102113-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 38781-0-III

STATE OF WASHINGTON, Respondent,

v.

LILTON LAMAR GREEN, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Lilton Green requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on May 18, 2023, concluding that the State met its burden to prove that Mr. Green's prior conviction should be included in his offender score when the date of the judgment and sentence was more than five years before his next criminal offense and the State presented no evidence of the date of his release from confinement. A copy of the Court of Appeals' published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Under RCW 9.94A.525(2)(c),

> class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant

> to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

Does this language require the State to prove a date certain consisting of either the last date of release from confinement or the date of the judgment and sentence to prevent a prior conviction from washing out?

IV. STATEMENT OF THE CASE

At issue are two class C felony prior convictions for telephone harassment, for which Mr. Green was sentenced on November 29, 1995. CP 74-75, 80-82. He committed another crime on December 19, 2000. CP 81. The State did not present any evidence of Mr. Green's actual release date for the convictions. Instead, it argued that under the terms of the sentence imposed in the judgment and sentence, Mr. Green could not have been released by December 19, 1995. CP 82; RP (Brittingham) 4. Specifically, Mr. Green was sentenced to a

90 day term with credit for 1 day served and was directed to arrange a work release bed. CP 86, 90-91.

The trial court and the Court of Appeals agreed with the State. In a published opinion, the Court of Appeals calculated that Mr. Green could only have received good time credit for up to one-third of his total sentence and therefore could not have been released by December 19, 1995. *Opinion*, at 5. Accordingly, the court concluded "that the State may rely on a judgment and sentence to establish the impossibility that an offense has washed out" by referencing applicable early release rules to calculate the earliest possible release date. *Opinion*, at 10.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(2) and (4). The opinion conflicts with *State v. Havens*, 171 Wn. App. 220, 286 P.3d 722 (2012), in which the Court of Appeals rejected the same argument by the State as presenting an inadequate record

of the date of release for purposes of calculating the time permitted to enforce legal-financial obligations. Further, the case presents questions of significant public interest concerning the State's burden to prove its asserted offender score and the wisdom of encouraging trial courts to calculate time likely served under obsolete laws and an incomplete factual record.

In *State v. Havens*, at issue was the timeliness of an order extending time to enforce legal-financial obligations. The applicable statute, RCW 9.94A.764(4), provided that the obligations expired after ten years from release from total confinement or the date of the judgment and sentence, whichever is later, unless the court entered an order extending jurisdiction before the expiration date. *Havens*, 171 Wn. App. at 223. In that case, Mr. Havens was sentenced to 12 months in prison on October 5, 1992 and ordered to pay restitution on October 26, 1992. *Id.* at 222. The trial court entered an order extending jurisdiction on December 31, 2002. *Id.*

As in this case, in *Havens*, the State argued that Mr. Havens could not have been released before December 31, 1992 because he received a 12-month sentence. *Id.* at 224. But in *Havens*, the Court of Appeals rejected this logic, concluding that the record was insufficiently developed and did not contain an exact date of release. *Id.* Consequently, because the State did not present evidence of a certain date of release from confinement, the date of the judgment and sentence must be the commencement date for enforcing legal-financial obligations. *Id.* at 225.

The Court of Appeals' decision in the present case that the court can infer the release date directly conflicts with *Havens*. Moreover, its reasoning amply illustrates precisely why the *Havens* approach requiring the State to prove the actual date of release from confinement. For example, the court cites former RCW 9.92.151 (1990) as establishing maximum good time credit of one-third of the sentence and infers that Mr. Green must have been imprisoned for no less than sixty days

from November 29, 1995. *Opinion*, at 5. But the statutes in effect at the time of Mr. Havens' offense permitted early release under multiple additional grounds. *See, e.g.,* former RCW 9.94A.150 (1995) (permitting furloughs and leaves of absence, extraordinary release, partial confinement to assist in finding work, early release within 10 days of the calculated release date, and reduction of the sentence due to inmate population exceeding the capacity of the facility). As such, the court's calculation of Mr. Green's likely release date necessarily assumes (without evidence) that none of these other provisions applied.

Moreover, under the former Sentencing Reform Act as well as the current Sentencing Reform Act, it is the jail and not the court that bears responsibility for certifying the amount of time served on an offense for purposes of calculating the defendant's credit for time served. *Compare* former RCW 9.94A.150(1) (1995), RCW 9.94A.729(1)(b). The judgment and sentence in this case reflects a time served credit of one day

but does not identify the source or the accuracy of that information.

The Court of Appeals' approach is likely to result in burdening trial courts with the duty to locate and parse obsolete statutes governing sentences in order to perform calculations based on speculative assumptions. This additional effort and the questionable accuracy of the results serve only to relieve the State of its burden to prove "the last date of release from confinement" required by the statute. RCW 9.94A.525(2)(c). The public has a substantial interest in the efficient use of judicial resources and ensuring that offender scores are correctly calculated to avoid overburdening already strained correctional facilities with overlong sentences. This Court should accept review and validate the *Havens* approach requiring the State to present evidence of the defendant's actual release date in order to conclude a prior conviction does not wash out.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(2) and (4) and this Court should enter a ruling that the State failed to prove that Mr. Green's prior convictions from 1995 did not wash out for purposes of calculating his offender score.

RESPECTFULLY SUBMITTED this 20 day of June, 2023.

This document contains 1,169 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Benton County Prosecuting Attorney
7122 W. Okanogan Pl., Suite A230
Kennewick, WA 99336

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

Signed this 20 day of June, 2023 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Published Opinion no. 38781-0-III (filed 5/18/2023)

APPENDIX A

FILED
MAY 18, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,	)	
	)	No. 38781-0-III
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
LILTON LAMAR GREEN,	)	
	)	
Appellant.	)	

FEARING, C.J. — RCW 9.94A.525(2)(c) erases from an offender score any previous felony conviction, other than for a sexual offense, "if, since the last date of release from confinement . . . , if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing a crime." What if the date of sentence for any earlier conviction is more than five years before the next crime, the length of the sentence for the earlier conviction carries into the five-year window of time, but the State fails to produce evidence of the exact date of release from the earlier crime? Appellant Lilton Green argues that the court must employ the date of the

sentence to calculate the time in the community. We disagree. We affirm the superior court's refusal to wash out, from the offender score, two convictions entered more than five years before the next criminal act because the sentence for the convictions necessarily resulted in Green remaining confined during the five-year limitation period.

FACTS

The facts controlling this appeal entail earlier convictions and sentences imposed on appellant Lilton Green. On November 29, 1995, the Benton County Superior Court sentenced Green on two class C felony convictions of felony telephone harassment. The court imposed ninety days of confinement to county jail, which it converted to eighty-nine days of partial confinement for work release, while recognizing a credit for one day already served. The judgment ran the sentence beginning November 29, 1995, with Green not reporting to jail until the availability of a work release bed.

On December 5, 1995, the Benton County Superior Court filed an amended judgment and sentence. We do not know for certain the reason for an amended judgment, but speculate the court updated the sentence because of the previous lack of the availability of a work release bed. The amended judgment imposed the same sentence: eighty-nine days of partial confinement listed as commencing on November 29, 1995, and recognizing one day of credit for time already served.

On June 27, 2001, the Benton County Superior Court sentenced Lilton Green on a new felony telephone harassment conviction. The judgment and sentence listed the date

of crime as December 19, 2000. The superior court sentenced Green to thirty days already served.

PROCEDURE

We move to the prosecution on appeal. In 2021, a jury convicted Lilton Green of violating a protection order. At sentencing, the State calculated Green's offender score as seven. In response, Green argued that his two 1995 convictions for felony telephone harassment should "wash out." Therefore, Green asked the court to set his offender score at five.

Lilton Green argued that, although the two 1995 judgments and sentences sentenced him to confinement, the State lacked any jail records to establish the date of his release. According to Green, the sentencing court needed to assume release on the date of sentencing, or November 29, 1995, in accordance with RCW 9.94A.525(2)(c). Five years expired between the date of sentencing and the commission of telephone harassment on December 19, 2000.

The State agreed it lacked records as to Lilton Green's date of release from confinement for his 1995 felonies. The State, however, responded that Green could not have completed his term of confinement for the convictions more than five years before the commission of the December 19, 2000 crime. The State posited that Green was sentenced on November 29, 1995. The 1995 judgment and sentence imposed eighty-nine days of jail, beginning November 29, in addition to the one day credited to Green. Green

must have remained confined until February 26, 1996. He re-offended December 19, 2000, within five years of February 26, 1996.

The State recognized the possibility of a generous good time credit, but insisted that any possible good time credit would not shorten his confinement to a date more than five years preceding December 19, 2000. Even if a work release bed was available for Lilton Green on November 29, 1995, for the release to have occurred more than five years before the 2000 crime, authorities must have released Green by December 19, 1995, twenty days after Green entered jail on his eighty-nine-days sentence.

The trial court concurred with the State's argument. The court observed a "factual impossibility" of Lilton Green's release from jail in 1995-96 more than five years before the December 19, 2000 crime. The trial court included the two 1995 convictions in Lilton Green's criminal history. Nevertheless, the court granted Green an exceptional sentence below the standard range because, on two separate occasions, the defendant's prior felony history narrowly failed to wash out.

LAW AND ANALYSIS

Lilton Green's sole assignment of error on appeal is the sentencing court's inclusion of the two 1995 felony convictions in his offender score. He repeats his contention that, due to the absence of direct evidence as to the date of his release from the 1995 sentence, this court must assume his release on the date of sentencing, more than

five years before his December 19, 2000 telephone harassment. At the least, we must assume release on some date before December 19, 1995. We disagree.

First, we perform some mathematical calculations with dates. Although the 1995 initial and amended judgments and sentences read that the term of confinement began on November 29, 1995, we assume the eighty-nine days of confinement did not begin until Lilton Green procured a work release bed. We do not know the date of procurement so we give Green the benefit of the doubt and assume his confinement began on November 29.

The State recognizes that jail authorities could have afforded Lilton Green early release for good-time behavior. In 1995, the maximum good-time credit permitted in a county facility could not exceed one-third of a total sentence. Former RCW 9.92.151 (1990). Good-time is calculated based on the total sentence imposed, not the amount of time an offender is incarcerated. *In re Personal Restraint of Williams*, 121 Wn.2d 655, 658, 853 P.2d 444 (1993). One-third of a ninety-day sentence is thirty days. So Green would be confined for at least sixty days. Green was credited with one day for time already served, and sixty days minus one day is fifty-nine days. Thus, the soonest Green could have been released from confinement was January 27, 1996. Green could not have served his final date of confinement by December 19, 1995.

The controlling statute, RCW 9.94A.525(2)(c), declares:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, *since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence*, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(Emphasis added.) The italicized portion of the statute, the "trigger clause," identifies the beginning of the five-year washout period as either (1) the last date of release from confinement pursuant to a felony conviction, or (2) the date of entry of the judgment and sentence. *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Lilton Green characterizes the second option as the default provision if and when the State cannot affirmatively establish a definitive date of release. We disagree.

When contemplating the meaning of a statute, we seek to divine the legislative intent and interpret the statutory provisions in a way that carries out that intent. *In re Dependency of Z.J.G.*, 196 Wn.2d 152, 163, 471 P.3d 853 (2020); *In re Dependency of G.M.W.*, 24 Wn. App. 2d 96, 122, 519 P.3d 272 (2022). If the plain language is subject to only one interpretation, our inquiry ends. *In re Dependency of Z.J.G.*, 196 Wn.2d 152, 163 (2020). We derive plain meaning from the context of the entire statute. *In re Dependency of Z.J.G.*, 196 Wn.2d 152, 163 (2020).

We highlight that RCW 9.94A.525(2)(c) references a release date, "if any." This language shows an intent to employ the date of judgment only if the court never

sentenced the offender to confinement. The language does not create a trigger date of the date of the judgment if the offender was released from jail, but no records confirm the exact date of release. The statute affords the sentencing court no discretion in choosing the trigger date. The statute does not evidence a preference between the two options. If one trigger date is preferred, that date is the release date.

State v. Schwartz, 6 Wn. App. 2d 151, 429 P.3d 1080 (2018), *aff'd*, 194 Wn.2d 432, 450 P.3d 141 (2019) asked the question of whether time spent in confinement for failure to pay legal financial obligations interrupts the running of the five-year washout period for RCW 9.94A.525(2)(c). Although *Schwartz* involved a disparate issue, we adopt the reasoning employed by the decision with regard to the release from confinement always being the measuring date if the offender spent time in jail. We wrote:

> When a statute speaks of "A, if any, or B" the words "if any" can reasonably communicate that A is to apply if it exists, and only if it does not exist will B apply. That is reasonably communicated by the trigger clause. In most cases, there will be a "last date of release from confinement . . . pursuant to a felony conviction," and that will be the trigger. Less often, there will be no period of confinement, either because the seriousness level and offender score are both low, a sentencing alternative is ordered, or the court imposes an exceptional sentence. In those cases, entry of the judgment and sentence will be the trigger. The clause cannot reasonably be read to create truly alternate dates . . . because the judgment and sentence date would always be more favorable and the "last day of release from confinement" would never apply.

State v. Schwartz, 6 Wn. App. 2d 151, 156-57 (2018) (some alterations in original) (footnotes omitted).

In support of his reading of RCW 9.94A.525(2)(c), Lilton Green forwards the principle that the State bears the burden of establishing earlier convictions. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). We note this rule, but further observe that the State met its burden to establish a conviction on November 29, 1995, with a sentence of eighty-nine days in jail.

Lilton Green wisely cites *State v. Havens*, 171 Wn. App. 220, 286 P.3d 722 (2012), in support of his position. Former RCW 9.94A.760(4) (2009), afforded the State ten years in which to enforce legal financial obligations without applying for an extension. The ten years commenced on "the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later." *State v. Havens*, 171 Wn. App. 220, 223 (2012). The record did not establish the date of Frank Havens' release from confinement. Therefore, this court held that the ten years began on the date of the judgment and sentence. The superior court had entered the judgment and sentence more than ten years before the State applied to extend the collection deadline.

The State, in *State v. Havens*, noted that the judgment and sentence imposed a one-year sentence. If the State had released Havens from confinement at the end of the one year, the release would have occurred within the ten-year limitation period.

Nevertheless, the State never asserted this argument before the trial court. This court wrote: "The record is not sufficiently developed to address this new contention." 171 Wn. App. 220, 224 (2012). Thus, the court considered the date of the judgment as the only date certain to make the beginning of the ten years.

Although helpful, *State v. Havens* delivers little solace for Lilton Green. The former RCW 9.94A.760(4) added the language, missing from RCW 9.94A.525(2)(c), of applying whichever period ends later. The former RCW 9.94A.760(4) lacked the key language, from RCW 9.94A.525(2)(c), of the confinement, "if any." The State did not assert any argument about a presumptive release date until the appeal. This court cited no decisions in support of its holding.

We deem Lilton Green's appeal to entail more an issue of evidence and proof rather than of statutory construction. The relevant question becomes whether a judgment and sentence may establish the outer boundaries of a confinement period when the State cannot prove the actual final date of confinement. RCW 9.94A.525(2)(c) does not identify the nature of the evidence needed to prove the date of release.

The reliability of a judicial filing permits a sentencing court to take notice of facts flowing directly therefrom. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005). A Washington court may rely on a judgment and sentence alone to prove the existence of a prior foreign conviction. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 256-57 (2005). Further, a sentencing court may reference a reliable judicial

record to determine facts underlying a prior foreign conviction. *State v. Thiefault*, 160 Wn.2d 409, 419-20, 158 P.3d 580 (2007); *Shepard v. United States*, 544 U.S. 13, 24-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (plurality opinion).

We conclude that the State may rely on a judgment and sentence to establish the impossibility that an offense has washed out. A judgment and sentence demonstrates on its face whether the sentencing court ordered a period of confinement. Armed with this reliable information, a court can discern the possibility that an offender was released before a certain date. By referencing applicable early release rules, this court can determine from a judgment and sentence alone the earliest possible confinement release date.

State v. Cross, 156 Wn. App. 568, 589, 234 P.3d 288 (2010), *vacated on remand*, 166 Wn. App. 320, 271 P.3d 264 (2012), suggests the State possesses the burden to disprove a washout. This rule echoes the statutory imperative that the State carry the burden of establishing by a preponderance of the evidence the accuracy of the offender score. RCW 9.94A.500(1); *State v. Wilson*, 113 Wn. App. 122, 136, 52 P.3d 545 (2002). Assuming, without holding, that the State bears the burden of disproving a washout, we conclude the State fulfilled this burden by a preponderance of evidence as to Lilton Green's 1995 convictions not being erased from the offender score.

CONCLUSION

We affirm the superior court's calculation of Lilton Green's offender score, and, in turn, his sentence for violating a protection order.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, J.

BURKHART & BURKHART, PLLC

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