69271-2

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NO. 69271-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES JOHNSON,

Appellant.

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

The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in calculating Appellant's offender score.

2. Appellant was denied his right to effective assistance of counsel at sentencing.

Issues Pertaining to Assignments of Error

1. Where a prior sentencing court determined some of Appellant's prior convictions constituted "same criminal conduct" for purposes of calculating his offender score, did the current sentencing court err by counting each of those offenses separately towards Appellant's offender score for his current offense?

2. Where Appellant's counsel adopted the State's position at sentencing that Appellant's offender score was 10 and that the court should impose the harshest sentence possible, in direct opposition to Appellant's own offender score determination and his request for a minimum sentence, was Appellant denied effective assistance of counsel?

B. STATEMENT OF THE CASE

Appellant James S. Johnson was convicted of attempted second degree robbery. CP 25. The prosecutor filed a memorandum asserting Johnson's offender score was "10", and requested the court to impose 60

months of incarceration, the maximum term possible. Supp CP __ (sub no. 32, State's Sentencing Memorandum, 7/20/12).

Johnson's counsel did not submit a sentencing memorandum, but did provide the court with Johnson's transcripts from three community colleges, a job recommendation letter from a Correctional Mental Health Counselor (CMHC) at the Monroe Correctional Complex (MCC), and 17 certificates Johnson received for completing various programs, at both at MCC and community colleges. Supp CP __ (sub no. 36, Miscellaneous Certificates, 7/24/12); 2RP 174.[1]

Johnson submitted, pro se, a letter to the trial court in which he accepted responsibility for his offense. Supp CP __ (sub no. 35, Letter to Court from Defendant, 7/24/12). Johnson also acknowledges his extensive criminal past, but notes he engaged in many positive, productive and legal endeavors before committing his latest offense. Regarding his offender score, Johnson disputes the prosecutor's calculation, claiming it "should be 7, not the 9+ that the prosecutor is asking", noting that the last court to sentence him, found two sets of his prior convictions constituted "same criminal conduct." Id. The letter concludes by requesting the court

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[1] There are two volumes of verbatim report of proceedings referenced as follows: 1RP - July 2, 2012 (trial); and 2RP - July 3 & 5, 2012 (trial), and August 24, 2012 (sentencing).

consider, for his sake and the sake of his family, imposing a sentence at the low end of the standard range. Id.

In a supplemental sentencing memorandum, the prosecutor disputes Johnson's calculation of his offender score. Supp CP __ (sub no. 40, State's Supplemental Sentencing Memorandum, 8/7/12). With regard to the prior court's "same criminal conduct" determinations, the prosecutor asserted it was done it error, but provides no authority for why the current sentence court is entitled to ignore the prior determination. Id.

At the sentencing hearing the prosecutor stated the parties had reached agreement that Johnson's offender score was "10", which provided for a standard range of 47.25 months to 63 months, with a statutory maximum sentence of 60 months. 2RP 172-73. The prosecutor recommended the statutory maximum of 60 months. 2RP 173.

Johnson's counsel, Cassie Trueblood, stated she concurred with the prosecutor's offender score calculation, and with his recommendation for a statutory maximum sentence. 2RP 174. Thereafter the following colloquy occurred:

> THE COURT: So, counsel, you are at this point affirmatively recommending the 60 months?
>
> MS. TRUEBLOOD: Your Honor, 60 months is just slightly above the mid range. I think the mid range sentence would probably be appropriate here, a mid range sentence of 56 months. And given that 60 months results in

no community custody, I think that would be an appropriate sentence.

THE COURT: Is the -- just so I understand -- the recommendation would be to essentially not -- in the sense to kind of avoid community custody?

MS. TRUEBLOOD: That's not necessarily the reason, but, yes, I think that -- I think that the State's recommendation is appropriate given the -- given all the factors considered.

THE COURT: Okay. Thank you. Mr. Johnson, this is your opportunity to speak. Is there anything that you want to tell me?

THE DEFENDANT: Yeah, Your Honor. I don't agree with my attorney's recommendation of the high end. I would respectfully ask you to consider the low end. . . .

2RP 175-76.

In light of the conflicting sentence recommendations from the defense, the trial court offered that "perhaps Ms. Trueblood did not get a chance to fully discuss the sentencing recommendation with her client" and therefore recessed "so Ms. Trueblood and Mr. Johnson can speak." 2RP 177. Following the recess the court asked for further comment from Trueblood and Johnson:

THE DEFENDANT: Your Honor, I still stand by my prior statement. My attorney and I are not in agreement with the recommendation. We are just at an impasse here. I ask you to please consider the 48 months.

. . .

MS. TRUEBLOOD: I don't have anything to add, Your Honor. Mr. Johnson would like to request 48 months, and he has expressed that. But I have nothing to add, personally, no, aside from what he's already stated.

THE COURT: I wanted to give everybody an opportunity to make sure that the Court has full

> consideration of differing options here. . . . Ms. Trueblood, if there are reasons that you see to advocate for something less than the high end of the range, I want to give you an opportunity to articulate those.
>
> MS. TRUEBLOOD: Your Honor, again, I submitted the materials from Mr. Johnson's education when he was in custody from things he attempted to do when he is out of custody. I think those materials are positive on Mr. Johnson's behalf. Other than that, I think the Court is aware of the record. I think the Court is aware of the facts. And I have nothing further to add.

2RP 177-78.

Thereafter the court opined that "Ms. Trueblood has articulated . . . some reasons for going less than the high end.[,]" but noted she "ultimately . . made reference to the State's high -end recommendation." 2RP 179. The court also acknowledged Johnson's request for a "low end" sentence and as such stated, "the Court in considering this is essentially viewing the defense recommendation as a 48-month recommendation towards the low end." Id.

After the parties declined further comment, the court stated it was going to exercise its "own independent judgment" and find that "regardless of essentially the stipulation from the defense, I would view accurately the score as being a 10 with a range of 47 and a quarter to 60." 2RP 180-81. After discussing various mitigating and aggravating facts it found existed, the court imposed a 58-month sentence. CP 13-23; 2RP 181-83. Johnson appeals. CP 1-12.

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN CALCULATING JOHNSON'S OFFENDER SCORE.

The trial court erred in sentencing Johnson based on an offender score of "10" because two sets of his prior convictions had previously been determined to constitute "same criminal conduct". As such, those convictions should have resulted in only 2 points toward Johnson's offender score instead of 5, applied by the court. The trial court's failure to properly calculate Johnson's offender score requires resentencing.

When imposing a sentence under Washington's Sentencing Reform Act (SRA), a court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW 9.94A.345; In re Restraint of Carrier, 173 Wn.2d 791, 798, 809, 272 P.3d 209 (2012); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Absent exceptional circumstances, a court must impose a sentence within the SRA standard range, as determined by an offender's criminal history and the seriousness of the current offense. RCW 9.94A.505; .510, .515, .525. An accurate standard range is a prerequisite to a lawful sentence, and a miscalculation is reviewed de novo. State v. Parker, 132 Wn.2d 182, 187-88, 937 P.2d 575 (1997).

An erroneous standard range results in an unlawful sentence, which may be challenged for the first time on appeal. Stated another way, the defense cannot agree to a sentence that results from an unlawfully inflated standard range. In re Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); accord, State v. Mendoza, 165 Wn.2d 913, 927 29, 205 P.3d 113 (2009). In contrast, the defense may waive offender score challenges based on factual disputes. See, In re Restraint of Cadwallader, 155 Wn.2d 867, 875, 123 P.3d 456 (2005) (discussing the difference between legal and factual issues in the offender score context).

The offender score is *usually* calculated by adding a point for each prior conviction and each other current convictions. RCW 9.94A.525. An exception to this general rule arises when a court determines some offenses constituted the "same criminal conduct."[2] RCW 9.94A.589(1)(a).

> [W]henever 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: PROVIDED, That if the

[2] "Same criminal conduct" is defined as two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). The test is an objective one that "takes into consideration how intimately related the crimes committed are, and whether, between the crimes charged, there was any substantial change in the nature of the criminal objective." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

> court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a) (emphasis added).

RCW 9.94A.525 includes a special provision for when there has been a *prior* "same criminal conduct" finding under RCW 9.94A.589(1)(a:

> (a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

RCW 9.94A.525(5) (emphasis added).

The language of RCW 9.94A.525 is mandatory. State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). More importantly, the language creates two classes of prior offenses for purposes of conducting the same criminal conduct analysis: (a) prior offenses that have previously been found to constitute the same criminal conduct, and (b) those that have not.

Under the first class of prior offenses, the plain language of the statute provides that if a prior trial court has determined that two or more convictions constitute the same criminal conduct, the current sentencing court is bound by that determination. See Wright, 76 Wn. App. at 828-29. Under the second class of prior offenses, the current sentencing court has authority to decide whether they meet the "same criminal conduct" criteria. State v. McCraw, 127 Wn.2d 281, 287, 898 P.2d 838 (1995); State v. Reinhart, 77 Wn. App. 454, 459, 892 P.2d 110, review denied, 127 Wn.2d 1014 (1995).

In 2001, Johnson was sentenced for a felony in King County Superior Court. Supp CP __ (sub no. 32, supra).[3] "Appendix B" to the resulting judgment and sentence shows the 2001 sentencing court found as "same criminal conduct" Johnson's three "VUCSA" convictions under Snohomish County Cause No. 95-1-016485, and his "possessing stolen property" and "forgery" conviction under Snohomish County Cause No. 97-1-014721. Id. There is no indication those determinations were ever challenged or overturned.

Under the mandatory language of RCW 9.94A.525(5)(a)(i), a finding that offenses constitute the same criminal conduct requires all

[3] A copy of Johnson's 2001 judgment and sentence is attached to the prosecutor's initial sentencing memorandum.

future sentencing courts to adhere to that finding. Wright, 76 Wn. App. at 828-29. In sentencing Johnson for attempted second degree robbery, the sentencing court here failed to comply with this requirement. When a trial court fails to follow the proper procedure for establishing an offender score, remand for resentencing is required. State v. Bolar, 129 Wn.2d 361, 366-67, 917 P.2d 125 (1996); Reinhart, 77 Wn. App. at 459. The sentencing court failed to follow the proper procedure in establishing Johnson's offender score. Therefore, this Court should reverse his sentence and remand for resentencing.

2. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

At sentencing, Johnson faced as an opponent not only the State's attorney, but his own as well. Despite Johnson's pro se filings correctly noting the errors in the prosecutor's calculation of his offender score, his attorney, Ms. Trueblood, concurred with the prosecutor's erroneous calculation. 2RP 174. Moreover, despite Johnson's clearly expressed desire to seek a low-end standard range sentence, Ms. Trueblood inexplicably concurred with the prosecutor's recommendation for the harshest sentence possible. Id. Under the circumstances, Johnson likely would have faired better had Ms. Trueblood not appeared at all. As it was, Johnson was left to defend himself pro se against two trained attorneys,

one of whom was supposed to be his advocated. This constituted a complete deprivation of the constitutional right to counsel at sentencing. This Court should therefore reverse and remand for resentencing.

The state and federal constitutions guarantee criminal defendants reasonably effective representation by counsel at all critical stages of a case. U.S. Const. amend. 6; Wash. Const. art. 1 § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must show that: 1) counsel's performance was deficient "and not a matter of trial strategy or tactics;" and 2) the deficient performance prejudiced the defendant's case. State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) and Strickland, 466 U.S. at 687-89). A tactical decision will be found deficient if it is not reasonable. Hendrickson, 129 Wn.2d at 77-78; Roe v. Flores-Ortega, 528 U.S. 470, 481, 145 L. Ed. 2d 985, 120 S. Ct. 1029 (2000). Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. State v. Thomas, 109 Wn.2d 222,

229, 743 P.2d 816 (1987). The defendant need not show counsel's deficient performance more likely than not altered the outcome. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He need only show lack of confidence in the outcome. Thomas, 109 Wn.2d at 226.

There was not reasonable tactical basis for Ms. Trueblood to concur with the prosecutor's erroneously high calculation of Johnson's offender score. Likewise, there can be no reasonable tactical basis for Ms. Trueblood to advocate for imposition of the harshest sentence possible. That Ms. Trueblood's representation of Johnson at sentencing constituted deficient performance cannot reasonable be disputed. In effect, Johnson had no one but himself to advocate for him at sentencing.

Ms. Trueblood's deficient performance was so egregious that it creates a lack of confidence in the outcome of the sentencing hearing. There can be no confidence that the trial court would have imposed the same 58-month sentence if Ms. Trueblood had truly advocated for a lesser sentence based on Johnson's history self-improvement. Moreover, had Ms. Trueblood successfully argued for the correct offender score, then Johnson's standard range would have been on 32.25 months to 42.75

months.[4] As such, Ms. Trueblood's failure to properly advocate for Johnson at sentencing was manifestly prejudicial to Johnson because it resulted in imposition of a sentence that is at least 15.25 months longer than it should be, and possibly more. This Court should therefore reverse and remand for resentencing.

D. CONCLUSION

For the reasons stated, this Court should reverse Johnson's judgment and sentence and remand for resentencing.

DATED this 13th day of March 2013.

Respectfully submitted,

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Attorneys for Appellant

[4] The seriousness level for Johnson's offense is "IV". RCW 9.94A.515. Because his conviction was for an attempted robbery, the standard range is 75% of that for the completed offense. RCW 9.94A.595. The standard range for a level "IV" offense based on an offender score of 7 is 43 to 57 months. RCW 9.94A.510. Therefore, Johnson's correct standard range was 75% of that, i.e., 32.25 to 42.75 months.

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69271-2-I
	)	
JAMES JOHNSON,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 13 PM 4:44

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH 2013.

X Patrick Mayovsky