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Supreme Court No. 102512-2

No. 84262-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL MORALES,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

Gabriel Morales appealed his sentence following his convictions. The trial court punished him for exercising his constitutional right to appeal by adding three additional points to his sentence.

He seeks this Court's review of this violation of due process and limitation on the right to appeal.

II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Mr. Morales seeks review of the Court of Appeals decision affirming his judgment and sentence.

III. ISSUE PRESENTED

A person may not be punished for exercising their constitutional right to appeal. Did the sentencing court err when it included offender score points accrued from convictions obtained following the entry of a judgment, and did the trial court deprive Mr. Morales of due process and undermine his right to appeal when it included these after-judgment points? Is the Court of Appeals decision affirming

the judgment and sentence in conflict with decisions of this Court, and does this case involve a significant question of law under the Washington Constitution and the United States Constitution meriting review? RAP 13.4(b)(1), (3).

IV. STATEMENT OF THE CASE

Gabriel Morales pleaded guilty in 2013 to two counts of obtaining a controlled substance by forged or altered prescription. CP 278-88. He received a sentence based on an offender score of 9. CP 280. Three of the points were based upon Mr. Morales's prior convictions for possession of a controlled substance. CP 304.

Mr. Morales returned to the superior court for resentencing due to the court's inclusion of three possession convictions in his offender score, pursuant to this Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (finding the possession of a controlled substance statute unconstitutional). The State agreed the sentencing court should remove Mr. Morales's prior convictions for possession of a

controlled substance from his offender score, rendering his score a 5. RP 4-5, 101.¹

The trial court sought clarification as to whether Mr. Morales's subsequent criminal history – convictions he had acquired since his release – should be counted in the resentencing. RP 7. The State's position was that the subsequent convictions returned Mr. Morales's score to an 8, leaving his standard range unchanged – 12 to 24 months. RP 101. Mr. Morales argued he was being punished, not for subsequent criminal conduct, but for the change in the law following *Blake*. RP 12-13.

Mr. Morales also argued he should be able to withdraw his guilty plea, since the terms and collateral consequences of his plea had substantively changed. RP 13, 35. Mr. Morales argued that *Blake* rendered his plea involuntary. RP 73. The

¹ Although removing the three *Blake* convictions would have reduced Mr. Morales's score to a 6, the court and parties agreed his new score was a 5. RP 4-5, 101. Slip op. at 2, fn 2.

court accepted briefing from the parties, and Mr. Morales filed a pro se Motion to Vacate and/or Resentence. CP 28-116.

The trial court sentenced Mr. Morales under *Blake*, finding his new score was an 8. RP 138; CP ___, sub.no. 73 (J & S, resentencing per *Blake*). The court found Mr. Morales subject to the same standard range as at the original sentencing hearing (12 months and one day to 24 months), and sentenced him to 18 months incarceration – the same sentence as before. Slip op. at 2. The court imposed the \$500 victim penalty assessment (VPA) and waived all other fees, including the DNA fee, transferring the motion to withdraw the plea to the Court of Appeals. RP 110, 138.

Mr. Morales argued on appeal that he was punished for challenging his unconstitutional convictions pursuant to this Court's decision in *Blake*, and the trial court's addition of subsequently acquired points chilled his right to appeal. Mr. Morales also argued any other outcome but reversal

undermines this Court's commitment to address institutional racism in its *Blake* decision.

The Court of Appeals rejected Mr. Morales's arguments and affirmed. Slip op. at 8, He seeks this Court's review.

V. ARGUMENT

This Court should grant review because the Court of Appeals decision is in conflict with decisions of this Court and involves a significant question of law under the Washington Constitution and the United States Constitution. RAP 13.34(b)(1), (3).

The court's imposition of three additional points at Mr. Morales's resentencing violated due process and chilled Mr. Morales's right to appeal.

1. The right to appeal is nearly absolute and any waiver must be voluntary, knowing, and intelligent.

The Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution guarantee a person's right to due process. U.S. Const. amend. XIV; Const. art. I, § 3. Additionally, article I,

section 22 expressly protects the right to appeal in all cases. Const. art. I, § 22. The right to appeal is nearly absolute, and a person can only relinquish the right upon a “voluntary, knowing, and intelligent waiver.” *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007).

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Engaging in constitutionally protected behavior, like challenging an unconstitutional sentence, cannot be the basis of punishment, as the State may not take action that will unnecessarily chill the exercise of a constitutional right. *See State v. Rupe*, 101 Wn.2d 664, 704-05, 683 P.2d 571 (1984); *United States v. Jackson*, 390 U.S. 570, 582, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

This Court has consistently tailored remedies to avoid chilling the right to appeal. In *State v. Sims*, a sentencing court granted Mr. Sims a special sex offender sentence alternative

(SSOSA) that was subject to an unconstitutional condition banishing him from Cowlitz County. 171 Wn.2d 436, 440, 256 P.3d 285 (2011). The Court of Appeals agreed the condition was unconstitutional, but ruled that upon resentencing, the trial court could also reconsider whether to grant the SSOSA. *Id.* at 441.

This Court disagreed and instead held that a full resentencing hearing, which could disturb the underlying grant of the SSOSA, would unnecessarily chill the defendant's right to appeal. *Id.* at 444, 445, 447-48. Accordingly, this Court remanded the case for the limited purpose of revising the challenged condition without disturbing the underlying SSOSA. *Id.* at 447-48.

In *In re the Personal Restraint of Cranshaw*, this Court considered a case involving a consolidated trial of multiple charges involving two victims where the appellate court reversed and remanded for retrial all of the convictions pertaining to just one of the victims. 196 Wn.2d 325, 326, 472

P.3d 989 (2020). The appellate court also remanded for resentencing on the affirmed counts. *Id.* Later, at the retrial, the jury found Mr. Cranshaw guilty of many of the same counts. *Id.* at 327. The result of this procedure was a substantial increase in Mr. Cranshaw’s offender score and an increase in his maximum potential sentence from 393 months to 536 months. *Id.* at 328.

This Court noted this “effectively punished [Mr. Cranshaw] for a direct appeal that succeeded in obtaining a new trial on several of the charges.” *Id.* at 328. This Court concluded his judgment and sentence was facially invalid, and it remanded the case for resentencing where the sentencing court would resentence him as though all of the original offenses were being sentenced in the same proceeding. *Id.*

2. Blake resentencing proceedings must be fundamentally fair and must not chill the due process right to appeal.

The same principles govern this case. Courts need to resentence thousands of people throughout Washington, as well

as to refund several million dollars in fines, due to this Court's decision in *Blake*. Courts need to resentence some individuals who may have obtained convictions in the time between their original sentencing and their *Blake*-related appeals, as did Mr. Morales.

Consequently, a person in Mr. Morales's position must either forego his right to correct errors through the appeal process, or vindicate his rights and be penalized for it. This dilemma will necessarily discourage individuals like Mr. Morales from pursuing *Blake*-related resentencing errors, chilling the right to appeal and the right to post-conviction relief. *See* Const. art. I, § 13; RCW 10.73.100(2), (6).

The fact that RCW 9.94A.525(22) contains language that appears to allow the court to enter points for post-sentencing convictions does not detract from Mr. Morales's argument. Statutes cannot grant courts the authority to undermine an individual's constitutional rights. *See State v. Villela*, 194 Wn.2d 451, 450 P.3d 170 (2019) (invalidating statute that

contravened an individual's constitutional rights under article I, section 7 of our constitution). Mr. Morales – and similarly situated individuals entitled to resentencing under *Blake* – has the right to challenge his unconstitutional convictions and sentence without a statute chilling his right to bring these challenges. Moreover, this Court reads statutes in a manner that avoids constitutional doubts about their validity. *Blake*, 197 Wn.2d at 188. Applying these two principles means this Court should not interpret RCW 9.94A.525(22) in a manner that unconstitutionally chills a person's right to appeal and right to challenge unconstitutional convictions in post-conviction proceedings.

3. Permitting the trial court to count subsequent points undermines the *Blake* Court's commitment to address institutional racism.

In *Blake*, this Court attempted to remedy racially disparate drug enforcement practices and the compounding effect this disparity has in future sentencings. 197 Wn.2d at 192. This Court acknowledged that the drug possession statute

has affected thousands of lives, but “its impact has hit young men of color especially hard.” *Id.* (citing Research Working Grp. of Task Force on Race & Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEA. U. L. REV. 623, 651-56 (2012)).

Ten years after the Task Force’s initial report, the Korematsu Center conducted a follow-up report in 2021 recognizing that racially disparate sentences in Washington remain an issue.² This Court has urged lower courts to “rely on history and context on issues of race to the same extent that courts have always relied on history and context to analyze all other issues.” *State v. Hawkins*, 200 Wn.2d 477, 501, 519 P.3d 182 (2022); Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (Wash. June 4, 2020).

² Fred T. Korematsu Center for Law and Equality, *Race and the Criminal Justice System, Task Force 2.0: “Race and Washington’s Criminal Justice System: 2021 Report to the Washington Supreme Court,”* 1, 17 (2021).

Blake provides many people of color, such as Mr. Morales, a chance to be resentenced; however, the inclusion of “new” points for subsequent convictions renders the right of appeal an illusory exercise. Despite overwhelming evidence of racism within our institutions, its precedential value persists. Supreme Court Letter at 1.

This Court should hold that counting Mr. Morales’s subsequent convictions in his offender score is inconsistent with due process and with this Court’s goals of addressing institutional racism. This Court should grant review. RAP 13.4(b)(1), (3).

VI. CONCLUSION

For the reasons set forth above, Mr. Morales respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with decisions of this Court and involves a significant question of law under the Washington Constitution and the United States Constitution. This Court should grant review. RAP 13.4(b)(1), (3).

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1,896 words, excluding the exemptions from the word
count per RAP 18.17.

DATED this 25th day of October, 2023.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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v.

GABRIEL MORALES,

Respondent.

No. 84262-5-I

DIVISION ONE

UNPUBLISHED OPINION

CHUNG, J. — In 2013, Gabriel Morales was sentenced based on an offender score that included convictions for drug possession. During Blake¹ resentencing, the trial court subtracted the drug possession convictions from Morales’s offender score but added additional points for subsequent felony convictions. The recalculated offender score resulted in the same standard range for sentencing, and the court ultimately entered the same term of confinement. Morales appeals, claiming that inclusion of new convictions violates his right to due process and chills his right to appeal. We affirm.

FACTS

In November 2013, Gabriel Morales pleaded guilty to two counts of obtaining a controlled substance by forged or altered prescription. At that time, Morales had an offender score of nine, with three of the points stemming from convictions for

¹ In 2021, the Washington State Supreme Court held the drug possession statute unconstitutional and voided all drug possession convictions. State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Post-Blake, defendants whose offender scores include points for convictions for simple possession must be resentenced based on offender scores recalculated without those convictions. State v. Edwards, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022).

possession of a controlled substance. This offender score established a standard range sentence of 12 months and one day to 24 months. The parties entered an agreed recommendation for 18 months of incarceration. The trial court accepted the recommendation and sentenced Morales to 18 months of confinement. Morales did not appeal and has completed his sentence.

Morales was resentenced pursuant to Blake. The parties agreed that removal of the possession convictions decreased Morales's offender score from nine to five.² However, at the time of his resentencing, Morales had three new felony convictions from 2017. These subsequent convictions added three points to Morales's offender score, bringing the total to eight. An offender score of eight yielded the same standard sentencing range as at the original sentencing, of 12 months and one day to 24 months. The court sentenced Morales to 18 months of incarceration, the same as his original term of confinement.

Morales appeals.

DISCUSSION

I. Additional Points on Resentencing

Morales argues that inclusion of his subsequent convictions in his offender score on resentencing violated due process, chilled his right to appeal, and undermined the Blake court's commitment to addressing institutional racism.

² According to his conviction history, Morales had three convictions for possession and one conviction for delivery of a controlled substance prior to his November 2013 conviction. Although only the possession convictions were required to be removed under Blake, the court and parties agreed to reduce his offender score to five.

A. Due Process and the Right to Appeal

The United States Constitution and the Washington Constitution prohibit the state from depriving anyone of life, liberty, or property without due process of law.

U.S. CONST. amend. XIV; CONST. art. I, § 3. Washington's due process right is coextensive with the federal right. In re Pers. Restraint of Dyer, 143 Wn.2d 384, 394, 20 P.3d 907 (2001). According to Morales, inclusion of subsequent convictions in a Blake resentencing violates due process by chilling the right to appeal because he "must either forego his right to correct errors through the appeal process, or vindicate his rights and be penalized for it."

Penalizing a defendant for successfully pursuing the right to appeal or a collateral remedy violates due process. State v. Brown, 193 Wn.2d 280, 288, 440 P.3d 962 (2019). However, "[t]he due process clause is not offended by all possibilities of increased punishment upon retrial after appeal but only those that pose a realistic likelihood of vindictiveness." Id. at 294. The presumption of vindictiveness "does not arise when the total sentence upon resentencing is not greater than the original sentence imposed." Id. at 293-94.

This same due process claim regarding a Blake resentencing was rejected in State v. Harris, No. 83341-3-I, slip op. at 4-9 (Wash. Ct. App. Feb. 6, 2023) (unpublished) <https://www.courts.wa.gov/opinions/pdf/833413.pdf>.³ There, Harris pointed to nothing in the record reflecting any likelihood of vindictiveness by the trial court. Id. at 6. Also relevant here, the trial court in Harris "imposed the *same sentence* it

³ While Harris is not binding on us, we find its reasoning persuasive and may properly cite and discuss it as "necessary for a reasoned decision." GR 14.1(c).

imposed before, not a harsher one.” Id. For these reasons, the Harris court held that “Harris’s due process claim fails.” Id.

Similarly, here, Morales has not provided any evidence of vindictiveness during resentencing. At the resentencing, the superior court followed the Sentencing Reform Act of 1981 (SRA) provision that “[p]rior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.” RCW 9.94A.525(22). And even including the subsequent convictions, Morales received the same standard range sentence as in the original sentence.⁴ Without a greater sentence or any indication of vindictiveness by the trial court, Morales’s due process claim fails.

Morales also claims that recalculating an offender score to include subsequent convictions violates due process by chilling the exercise of his constitutional right to challenge his sentence. In support, Morales cites State v. Sims, 171 Wn.2d 436, 440, 256 P.3d 285 (2011), and In re Pers. Restraint of Cranshaw, 196 Wn.2d 325, 326, 472 P.3d 989 (2020). Both cases, however, are distinguishable.⁵ In Sims, the defendant received a SSOSA⁶ and appealed as unconstitutional a community custody condition imposed as part of the sentence. 171 Wn.2d at 440. The State conceded the error and without filing a cross-appeal, raised the issue of whether the superior court should be allowed to reconsider the defendant’s SSOSA during resentencing. Id. Division Two

⁴ The majority in Brown held that in making this determination, a court looks to the “total aggregate” of prison time imposed at the two sentencing hearings, rather than the “aggregate remainder” approach, in which the comparison is between the remaining sentence once the dropped convictions are factored out and the new sentence. 193 Wn.2d at 290-91, 293-94.

⁵ The same arguments were addressed and rejected in Harris, No. 83341-3-I, slip op. at 5-10.

⁶ Special Sex Offender Sentencing Alternative.

accepted the concession and remanded for resentencing, stating that the trial court could either reimpose the SSOSA with a corrected condition or deny the SSOSA altogether. Id. at 441. On review, the Washington Supreme Court relied on RAP 2.4(a),⁷ to hold that the court had erred in remanding for a full resentencing. Id. at 449. The court characterized the State's request to revoke the SSOSA as affirmative relief, and concluded that the necessities of the case did not require such relief. Id. at 443-44. The court also noted the chilling effect on the defendant's constitutional right to appeal, stating that the court of appeals had "undervalued how compelling Sims's argument about the chilling effect is." Id. at 448. The court reasoned, "Because SSOSA sentences are of such high value to defendants, they would be unlikely to risk appealing even abhorrently unlawful or unconstitutional sentencing conditions for fear of risking the underlying SSOSA sentence." Id. at 447.

In Cranshaw, the defendant was found guilty and sentenced on several convictions relating to victims B.B. and S.H. 196 Wn.2d at 326. The appellate court reversed the convictions as to B.B. and remanded for a new trial. Id. at 326. As to S.H., however, the court affirmed the convictions, so Cranshaw was resentenced on the affirmed counts. Id. On retrial, a jury convicted the defendant for the crimes against B.B., and he was sentenced separately for those convictions. Id. at 327. As a result of the separate sentencings, the defendant received a substantially longer sentence than he would have had he been sentenced on all of the convictions on the same day. Id. The Washington Supreme Court granted Cranshaw's personal restraint petition, holding

⁷ RAP 2.4(a) states that the appellate court will grant affirmative relief to a respondent who has not filed a notice of cross-appeal only "if demanded by the necessities of the case."

that the “unique circumstances” warranted resentencing as if all convictions were sentenced in a single proceeding, because he “was effectively punished for a direct appeal that succeeded in obtaining a new trial.” Id. at 328.

In both Cranshaw and Sims, successful appeals led to imposition or threat of a harsher sentence on remand without additional criminal conduct by the defendant. The result was a potential chilling of the constitutional right to appeal. Unlike in Cranshaw and Sims, Morales’s successful appeal did not lead to the imposition or threat of a harsher sentence on remand without additional criminal conduct by the defendant. Rather, Morales engaged in subsequent criminal activities resulting in additional convictions. His sentences consequently remained the same, despite reduction of his offender score under Blake, because he had additional convictions that were included in scoring pursuant to RCW 9.94A.525(22). On this record, Cranshaw and Sims are inapposite.

Morales contends that even if RCW 9.94A.525(22) “appears to allow the court to enter points for post-sentencing convictions,”⁸ he has the right to challenge his unconstitutional convictions and sentence “without a statute chilling his right to bring these challenges.” Morales correctly notes that courts construe statutes to avoid constitutional doubt. See Blake, 197 Wn.2d at 188. However, as the above discussion shows, there is no “chilling” effect here because Morales did not receive a harsher sentence on resentencing. Morales also fails to provide an alternative interpretation of

⁸ RCW 9.94A.525(1)(a) states that “[a] prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed.” The court in State v. Collicott, interpreting the predecessor statute that contained the same language as RCW 9.94A.525(1), held that a conviction after the first sentencing but prior to resentencing was properly counted as a prior offense. 118 Wn.2d 649, 653, 827 P.2d 263 (1992).

RCW 9.94A.525(22) and legal argument in support, nor is any such alternative interpretation apparent here.⁹ Under the arguments as presented, Morales's resentencing did not violate due process.

B. Undermining Commitment to Address Institutional Racism

Morales argues that including subsequent convictions in offender scores undermines the Blake court's attempt "to remedy racially disparate drug enforcement practices and the compounding effect this disparity has in future sentencing." Blake acknowledged that court decisions and "[t]he drug statute that they interpreted ha[ve] affected thousands upon thousands of lives, and its impact has hit young men of color especially hard." 197 Wn.2d at 192. This statement came in the context of the court's explanation that the legislature was not ignorant of prior decisions construing the simple drug possession statute as lacking a required mens rea. Id. at 191-92. The court noted the racial impact of the simple possession statute and held the statute unconstitutional, but made no comment on the parameters for resentencing in light of the decision.

We are likewise mindful of the racially disproportionate impact of the drug possession statute and the importance of recognizing structural and institutional racism in sentencing. But Morales has not provided argument or authority as to why these unfortunate statistics mandate a different approach in Blake resentencings generally, or, specifically, in calculating an offender score. Any changes to the SRA must come from

⁹ "[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (internal quotation marks omitted) (internal citation omitted); RAP 10.3(a)(6). Relevant here, Morales makes no argument that the term "prior conviction" in RCW 9.94A.525(1) or (22) can or should be interpreted differently in a resentencing or that the "date of sentencing" can or should be read to refer to the original sentencing, not the resentencing.

the legislature. In re Pers. Restraint of Forcha-Williams, 200 Wn.2d 581, 590-92, 520 P.3d 939 (2022).

II. Statement of Additional Ground (SAG)

Morales also filed a SAG in which he argues that his 2013 guilty plea was involuntary because his offender score was improperly calculated in light of Blake. Morales originally raised this issue in superior court as a motion to vacate his plea. The court correctly transferred the motion to this court for consideration as a personal restraint petition as required by CrR 7.8(c)(2). This court reviewed the petition and dismissed it as untimely. The Washington State Supreme Court declined review on January 20, 2023. On April 10, 2023, this court's order terminating review became final. Our prior order is and remains dispositive on this point. We will not permit Morales to revisit the issue of the voluntariness of his plea agreement in this direct appeal.

Affirmed.

Chung, J.

WE CONCUR:

Seldman, J.

Birk, J.