Case Number: 15-1-00674-1

The following documents have been uploaded:

- 780999_Petition_for_Review_20190819164057D1977683_0311.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.081919-11.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- kwebber@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190819164057D1977683