Supreme Court No. 102663-3

No. 57060-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELVIN XAVIER,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

Melvin Xavier has come a long way since his volatile marriage ended in in a gunfight. The final chapter of Mr. and Mrs. Xavier's relationship ended with both spouses wielding firearms and Kristina being shot in the leg.

Mr. Xavier pled guilty and was sentenced to serve almost 20 years in prison. Mr. Xavier was later resentenced under *Blake*[1], having several of his convictions vacated and receiving a reduced sentence.

Yet the court did not consider evidence of Mr. Xavier's rehabilitation and remorse. Mr. Xavier argued the trial court failed to exercise its authority to consider mitigation evidence, among other errors. This Court should accept review of the Court of Appeals decision affirming his sentence because Xavier was denied a full, de novo resentencing hearing.

II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

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

III. ISSUES PRESENTED

1. When a case is remanded for resentencing because a constitutionally invalid conviction is included in the offender score, the court must conduct a de novo, plenary resentencing. This requires the court to meaningfully consider evidence of rehabilitation. At Mr. Xavier's resentencing, the trial court imposed a new sentence; however, the court failed to exercise its full sentencing authority, including consideration of rehabilitation and other mitigating factors. Where the trial court fails to conduct a de novo sentencing hearing and the Court of Appeals affirms, is the decision in conflict with this Court's decisions and with other decisions of the Court of Appeals, requiring review? RAP 13.4(b)(1), (2).

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[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

2. Mr. Xavier requests this Court review each and every issue raised in his statement of additional grounds, as well as whether the sentencing court erred by failing to determine whether his 2001 offenses arose from the same criminal conduct. Is the Court of Appeals decision regarding these issues in conflict with decisions of this Court? RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

One day, Melvin Xavier and his wife Kristina began to argue at home. CP 7-9. As the argument escalated, each of them grabbed a firearm. CP 9. Kristina told officers she armed herself with the family shotgun and pointed it directly at her husband. CP 9. Melvin grabbed a handgun from the master bedroom and walked toward Kristina, holding the handgun in a "low ready" position. CP 9.

Kristina told officers, "the next thing she knew, her leg went numb" and was bleeding. CP 9. One of the Xavier children said both parents had been "waving guns around." CP

8. When first responders arrived, Kristina was being treated by bystanders for an apparent gunshot wound to her leg. CP 7-8.

Mr. Xavier was charged with several counts including assault in the first degree as a domestic violence offense, felony harassment, and unlawful possession of a firearm. CP 1-9.

Because Mr. Xavier faced a sentence of death in prison as a persistent offender under the Persistent Offender Accountability Act (POAA), he pled guilty in 2020 to the offense of robbery in the second degree – a non-strike offense that was added to the third amended information for purposes of the plea. CP 30-37 (third amended information).[2]

At his July 2020 sentencing, the court determined Mr. Xavier's offender score was 16 and sentenced Mr. Xavier to serve 236 months in prison. CP 50.

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[2] *In re Barr*, 102 Wn.2d 265, 271, 684 P.2d 712 (1984) (allowing a guilty plea even where there is no factual basis for the plea offense, as long as record establishes a factual basis for the original crime and defendant states their complicity).

In 2021, Mr. Xavier returned to court for resentencing after this Court's decision in *State v. Blake*, 197 Wn.2d at 193. Because the controlled substance statute was found unconstitutional, convictions pursuant to it are and always have been void. *Id.* at 186, 195. *Blake* necessitated a new sentencing hearing because Mr. Xavier's score included a conviction for possession of a controlled substance (PCS). CP 49.

Mr. Xavier filed a motion to be resentenced and for the vacation of his prior conviction for PCS. Vacating the PCS conviction changed Mr. Xavier's offender score from 16 to 15. CP 49; CP 71.

When the parties returned to court for the new sentencing proceeding, the parties discussed a negotiated exceptional sentence of 144 months: 72 months on count 1 (second-degree robbery) and 72 months on count 2 (first-degree unlawful possession of a firearm), to run consecutively. RP 110-12. The court made findings that an exceptional sentence of 144 months was consistent with the interests of

justice and sentenced Mr. Xavier to 144 months. RP 123; CP 83-85.

Kristina Xavier, the alleged victim, addressed the court, objecting, "I still strongly believe that, that is too much time." RP 113. Kristina asked the court to consider Melvin's mental health and substance abuse issues, as well as the fact that he never had an opportunity for rehabilitation as a juvenile. RP 113-14. She stated, "My husband is not an abusive man," and blamed drugs for "every single crime that [Melvin] has ever committed." RP 114-15. Kristina emphasized that she and the prosecutor "have had multiple conversations and just she knows my position that I genuinely think that this is still too much time." RP 115.

The court did not ask about Mr. Xavier's efforts to reform himself in prison – nor did it consider Kristina's request for leniency – when it conducted the resentencing hearing and when it imposed the lengthy sentence.

The Court of Appeals found Mr. Xavier had "waived" his right to review of his sentence, relying on a 1999 case, *In re Pers. Restraint of Breedlove*.[3] Mr. Xavier seeks this Court's review. RAP 13.4(b)(1), (2).

V. ARGUMENT

1. *Mr. Xavier did not waive his right to collaterally attack his judgment and sentence – this Court should grant review.*

This Court should grant review because a new sentencing hearing following a sentence vacated for a miscalculated offender score is not a ministerial correction or a limited hearing; instead, "a sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Where a court exercises its discretion at a resentencing hearing, the proceeding is not "merely ministerial." *State v. Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011).

[3] 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

"Remand for resentencing renders the prior judgment and sentence void and results in a new final judgment, which is appealable as a matter of right." *State v. Delbosque*, 195 Wn.2d 106, 126, 456 P.3d 806 (2020) (internal citation omitted). This is distinguished from the correction of a scrivener's error, which does not require a new final judgment. *Id*.

The Court of Appeals disagreed with Mr. Xavier's claim that the court should have conducted a de novo sentencing hearing with consideration of his evidence of rehabilitation. Slip op. at 4. Instead, the Court found this Court's decision in *Breedlove* controlling, because the sentence imposed was one that Mr. Xavier had previously agreed to. Slip op. at 4. Yet in *Breedlove*, this Court clarified that "[i]mposition of a sentence which is not authorized by the SRA is a fundamental defect which may justify collateral relief." 138 Wn.2d at 304. And three years later in *Goodwin*, this Court grappled again with the collateral attack of a negotiated plea. 146 Wn.2d at 872. Neither the fact of a negotiated plea, nor *Breedlove* itself, is

dispositive of whether Mr. Xavier executed a binding waiver of "his right to challenge the exceptional sentence." Slip op. at 4.

Mr. Xavier was entitled to a full resentencing because the court was exercising "independent discretion." *State v. Dunbar*, __ Wn. App. 2d __, 532 P.3d 652, 656 (2023) ("We hold that, unless the reviewing court restricts resentencing to narrow issues, any resentencing should be de novo").

"When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). This requirement includes meaningfully considering mitigating evidence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Where a sentencing court does not exercise or misapprehends its discretion, a person is entitled to a new sentencing hearing. *Id.*; *McFarland*, 18 Wn. App. 2d at 531; *State v. Corona*, 164 Wn. App. 76, 78, 261 P.3d 680 (2011); *McFarland*, 189 Wn.2d at 56.

When a prior sentence is unlawful and a person returns for resentencing, the trial court should consider evidence of rehabilitation since the prior sentencing. *See Pepper v. United States*, 562 U.S. 476, 481, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). Evidence of rehabilitation should be considered on remand because "appropriate sentences can only be imposed" when sentencing courts "consider the widest possible breadth of information about a defendant." *United States v. Salinas-Cortez*, 660 F.3d 695, 698 (3d Cir. 2011).

It is only when the constitution or the Legislature excludes the consideration of rehabilitation that it should not be considered by the court. *See Concepcion v. United States*, __ U.S. __, 142 S. Ct. 2389, 2396, 213 L. Ed. 2d 731 (2022).

At the resentencing hearing, the trial court only considered the attorneys' arguments and minimally considered the position of the alleged victim. RP 105, 113-15. Mr. Xavier addressed the court and gave a statement of deep remorse. RP 122-23. Yet the court did not permit Mr. Xavier to present

additional evidence of his rehabilitation or additional mitigating evidence.

When a court has the discretion to make a sentencing decision, they must meaningfully consider the request in accordance with the applicable law." *McFarland*, 189 Wn.2d at 56. A court's failure to exercise discretion is an abuse of discretion. *Grayson*, 154 Wn.2d at 342. This Court should grant review of the Court of Appeals decision, because it is in conflict with this Court's decisions and with its own published decisions. RAP 13.4(b)(1), (2).

2. *This Court should review Mr. Xavier's Statement of Additional Grounds and his same criminal conduct issue.*

Mr. Xavier also requests this Court review his Statement of Additional Grounds, as well as his argument on same criminal conduct, which he incorporates by reference from the Brief of Appellant (pages 14-19).

This Court should grant review. RAP 13.4(b)(1), (2).

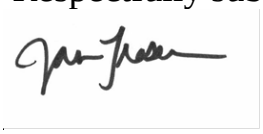
VI. CONCLUSION

For the reasons set forth above, Mr. Xavier respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with published decisions of the Court of Appeals and with decisions of this Court. This Court should grant review. RAP 13.4(b)(1), (2).

This document is in 14-point font and contains 1,823 words, excluding the exemptions from the word count per RAP 18.17.

DATED this 20th day of December, 2023.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MELVIN ANTONIO XAVIER III, Appellant.	No. 57060-2-II UNPUBLISHED OPINION

GLASGOW, C.J. — Melvin Antonio Xavier III shot his wife in the leg. The State charged Xavier with first degree assault and several other offenses. To avoid a persistent offender designation, Xavier pleaded guilty to second degree robbery instead of first degree assault. At sentencing, the parties jointly recommended an exceptional sentence and the trial court imposed the recommended sentence.

Xavier later moved for resentencing pursuant to *State v. Blake*.[1] The parties jointly recommended a lower exceptional sentence. The trial court again imposed the sentence both parties requested.

Xavier now appeals, arguing that the resentencing court erred by failing to consider evidence of rehabilitation and failing to find that his prior 2001 convictions for second degree robbery and second degree assault constituted the same criminal conduct. In a statement of

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

additional grounds for review (SAG), Xavier also argues that the trial court miscalculated his offender score because his prior conviction for attempting to elude had washed out. We affirm.

FACTS

I. BACKGROUND AND FIRST SENTENCING HEARING

In 2020, Xavier threatened to kill his wife and shot her in the leg. As a result, the State charged Xavier with first degree assault, felony harassment, and two counts of first degree unlawful firearm possession. The State later added charges of fourth degree assault, tampering with a witness, and violating a court order.

Xavier ultimately pleaded guilty to second degree robbery with a domestic violence aggravator, felony harassment, unlawful firearm possession, fourth degree assault, tampering with a witness, and violating a no contact order. As part of his plea, he agreed that the prosecutor's statement of his criminal history was correct and complete.

At a combined plea and sentencing hearing, Xavier's defense attorney discussed the negotiations that led to Xavier's plea. He explained that Xavier had previously been convicted of two strike offenses. First degree assault was also a strike offense, and if Xavier were convicted of this third strike offense, he would have been designated a persistent offender and sentenced to life in prison without the possibility of parole. Former RCW 9A.36.011(2) (1997); former RCW 9.94A.030(33)(a), (38)(a) (2019); RCW 9.94A.570. Xavier instead pleaded guilty to second degree robbery, which was not a strike offense, under *In re Personal Restraint of Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). RCW 9A.56.210; former RCW 9.94A.030(33) (LAWS OF 2019, ch. 187, § 1). *Barr* allows a trial court to "accept a guilty plea to an amended charge not supported by a factual basis as long as there is a factual basis for the original charge." *State v. Wilson*, 16 Wn.

App. 2d 537, 538, 481 P.3d 614, *review denied*, 197 Wn.2d 1018 (2021). The trial court recited Xavier's offender score for each count and Xavier said he understood; he did not offer corrections or object to the trial court's recitation.

The trial court accepted Xavier's guilty plea and proceeded to sentencing. The defense and the State jointly recommended an exceptional sentence of 236 months in prison. Xavier's wife asked for leniency, stating that "if drugs hadn't been involved," the incident "wouldn't have happened." Verbatim Rep. of Proc. (VRP) at 63. The trial court nevertheless imposed the sentence the parties recommended. The trial court found that the parties had stipulated that justice would be "best served by the imposition of an exceptional sentence," and it concluded that the parties' stipulation provided "a substantial and compelling reason for an exceptional sentence." Clerk's Papers (CP) at 61. The trial court further concluded that the domestic violence aggravator provided a "sufficient independent basis" for the sentence. *Id.*

II. RESENTENCING HEARING

After *Blake*, Xavier moved for resentencing because the trial court had calculated his sentencing range using a conviction that *Blake* had invalidated.

At the resentencing hearing, the State said Xavier's offender score for the second degree robbery conviction was 15, and Xavier did not object. The defense and the State jointly recommended a lower exceptional sentence of 144 months in prison. Xavier's wife asked for leniency again, stating that she "strongly [believed]" 12 years was "too much time." VRP at 113. Xavier asked about getting help with reentry into the community through the parent sentencing alternative, although the State explained that he was not eligible. Once again, the trial court imposed the sentence the parties recommended, finding that the parties had stipulated that justice

would be "best served by the imposition of an exceptional sentence" and concluding that the stipulation provided "a substantial and compelling reason for an exceptional sentence." CP at 84.

Xavier appeals his judgment and sentence.

ANALYSIS

I. CONSIDERATION OF MITIGATION EVIDENCE

Xavier argues that the trial court erred by resentencing him "without meaningful consideration of mitigation, including [his] evidence of rehabilitation" and his wife's request for a lower sentence. Br. of Appellant at 13. We decline to reach this argument.

A trial court may impose an exceptional sentence where the defendant and the State stipulate that justice would be best served by an exceptional sentence and the court finds such a sentence "to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act." RCW 9.94A.535(2)(a). When a defendant knowingly, intelligently, and voluntarily agrees to an exceptional sentence, they waive their right to review of the sentence. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

Here, *Breedlove* is controlling. Xavier waived his right to challenge the exceptional sentence because he agreed to it. The trial court imposed exactly the sentence that Xavier requested. He does not argue, and the record does not suggest, that his decision was not knowing, intelligent, and voluntarily. We therefore decline to reach his argument that the trial court erroneously resentenced him by failing to consider evidence of rehabilitation.

II. SAME CRIMINAL CONDUCT

Xavier argues that the trial court calculated his offender score incorrectly because his "2001 convictions for second degree robbery and second degree assault [constituted] the same criminal

conduct and may not be scored separately." Br. of Appellant at 14. He notes that while he did not raise this argument during the post-*Blake* resentencing hearing, he raised it in a 2007 sentencing hearing. We decline to reach this argument.

For purposes of calculating a defendant's offender score, if the sentencing court enters a finding that some or all of the defendant's "current offenses encompass the same criminal conduct[,] then those current offenses shall be counted as one crime." Former RCW 9.94A.589(1)(a) (2015). Crimes constitute the same criminal conduct when they involve the "same criminal intent, same time and place, and same victim." *State v. Westwood*, No. 100570-9, slip op. at 5 (Wash. Sept. 7, 2023).[2] Given that "application of the same criminal conduct statute involves both factual determinations and the exercise of discretion," a defendant who does not argue below that their offenses encompass the same criminal conduct waives this challenge to their offender score on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618 (2002).

Here, Xavier waived the argument that his convictions for second degree robbery and second degree assault constituted the same criminal conduct. During his 2007 sentencing hearing, Xavier withdrew this argument to take advantage of a plea agreement. *State v. Xavier*, noted at 147 Wn. App. 1026, slip op. at 4 (2008). Xavier did not raise the argument again in his 2020 and 2021 sentencing hearings in this case.

Even if Xavier had not waived the issue, our record does not contain the information necessary to determine whether the two offenses constituted the same criminal conduct. "The party presenting an issue for review has the burden of providing an adequate record to establish such error." *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *see also* RAP 9.2(b). And

[2] https://www.courts.wa.gov/opinions/pdf/1005709.pdf.

Xavier has the burden of proving that his prior 2001 offenses were the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). The criminal history section of Xavier's most recent judgment and sentence simply lists the offenses as "Rob 2" and "Assault 2." CP at 71. The preceding judgment and sentence lists the offenses the same way. Neither our record nor the unpublished decision addressing Xavier's 2007 sentencing hearing allows us to determine whether the offenses involved the same intent, time, place, and victim.[3] We therefore decline to address the merits of this issue.

III. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Xavier argues that the trial court calculated his offender score incorrectly because he was convicted for attempting to elude in 2002 and that conviction washed out. We decline to reach this argument.

With exceptions that do not apply here, a trial court must not include prior class C felony convictions other than sex offenses in a defendant's offender score if, since the defendant's last date of release from confinement for "a felony conviction, if any, or entry of judgment and sentence," the defendant "had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." Former RCW 9.94A.525(2)(c) (2017). Attempting to elude was a class C felony in 2002. Former RCW 46.61.024 (1983).

Here, like the same criminal conduct argument, Xavier waived the argument that his conviction for attempting to elude washed out. As part of his plea, Xavier agreed that the prosecutor's statement of his criminal history was correct and complete. During the resentencing

[3] Although the State's Brief of Respondent mentions a supplemental designation of clerk's papers, that document does not appear in our record, nor have the clerk's papers been supplemented.

hearing, the State said Xavier's offender score for the most significant crime was 15, and Xavier did not object. Again, Xavier received the exact sentence he requested. And even if the conviction had washed out, the 1point change would not have made a difference in Xavier's sentence, because his offender score was well above 9 for the most significant crime and the trial court adopted the exceptional sentence both parties requested. *See* former RCW 9.94A.525(8) (stating that if "the present conviction is for a violent offense," a "prior adult nonviolent felony conviction" counts for one point).

CONCLUSION

We affirm Xavier's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Cruser, J.

Price, 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. 57060-2-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

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