No. 90407-3
COA No. 69906-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY L. GARROTT,

Petitioner.

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

The Honorable Kimberley D. Prochnau

PETITION FOR REVIEW

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RULES

A. IDENTITY OF PETITIONER

Rodney Garrott asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Rodney L. Garrott*, No. 69906-7-I (April 21, 2014). A copy of the decision is in the Appendix at pages A-1 to A-6.

C. ISSUES PRESENTED FOR REVIEW

1. The Due Process Clauses of the United States and Washington Constitutions require the process at sentencing to abide by prevailing notions of fundamental fairness. Here, due to the failure of the State to timely move to resentence Mr. Garrott, he was subjected to a higher offender score once he moved to be resentenced several years later. Is a significant question under the United States and Washington Constitutions involved where the State's failure to act in a timely manner violated Mr. Garrott's right to fundamental fairness?

2. Whether this Court should reexamine and reverse its decision in *State v. Collicott,* 118 Wn.2d 649, 827 P.2d 263 (1992) in favor of its decision in *State v. Whitaker*, 112 Wn.2d 341, 771 P.2d 332 (1989)?

D. STATEMENT OF THE CASE

On April 23, 2004, Rodney Garrott was found guilty in King County Superior Court following a jury trial, of one count of residential burglary and one count of first degree trafficking in stolen property. Mr. Garrott appealed those convictions and this Court reversed the convictions based upon a finding of the ineffective assistance of trial counsel, and remanded for a new trial. *State v. Garrott*, 2005 WL 1302983 (No. 54256-7-I, May 23, 2005). Mr. Garrott subsequently pleaded guilty to a single count of residential burglary, and on February 3, 2006, he was sentenced on that count.

While Mr. Garrott's appeal was pending, he entered a guilty plea to two separate cause numbers arising from two unrelated incidents: one count of residential burglary and one count of second degree possession of stolen property. CP 5-14, 299-308. Mr. Garrott was sentenced on those matters on May 28, 2004.[1] CP 23-30, 316-22. The State did not move to have Mr. Garrott resentenced on these

[1] Resentencing on these two convictions is the subject of this appeal.

offenses following his sentencing in 2006 on the 2004 convictions which were reversed.

On August 29, 2011, Mr. Garrott filed a Personal Restraint Petition (PRP) directly in the Supreme Court, moving to be resentenced on the May 2004 counts based upon the reversal of the April 2004 counts and subsequent resentencing in 2006.[2] In the interim between May 2004 and August 2011, Mr. Garrott had suffered additional felony convictions. CP 136-61. In its response to Mr. Garrott's PRP, the State conceded Mr. Garrott was entitled to be resentenced on the May 2004 convictions, but contended that the subsequent convictions had to be counted in recalculating Mr. Garrott's presumptive sentence. CP 91-92. The Supreme Court granted Mr. Garrott's PRP, and remanded for resentencing. CP 398.

At resentencing Mr. Garrott moved to represent himself, which, following a colloquy, was granted. CP 166, 399; RP 19-31. Mr. Garrott objected to the addition of the subsequent convictions to his offender score as "prior convictions," contending it was the State's failure to move to have him resentenced in 2006 that caused the

[2] Mr. Garrott initially filed a Motion to Modify or Correct Sentence Pursuant to CrR 7.8. CP 41-84. The trial court transferred the motion to this Court pursuant to CrR 7.8(c)(2). CP 40.

subsequent convictions to be counted in calculating his offender score in 2013. RP 61-64, 65-67. The trial court disagreed and resentenced Mr. Garrott, counting the subsequent convictions in his offender score. CP 192, 425; RP 67-68.

The Court of Appeals affirmed Mr. Garrott's sentences. Decision at 2-5.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE DILATORY BEHAVIOR OF THE STATE VIOLATED MR. GARROTT'S RIGHT TO DUE PROCESS AND FUNDAMENTAL FAIRNESS

1. Mr. Garrott possessed the right to due process and fundamental fairness at sentencing. Article I, section 3 of the Washington Constitution and the Fifth Amendment of the United States Constitution provide, "No person shall be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); *State v. Foster,* 91 Wn.2d 466, 473, 589 P.2d 789 (1979). The due process inquiry asks whether the complained of treatment is so arbitrary or unfair that it denies due process. *State v. Handley,* 115 Wn.2d 275, 290 n. 4, 796 P.2d 1266 (1990).

"Although 'due process' cannot be precisely defined, the phrase requires 'fundamental fairness.'" *In re Dependency of K.N.J.,* 171 Wn.2d 568, 574, 257 P.3d 522 (2011), *quoting In re Personal Restraint Petition of Blackburn,* 168 Wn.2d 881, 885, 232 P.3d 1091 (2010). A government deprivation of liberty must abide by "prevailing notions of fundamental fairness." *State v. Lord,* 117 Wn.2d 829, 867, 822 P.2d 177 (1991).

Under RCW 9.94A.589(1), the defendant's offender score is determined by "using all other current and prior convictions as if they were prior convictions[.]" A "prior conviction" is "a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1).

On remand following a successful appeal, there is no prohibition against using the defendant's subsequent convictions in recalculating the standard range. *Collicott,* 118 Wn.2d at 664-65. In *Collicott*, the defendant pleaded guilty to several offenses in 1985, then appealed the sentences imposed, arguing the crimes constituted the same criminal conduct. In 1986, while the appeal was pending, the defendant pleaded guilty to another unrelated offense. *Id.* at 652-53. This Court reversed the 1985 sentences and held that on remand, the sentencing court could

use the 1986 conviction as a prior conviction in recalculating the standard range. *Id.* at 664-65.

Collicott differed markedly from the case at bar. Here, the only reason the subsequent convictions could have been counted in calculating Mr. Garrott's presumptive sentence in 2013 was because of the State's failure to move for resentencing after the April 2004 convictions were reversed. All of Mr. Garrott's convictions occurred in King County, so the King County Prosecutor's Office was aware that the 2004 convictions had been reversed, but the Prosecutor's Office made no attempt to have Mr. Garrott resentenced on the May 2004 convictions. Further, the State acknowledged its error in its response to Mr. Garrott's PRP when it conceded the May 2004 convictions had to be remanded for resentencing. Had the State moved timely for resentencing in 2006, Mr. Garrott's offender score would not have been as high as it was when he was subsequently resentenced in 2013.

It is patently unfair, and violative of due process and fundamental fairness, for Mr. Garrott to suffer a greater sentence based upon the failure of the prosecutors. As a result, Mr. Garrott's right to be sentenced in a fundamentally fair manner was violated, thus his right to due process was violated. This Court should grant review and hold

that the rule in *Collicott* should not apply and the subsequent convictions should not have been counted in recalculating Mr. Garrott's presumptive standard range.

2. Alternatively, the decision in *Collicott* should be reexamined and overruled in favor of this Court's decision in *Whitaker*. In response to Mr. Garrott's argument that the intervening convictions should not count, the State repeatedly claimed that *Collicott* required they be included. CP 319-20. *Collicott* does not compel this conclusion, and to the extent this Court deems it does, the decision in *Collicott* should be reexamined and overruled.

Initially, the portion of *Collicott* that speaks to the scoring issue was *dicta* and had no precedential value. The focus of the lead opinion written by Justice Smith, was whether the trial court's decision to impose an exceptional sentence was justified in light of the trial court's incorrect analysis of the same criminal conduct test. 118 Wn.2d at 667. This "lead" opinion was only joined by three other justices. The four justices would have reversed the imposition of the exceptional sentence, finding insufficient evidence in the record to support it. *Id.* at 661-63. The unanimous decision of the Court was to overrule its prior decision and adopt a different rule for determining whether offenses

constituted the same criminal conduct. *Id.* at 667, 679-80. Thus, *Collicott* stands only for the proposition that the correct test for determining whether offenses are the same criminal conduct is that announced in *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 160 (1987). *Id.* at 669-70. The remainder of the decision, particularly that portion purporting to determine the defendant's offender score on remand, is dicta with no precedential value. *See Kailin v. Clallam County*, 152 Wn.App. 974, 985-86, 220 P.3d 222 (2009) (internal quotation marks omitted) (where there is "'no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.'"), *quoting W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999).[3]

This Court should instead should reverse the decision in *Collicott* and apply the test adopted by the Court in *Whitaker*, which dealt with a similar issue. In 1981, Mr. Whitaker had been given

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[3] This rule was noted by the five justice concurrence/majority opinion:

> My disagreement with the majority opinion here is that it goes beyond what is necessary to resolve this case. I refer specifically to the discussions of collateral estoppel, the "clearly too lenient" standard, and the "zone of privacy" factor.
>
> *Whitaker,* 118 Wn.2d at 669-70 (Durham, J., concurring).

probation and a deferred sentence for a negligent homicide conviction. In 1986, the court revoked his probation and imposed the sentence originally deferred in 1981. In calculating his offender score, the Court included a 1986 reckless driving conviction as a prior conviction because it existed prior to the revocation hearing. Mr. Whitaker appealed the inclusion of this offense. This Court decided it was error to include the 1986 conviction as a prior offense, because to "hold otherwise would be illogical." *Id.* at 346. The Court held that when a trial court revokes probation for a pre-Sentencing Reform Act (SRA) offense and then calculates the offender score under the SRA guidelines, the date of sentencing relates back to the date of the original proceeding. *Id.* at 346-47.

Using *Whitaker*, the trial court erred when it resentenced Mr. Garrott by counting the intervening convictions in his offender score when he was resentenced in 2013. When the April 2004 convictions were reversed, Mr. Garrott should have been resentenced. Because the State failed to move to have him resentenced in a timely manner, his intervening convictions were incorrectly treated as prior convictions. As noted in *Whitaker*, this produced an illogical result. The sentencing

date for the May 2004 convictions on resentencing should have related relate back to May 2004 instead of 2013.

This Court should accept review and overrule the decision in *Collicott* in favor of the decision in *Whitaker*. As a consequence, Mr. Garrott's sentence in this matter should be reversed and he should be resentenced without the use of the subsequent convictions that occurred between 2004 and 2013.

F. CONCLUSION

Mr. Garrott respectfully asks this Court to grant review and reverse his sentence and remand for a sentence without the subsequent convictions factored into the calculation of his offender score.

DATED this 20th day of May 2014.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON,	)	No. 69906-7-I
	)	consolidated with
Respondent,	)	No. 69907-5-I
	)	
v.	)	
	)	
RODNEY LOUIS GARROTT,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 21, 2014
	)	

VERELLEN, J. — Subsequent convictions are properly included in a defendant's offender score upon resentencing. Rodney Garrott was entitled to be resentenced after a prior conviction was reversed on appeal, but the trial court did not err by including subsequent convictions in his offender score at his 2013 resentencing. We affirm.

FACTS

In May 2004, Garrott pleaded guilty to two counts of residential burglary and one count of second degree possessing stolen property (the May 2004 convictions). His offender score at sentencing included prior convictions for residential burglary and first degree trafficking in stolen property. The trial court calculated his offender score at 7 with a standard range of 43 to 57 months and imposed a sentence of 50 months.

In May 2005, this court reversed his prior convictions and, on remand, Garrott pleaded guilty to one count of residential burglary as part of a plea bargain dropping the trafficking charge.

In 2006, the trial court entered judgment and sentence against Garrott on two subsequent, unrelated counts of residential burglary.

In August 2011, Garrott filed a personal restraint petition in the Washington Supreme Court, arguing that the judgments and sentences on the May 2004 convictions were facially invalid because they included the now reversed prior convictions in the offender score. He asked that the court remand for resentencing at a lower offender score. The State conceded that the convictions were facially invalid, but argued that his offender score at resentencing would likely be significantly higher because his 2006 convictions would be included. The Supreme Court commissioner invited supplemental briefing from Garrott, stating "I am not persuaded Mr. Garrott fully appreciates the peril underlying his request for resentencing."[1]

The Supreme Court considered Garrott's supplemental brief, granted his personal restraint petition, and remanded to the trial court for resentencing on the May 2004 convictions. At resentencing, the trial court calculated his offender score as 16, including Garrott's 2006 subsequent convictions and five previously undisclosed but subsequently discovered 1999 convictions from Illinois. Given his offender score, the standard range was 63 to 84 months, and the trial court sentenced him to 63 months.

Garrott appeals.

DISCUSSION

Offender Score at Resentencing

Garrott argues that the State had a duty to promptly resentence him on the May 2004 convictions and that its failure to do so violated due process and fundamental

[1] Clerk's Papers at 164.

fairness because the 2013 resentencing resulted in a higher offender score and sentence. We disagree.

Garrott cites no authority for his proposition that the State had a duty to promptly resentence him on the May 2004 convictions after the prior convictions were reversed in 2005. To the extent Garrott alludes to speedy sentencing case law, he provides no authority that such standards apply to this resentencing after prior convictions were reversed on appeal.[2] Therefore, we do not consider these arguments.[3]

Alternatively, Garrott argues that the trial court erred by including the intervening convictions in his offender score. Garrott acknowledges that State v. Collicott recites that there is no prohibition against using the defendant's subsequent convictions in recalculating the standard range on resentencing.[4] But he argues that State v. Whitaker is more analogous and requires that the subsequent convictions not be included in his offender score.[5]

In Whitaker, the analysis turned on whether the defendant's "date of sentencing" was the date of his original probation hearing or a later hearing revoking his probation.[6]

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[2] See generally Susan L. Thomas, Annotation, *When Does Delay in Imposing Sentence Violate Speedy Trial Provision*, 86 A.L.R. 4th 340 (1991).

[3] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (where no authority is cited, we may assume counsel found none after a search) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

[4] 118 Wn.2d 649, 827 P.2d 263 (1992).

[5] 112 Wn.2d 341, 771 P.2d 332 (1989).

[6] Whitaker, 112 Wn.2d at 344. Whitaker was convicted before the legislature enacted the Sentencing Reform Act of 1981, which provides for community custody instead of probation. Id. at 342.

Garrott's sentences do not involve probation or revocation of probation, so Whitaker is not on point.

Rather, this case is more analogous to Collicott. There, Collicott pleaded guilty in 1985 to burglary, rape, and kidnapping.[7] In 1986, after sentencing for the 1985 convictions, Collicott again pleaded guilty to another burglary charge.[8] In 1992, Collicott successfully appealed the 1985 convictions, and the Supreme Court held that on remand, the 1986 burglary conviction could be included when calculating Collicott's offender score at resentencing for the 1985 crimes.[9] In doing so, the court distinguished Whitaker because there was no probation or revocation of probation at issue.[10]

Garrott argues that the portion of Collicott that speaks to offender scores is dicta and has no precedential value. But even if dicta, State v. Shilling stands for the same proposition.[11] In Schilling, this court held that an "offender score includes *all* prior convictions (as defined by RCW 9.94A.030(9)) existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology."[12] Garrott makes no attempt to distinguish Shilling.

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[7] Collicott, 118 Wn.2d at 650.

[8] Id. at 653.

[9] Id. at 664-65.

[10] Id. at 665.

[11] 77 Wn. App. 166, 889 P.2d 948 (1995).

[12] Id. at 175.

Because Collicott and Shilling both support the inclusion of Garrott's Illinois convictions and subsequent convictions in his offender score at resentencing, the trial court did not err.

Statement of Additional Grounds

Garrott raises several additional grounds for review, but most are premised on his claim that the State was required to promptly resentence him.[13] For the reasons outlined above, this argument fails.

Garrott relies on State v. Ellis[14] and State v. Modest[15] to support his argument that he was entitled to a speedy resentencing. But neither is applicable here. In Ellis, this court held that the defendant was entitled to a dismissal of charges against him where there was a 23-month delay in sentencing.[16] In Modest, this court held that, although presumptively prejudicial, a two-year delay between the mandate after appeal and resentencing did not require dismissal of the charges because the defendant was not actually prejudiced by the delay.[17] These cases have no application here because Garrott did not appeal his May 2004 convictions and sentencing on those convictions was never delayed.

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[13] In his statement of additional grounds for review, Garrott quotes authority holding that a defendant has no duty to bring himself to trial or to be sentenced. But this authority does not address whether the State has an affirmative duty to resentence a defendant under these circumstances. Therefore, it is not persuasive.

[14] 76 Wn. App. 391, 885 P.2d 1360 (1994).

[15] 106 Wn. App. 660, 24 P.3d 1116 (2001).

[16] Ellis, 76 Wn. App. at 395.

[17] Modest, 106 Wn. App. at 665.

Garrott also argues that the trial court erred in failing to address his motion for relief from judgment or order. But he failed to designate this motion or the trial court's order as part of the record on appeal. Therefore, the record is inadequate to permit our review of this issue.[18]

Finally, Garrott has moved to modify the court administrator's ruling that he may not file a pro se reply brief. Because he is represented by counsel on appeal, his proposed reply brief seeks to add new assignments of error on appeal and he has filed a statement of additional grounds on appeal, we deny his motion.[19]

We affirm the trial court.

WE CONCUR:

[18] State v. Vazquez, 66 Wn. App. 573, 583, 832 P.2d 883 (1992) (a party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the evidence relevant to the issues raised on appeal); State v. Wheaton, 121 Wn.2d 347, 365, 850 P.2d 507 (1993) (where the record is inadequate for review of an issue, an appellate court will not reach the issue).

[19] Other than a statement of additional grounds for review under RAP 10.10, there is "no other rule of appellate procedure that authorizes the filing of any other pleading or correspondence directly with the appellate court when, as in this case, the appellant is represented by counsel." State v. Romero, 95 Wn. App. 323, 327, 975 P.2d 564 (1999).

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. 69906-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Amy Meckling, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: May 20, 2014