SUPREME COURT NO. 90994-6
COA NO. 44417-8-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANGELA RODRIGUEZ,

Petitioner.

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

The Honorable Daniel L. Stahnke, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Angela Rodriguez asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Rodriguez requests review of the published decision in State v. Angela Rodriguez, Court of Appeals No. 44417-8-II (slip op. filed October 7, 2014), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether a current misdemeanor conviction for a domestic violence offense does not count in the offender score as a prior conviction for a "repetitive domestic violence offense" under the Sentencing Reform Act because the legislature only intended such offenses to contribute to the offender score when they are actual prior offenses that are actually repetitive?

D. STATEMENT OF THE CASE

Rodriguez pled guilty to felony violation of a domestic violence court order (felony DV-VNCO) under count I and a gross misdemeanor violation of a no-contact order (misdemeanor DV-VNCO) under count II. CP 5-7, 14; RP 3-7. Count I involved an assault on Rodriguez's father and count II involved contact with her mother. CP 14; RP 8. A single incident during the same period of time formed the basis for both convictions. CP

14. Rodriguez had no prior violations of a no-contact order. CP 14. At sentencing, the parties disputed whether the misdemeanor DV-VNCO contributed a point to the offender score for the felony DV-VNCO as a "repetitive domestic violence offense." CP 46-51.

Several statutory provisions are implicated. The Sentencing Reform Act (SRA) creates a grid of standard sentence ranges for felonies based upon the defendant's offender score and the seriousness level of the current offense. RCW 9.94A.510. An offender score is the sum of points accrued under RCW 9.94A.525, which includes points for "prior convictions" and points for "other current offenses." RCW 9.94A.525.

RCW 9.94A.525(21)(c) specifies "If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows: . . . *Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030*, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011." (emphasis added).

The SRA defines "repetitive domestic violence offense" to include any "[d]omestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense." RCW 9.94A.030(41)(a)(ii).

RCW 9.94A.525(1) provides "A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589."

RCW 9.94A.589(1)(a) states "Except as provided in (b) or (c) of this subsection, whenever 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 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. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

At sentencing, the State claimed the offender score should be one point on the theory that Rodriguez's current gross misdemeanor conviction for violating a no-contact order was a prior conviction for a "repetitive domestic violence offense" under RCW 9.94A.525(21)(c). CP 46-47. The defense argued the offender score should be zero because the current

misdemeanor offense for which Rodriguez had been convicted did not count as a prior "repetitive domestic violence offense." CP 48-50.

The trial court agreed with the State that the misdemeanor DV-VNCO qualified as a prior conviction for a "repetitive domestic violence offense" under RCW 9.94A.525(21)(c). RP 11-19. It sentenced Rodriguez on the felony count to a term of 14 months based on an offender score of one point and 364 days in jail for the gross misdemeanor count with 314 days suspended. CP 29-30, 53, 56-57.

On appeal Rodriguez argued her misdemeanor conviction for violating a no-contact order did not contribute to her offender score as a prior conviction for a "repetitive domestic violence offense." See Brief of Appellant at 3-17. The State conceded error. See Brief of Respondent at 1-7.

The Court of Appeals refused to accept the State's concession. Slip op. at 1. Instead, it issued a published decision without oral argument that the SRA allows a present conviction for a domestic violence offense to be treated as a prior conviction for a "repetitive domestic violence" offense for purposes of computing the offender score, even where the misdemeanor and felony offenses take place at the same time, are adjudicated at the same time and are sentenced at the same time as part of the same case. Slip op. at 5-10. Rodriguez seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE QUESTION OF WHETHER A CURRENT MISDEMEANOR DOMESTIC VIOLENCE OFFENSE SHOULD BE TREATED AS A PRIOR, REPETITIVE DOMESTIC VIOLENCE OFFENSE FOR SCORING PURPOSES UNDER THE SENTENCING REFORM ACT IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Court of Appeals acknowledged the offender score issue was moot because Rodriguez had served her time, but reached the merits of the claim because it constitutes an issue of continuing and substantial public importance. Slip op. at 3-4. The Court of Appeals is correct in that respect. The sentencing issue presented by this case is a big deal.

According to the Court of Appeals, "the prevailing practice, followed by most prosecutors in the State, is to calculate offender scores consistently with the manner in which the trial court calculated Rodriguez's offender score on the felony DV–VNCO in this case." Slip op. at 4. For that reason, "the issue regarding the proper calculation of an offender score based on RCW 9.94A.525(21)(c) is likely to reoccur, and our opinion here will provide valuable guidance to the lower courts." Id.

For the same reason, the issue is one of substantial public importance that should be determined by the Supreme Court under RAP 13.4(b)(4). The Court of Appeals decision does indeed provide guidance to the lower courts on this recurring issue, but not the right kind of

guidance. The Court of Appeals' interpretation of the statute is flawed and many defendants in other cases will be harmed by this decision unless the Supreme Court rectifies it.

A current misdemeanor offense of violating a no-contact order does not qualify as a prior conviction for a "repetitive domestic violence offense" under RCW 9.94A.525(21)(c) for offender score purposes. The legislature intended that provision to apply only to repetitive domestic violence offenses, not offenses that took place at the same time and adjudicated as part of the same case. The legislature intended that provision to apply only to misdemeanor domestic violence convictions that are true prior convictions, not current convictions, because the law is aimed at repeat offenders, not first-time offenders.

The law at issue here is a carefully crafted piece of legislation that many people worked on for a long time to ensure a small class domestic violence offenders — recidivist domestic violence offenders — would find their punishment increased by taking into account their past history of criminal domestic violence. The Court of Appeals' interpretation of the statute upends that finely calibrated legislative goal by applying the increased punishment provision to those who are not recidivist offenders. Rodriguez asks the Supreme Court to step in and clean up the mess that

the Court of Appeals' erroneous interpretation of the scoring statute has created.

a. The Plain Language Of The Statute Shows Current Misdemeanor Convictions For A Domestic Violence Offense Do Not Count Toward The Offender Score As Prior Convictions.

The Court of Appeals concluded the gross misdemeanor conviction — the conviction "arising from the same incident as the felony DV-VNCO for which her offender score was being calculated" — counts as a "prior conviction" under RCW 9.94A.525(1) or RCW 9.94A.589(1)(a). Slip op. at 7-8. That conclusion matters because only a "prior conviction for a repetitive domestic violence offense" is included in the offender score under RCW 9.94A.525(21)(c).

The Court of Appeals would be correct if one only considers the single sentence defining "prior conviction" as "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). That definition, considered in isolation, includes nearly every conviction that exists because sentencing typically takes place after the date of conviction.

RCW 9.94A.525(1), however, draws a distinction between a "prior conviction" and other "current" offenses: "Convictions entered or sentenced on the same date as the conviction for which the offender score

is being computed shall be deemed 'other current offenses' within the meaning of RCW 9.94A.589." Thus, a conviction that exists before the date of sentencing but which is entered or sentenced on the same date as the other conviction is a "current offense," not a "prior conviction." Rodriguez's misdemeanor DV-VNCO conviction was entered on the same date as the felony DV-VNCO conviction (CP 7-15) and later sentenced on the same date as the felony DV-VNCO conviction. CP 27-36, 52-60. Rodriguez's misdemeanor DV-VNCO conviction is a current offense.[1]

Apparently realizing its "prior conviction" analysis under RCW 9.94A.525(1) is something less than irrefutable, the Court of Appeals seized on isolated language in RCW 9.94A.589(1)(a), which states "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." Slip op. at 8-9.

The language of RCW 9.94A.589(1)(a), when looked at as whole, precludes the conclusion that Rodriguez's current offense of misdemeanor DV-VNCO should be treated "as if" it were a prior conviction for scoring purposes. The provision that directs courts to treat current offenses as prior offenses for purposes of the offender score only applies to felonies

[1] "Current" means "presently elapsing" and "occurring in or belonging to the present time." Webster's Third New Int'l Dictionary 1924 (1993).

because the statute uses the clause, "the sentence range for *each* current offense." RCW 9.94A.589(1)(a) (emphasis added). This language presumes each current offense has a sentencing range to be determined by an offender score. Only felonies have sentence ranges determined by an offender score. Misdemeanor convictions do not. RCW 9.94A.525; City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004) (SRA does not apply to sentencing of misdemeanors); State v. Bowen, 51 Wn. App. 42, 46, 751 P.2d 1226 (1988) ("The SRA applies only to the sentencing of felony offenders."), review denied, 111 Wn.2d 1017 (1988).

The rule under RCW 9.94A.589(1)(a) applies when *both* current offenses have a sentencing range, as indicated by the legislature's use of the word "each." Every word of a statute must be given significance. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). The Court of Appeals' reading of the statute is flawed because it reads the word "each" out of the statute. "[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous." Jongeward v. BNSF R. Co., 174 Wn.2d 586, 601, 278 P.3d 157 (2012).

The remaining language in RCW 9.94A.589(1)(a) bolsters Rodriguez's interpretation: "PROVIDED, That if the 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.

Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

In considering the "same criminal conduct" issue, the phrase "those current offenses shall be counted as one crime" must refer to two or more current felony offenses. Current offenses that are the same criminal conduct are treated as one crime for the purpose of computing the offender score for each offense. RCW 9.94A.589(1)(a). But no offender score attaches to misdemeanor convictions, which means they can never be part of the "same criminal conduct" with a felony offense. The language of the same criminal conduct provision, in using the plural phrase "those current offenses," envisions reciprocity between the two current offenses in terms of reducing the offender score for each of them. This further supports Rodriguez's argument that RCW 9.94A.589(1)(a), in treating current offenses as prior convictions for scoring purposes, refers only to two current felonies, not one felony and one misdemeanor.

According to the Court of Appeals, Rodriguez's current offense for misdemeanor DV-VNCO must be treated as if it were a prior conviction because it is not the same criminal conduct as the felony offense. Slip op. at 9. It contends "[t]he only time a current conviction is not counted as though it were a prior conviction under RCW 9.94A.589(1)(a) is if it is an

'other current offense' that is the same criminal conduct as the offense for which the offender score is being calculated." Slip op. at 8-9. The Court of Appeals' erroneous premise is that the same criminal conduct provision applies to current misdemeanors. As set forth above, it does not.

Furthermore, the exceptional sentence provisions of RCW 9.94A.535 for consecutive sentences, referenced by RCW 9.94A.589(1)(a), apply only when both current offenses are felonies. See State v. Whitney, 78 Wn. App. 506, 517, 897 P.2d 374 (court may run misdemeanor conviction consecutive to felony conviction without justifying the consecutive sentence under the SRA because the SRA "applies only to felony sentences and does not limit the judge's discretion in imposing a sentence for a misdemeanor conviction."), review denied, 128 Wn.2d 1003, 907 P.2d 297 (1995). It is clear that RCW 9.94A.589(1)(a), including the provision treating current offenses "as if" they are prior convictions, does not cover misdemeanors.

Moreover, only "repetitive" domestic violence offenses are subject to being counted in the offender score. RCW 9.94A.525(21)(c). The term "repetitive domestic violence offense" is defined to include any "[d]omestic violence violation of a no-contact order under chapter 10.99 RCW that is not a felony offense." RCW 9.94A.030(41)(a)(ii). The Court of Appeals rejected Rodriguez's argument that the statute requires a

repetitive pattern of domestic violence because the definition of "repetitive domestic violence offense" is not defined by anything other than the type of offense. Slip op. at 9.

That narrow approach ignores the larger picture. If the Court of Appeals were right, there would be absolutely no reason for the legislature to use the word "repetitive." It would have just used the phrase "domestic violence offense." The Court of Appeals' interpretation reads the word "repetitive" out of the statute.

The ordinary meaning of the adjective "repetitive" is "containing repetition." Webster's Third New Int'l Dictionary 1924-25 (1993). "Repetition" means "the act or an instance of repeating something that one has already said or done." Id. at 1924. There is a temporal aspect to repetition. One event occurs. And then another event occurs later in time. That is what makes the two events repetitive. Rodriguez committed her two offenses at the same time. She did not commit one domestic violence offense and then commit another at a later time. Her misdemeanor offense did not constitute a serial domestic violence offense. It is not a repetitive offense.

Again, every word in a statute must be given significance. Roggenkamp, 153 Wn.2d at 624. Under the Court of Appeals interpretation, however, repetitive does not mean repetitive. Its

interpretation allows non-repetitive offenses — offenses that take place at the same time and are tried as part of the same case — to be treated the same as repetitive offenses. That was not the legislature's intent in drafting this law.

Even if the statutory scheme were ambiguous, the rule of lenity applies in favor of Rodriguez. "Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). A statute is ambiguous if it is susceptible to more than one reasonable interpretation. State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). As set forth above, Rodriguez's interpretation of when misdemeanor domestic violence offenses will count in the offender score is reasonable. The rule of lenity operates in favor of Rodriguez's interpretation.

b. Legislative History Shows The Misdemeanor Scoring Rule For "Repetitive Domestic Violence Offenses" Was Meant To Apply To Repeat Offenders, Where The Misdemeanor Offense At Issue Is An Actual Prior Conviction, Not A Current Offense.

The Court of Appeals turned a blind eye to the legislative history of this law. That history unequivocally shows the legislature intended a "repetitive domestic violence offense" to be included in the offender score only when it is an actual prior offense that is actually repetitive.

Comments made by the prime sponsor of the bill and those testifying in support are illuminating. See State v. Evans, 177 Wn.2d 186, 199-203, 298 P.3d 724 (2013) (considering committee hearings as probative of legislative intent); In re Marriage of Kovacs, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993) (noting the "remarks of . . . a prime sponsor and drafter of the bill" can assist in determining legislative intent).

Those comments demonstrate a unified theme that the misdemeanor scoring provision was meant to apply to a small class of people that constitute repeat, recidivist offenders. No one talked about or even hinted that the misdemeanor scoring provision applied to current misdemeanor offenses that are tried and sentenced along with a current felony offense. The remarks were exclusively made in terms of prior convictions, with no reference to treating a current conviction for a misdemeanor domestic violence offense as a prior conviction for purposes of the offender score. See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 15 min. 50 sec., recording by TVW, Washington State's Public Affairs Network, available at http:// www. tvw. org.[2]; Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 27, 2010) at 1 hour

[2] Recordings of all committee hearings cited herein are available at http:// www. tvw. org.

11 min. 15 sec.; Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 27 min. 55 sec.; Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 26, 2010) at 54 min. 24 sec.

The prime sponsor explained "There was a great concern that, when you look at domestic violence, most of the time it's people just lose it, and it's inexcusable what they do to their partner as far as committing acts of violence. But a minority of the time, there are terroristic, repeated acts of, and sometimes it's not violence, it's usually a subtle, manipulative, insidious pattern of coercion and control which can erupt in violence and very often death. And these repeated offenders are the ones we're targeting from this, in this bill." See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 19 min. 48 sec.

The prime sponsor continued, "So the bill here will allow those prior misdemeanors to count. So if you have three or four or however many, it is as if, when you commit a felony offense, so the current offense is a felony offense, a dv offense, and the fiscal effect I'm assuming of this bill won't be felt, and again, it's a relatively small universe of repeat offenders, until future biennia because the -- nothing's gonna take effect until these misdemeanors are committed in the future as well, so this sort of, the scoring system isn't going to be accumulating for offenders until

three or four years from now." See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 20 min. 54 sec.

The following day, the sponsor reiterated "This is a sibling to the omnibus domestic violence bill moving through the judiciary committee, follows very much the intent of Representative Pearson's bill coming out of the Attorney General's office to hold accountable the repeat domestic violence offenders. The bill would be counting prior misdemeanors when the current offense is a felony. And that would allow for proper accountability and also incapacitation of these repeat domestic violence offenders."[3] See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 27, 2010) at 1 hour 12 min. 50 sec.

Testimony in support of H.B. 2777 reflects, "This bill is targeting those repeat domestic violence offenders. It is hard to prosecute an offender as a first-time offender when in reality this person has a history

[3] Representative Pearson's bill was E.S.H.B. 2427, which contained an identical scoring provision for "repetitive domestic violence offenses." See E.S.H.B. 2427 Bill Report 2427 at 1, 3-4 (attached as app. A); Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 28 min. 14 sec. Testimony in support of E.S.H.B. 2427 provided "Studies have shown that there is a small group of offenders that recidivate. This bill targets the worst of the worst serial domestic violence abusers. Passage of this legislation will help restore victim confidence in the criminal justice system by putting serial abusers away for a long time and holding them accountable." E.S.H.B. 2427 Bill Report 2427 at 4.

of committing domestic-violence-misdemeanor offenses. This bill will allow those prior violations for Assault, Harassment, Stalking, and Violations of a No-Contact Order to now be counted like a felony offense." H.B. Rep. on H.B. 2777 at 3 (testimony in support) (attached as app. B).

A representative from the Washington Association of Prosecuting Attorneys told the House committee "Our issue is that, you know, we'll get an offender in felony court for their first felony, and it's uncomfortable to deal with them like they're a first time offender when we can see this long history of domestic violence assaults. And I think the best part of this bill allows us, and allows the court to take into account, the actual history. We're not talking about dealing with allegations, we're talking about actual prior convictions." See Hearing on H.B. 2777 Before the H. Pub. Safety & Emergency Preparedness Comm. (Jan. 26, 2010) at 31 min. 17 sec.

Testifying in support of the bill before the Senate Judiciary Committee, a King County prosecutor gave the "recidivist dv offender" as an example of how the scoring rule on misdemeanors should apply, emphasizing the rule would apply to a "very narrow group of folks." Hearing on E.S.H.B. 2777 Before the Senate Jud. Comm. (Feb. 23, 2010) at 1 hour 19 min. 15 sec. to 25 min. 52 sec.

The legislative history of the bill shows the legislature intended the misdemeanor scoring provision of RCW 9.94A.525(21)(c) to apply to actual prior convictions, not current convictions. The law is aimed at a small group of repeat/chronic/recidivist/serial offenders with actual past convictions for domestic violence offenses. See also Patricia Sully, Taking It Seriously: Repairing Domestic Violence Sentencing In Washington State, 34 Sea. U.L. Rev. 963, 964-65, 977-78, 987, 992 (2011) (analyzing legislative purpose behind the bill). Rodriguez is not a recidivist offender. When she was sentenced on her misdemeanor and felony DV-VNCO offenses, she had no prior domestic violence convictions. The scoring provision of RCW 9.94A.525(21)(c) was not meant to apply under such circumstances.

F. CONCLUSION

For the reasons stated above, Rodriguez requests that this Court grant review.

DATED this 6th day of November 2014.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent. v. ANGELA MARIE RODRIGUEZ, Appellant.	No. 44417-8-II PUBLISHED OPINION

LEE, J. — Angela Marie Rodriguez appeals two domestic violence (DV) violation of a no-contact order (VNCO) sentences. She argues that the trial court improperly calculated her offender score for the felony DV-VNCO by counting her concurrent gross misdemeanor DV-VNCO conviction as one point under the repetitive domestic violence provision of the Sentencing Reform Act (SRA)[1]. She also challenges the length of the suspended sentence, community custody, and no-contact order imposed on her gross misdemeanor DV-VNCO conviction. The State concedes these alleged errors.[2]

We accept the State's concession of error regarding the length of Rodriguez's suspended gross misdemeanor sentence, community custody, and no-contact order. However, we reject the State's concession of error regarding the calculation of her offender score on the felony DV–VNCO. Accordingly, we affirm the trial court's offender score calculation and sentence for the

[1] Ch. 9.94A RCW.

[2] The State acknowledges that its concession on the offender score calculation for the felony DV-VNCO issue is contrary to the position taken by trial counsel and the Caseload Forecast Council, which publishes the Washington State Adult Sentencing Guidelines Manual.

felony DV-VNCO conviction. We reverse the sentence for the gross misdemeanor DV-VNCO conviction and remand to the trial court to resentence Rodriguez on the gross misdemeanor DV-VNCO by correcting the length of the suspended sentence, community custody, and no-contact order.

FACTS

On November 13, 2012, the State charged Rodriguez with one count of felony DV-VNCO and one count of gross misdemeanor DV-VNCO. These charges resulted from the same incident, but involved different victims. Rodriguez pleaded guilty to both charges on December 14, 2012.

Rodriguez was sentenced on December 21, 2012. For purposes of calculating Rodriguez's offender score for the felony DV-VNCO, the trial court determined that Rodriguez's gross misdemeanor DV-VNCO would be considered a "prior conviction" and, thus, calculated her offender score as 1 rather than 0. Based on an offender score of 1, the trial court sentenced Rodriguez to 14 months' total confinement and 12 months of community custody on the felony DV-VNCO conviction. On the gross misdemeanor DV-VNCO conviction, the trial court sentenced Rodriguez to 364 days' confinement with 50 days of credit for time served, and suspended the remaining 314 days for 60 months on community custody. Rodriguez's community custody provisions on the suspended sentence included a 60 month no-contact order with the victim. Rodriguez appeals the calculation of her offender score on the felony DV-VNCO conviction and the length of her suspended sentence, community custody, and no-contact order on her gross misdemeanor DV-VNCO conviction.

ANALYSIS

A. FELONY DV-VNCO OFFENDER SCORE

Rodriguez first argues that the trial court miscalculated her offender score on the felony DV-VNCO sentence by counting her gross misdemeanor DV-VNCO conviction as a prior conviction under RCW 9.94A.525(21)(c) of the SRA. Rodriguez asserts that under RCW 9.94A.525(21)(c), a gross misdemeanor or misdemeanor DV conviction may be included in an offender score only if it (1) was committed prior to (temporally before) the felony being sentenced and (2) is repetitive (part of a pattern). We disagree. Interpreting RCW 9.94A.525(21)(c) together with related statutes shows that the legislature intended to have a gross misdemeanor DV conviction count as one point in the offender score for a felony DV conviction even if both offenses were committed as part of the same incident. Therefore, we affirm the trial court's calculation of Rodriguez's offender score on the felony DV-VNCO conviction.

1. Mootness

As an initial matter, Rodriguez was sentenced to 14 months' confinement and she has finished serving her term of confinement. Therefore, Rodriguez's assignment of error regarding the calculation of her offender score is moot. "'A case is moot if a court can no longer provide effective relief.'" *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). The remedy for an improperly calculated offender score is remand for resentencing using the correct offender score. Thus, the relief is generally less confinement due to a lower offender score. *Ross*, 152 Wn.2d at 228 (citing *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)). Because Rodriguez has served her term of confinement, there is no relief that we can grant and Rodriguez's challenge to her offender score is moot.

"However, if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, we may still reach a determination on the merits to provide guidance to lower courts." *Ross*, 152 Wn.2d at 228 (citing *State v. Blilie*, 132 Wn.2d 484, 488 n.1, 939 P.2d 691 (1997)). There is a continuing and substantial public interest in ensuring that offenders are sentenced with the correct offender score. *See* RCW 9.94A.525(22). And, the State has informed us that the prevailing practice, followed by most prosecutors in the State, is to calculate offender scores consistently with the manner in which the trial court calculated Rodriguez's offender score on the felony DV-VNCO in this case. Therefore, the issue regarding the proper calculation of an offender score based on RCW 9.94A.525(21)(c) is likely to reoccur, and our opinion here will provide valuable guidance to the lower courts. Accordingly, we reach the merits of Rodriguez's claim.

2. Interpretation of RCW 9.94A.525(21)(c)

a. Standard of Review

We review the calculation of an offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Statutory interpretation also is a question of law this court reviews de novo. *State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014) (citing *State v. Franklin*, 172 Wn.2d 831, 835, 263 P.3d 585 (2011)).

We employ statutory interpretation to determine and give effect to the legislature's intent. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013); *Rice*, 180 Wn. App. at 313. To determine legislative intent, we first look to the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole. *Evans*, 177 Wn.2d at 192. In determining the plain meaning, we must consider "the text of the provision

in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Evans*, 177 Wn.2d at 192. Only "[i]f the statute is still susceptible to more than one interpretation after we conduct a plain meaning review, then the statute is ambiguous and we rely on statutory construction, legislative history, and relevant case law to determine legislative intent." *Rice*, 180 Wn. App. at 313.

b. RCW 9.94A.525(21)(c)

The sentencing provision at issue here is RCW 9.94A.525(21)(c). RCW 9.94A.525(21) states:

> If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:
>
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.[3]

The plain language of RCW 9.94A.525(21)(c) uses the words "prior" and "repetitive." The plain language definition of "prior" is "earlier in time or order: preceding temporally, causally, or psychologically." WEBSTER'S THIRD INTERNATIONAL DICTIONARY at 1804 (1969). And, repetitive means "containing repetition." WEBSTER'S, *supra*, at 1924-25.

Rodriguez argues that under the plain language of RCW 9.94A.525(21)(c), a conviction for a DV offense can be counted as one point under RCW 9.94A.525(21)(c) only if it (1) occurred temporally before the current felony DV offense and (2) is repetitive (part of a pattern). Therefore,

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[3] RCW 9.94A.030(20) defines "domestic violence" as having the same meaning as defined in RCW 10.99.020 and RCW 26.50.010. RCW 10.99.020(5)(r) defines "domestic violence" as a violation of a no-contact order when committed by one family or household member against another. Here, there is no dispute that both the felony and gross misdemeanor VNCO convictions were domestic violence because they were committed against her parents. RCW 10.99.020(3).

according to Rodriguez, her gross misdemeanor DV-VNCO should not have counted as one point because her gross misdemeanor DV-VNCO was committed at the same time as her felony DV offense, was against a different victim, and was not part of a repetitive pattern.

Rodriguez's interpretation of RCW 9.94A.525(21)(c) fails to account for the sentencing scheme employed within the SRA as a whole. Provisions governing the calculation of an offender score are unique because they must be applied within the complex framework of the SRA. Statutes are interpreted to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). And, even when examining the plain language of a statute, we must consider "the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Evans*, 177 Wn.2d at 192. Therefore, we must consider the meaning of RCW 9.94A.525(21)(c) within the context of the SRA as a whole in order to determine the plain meaning of the provision.

To interpret the effect of RCW 9.94A.525(21)(c) within the SRA as a whole, we must begin with RCW 9.94A.505 and RCW 9.94A.530. When an offender is sentenced on a felony, RCW 9.94A.505(2)(a)(i) requires that a trial court impose a standard range sentence unless another term of confinement applies. And, RCW 9.94A.530 dictates that an offender's standard sentencing range is determined by using the seriousness level of the offense for which the offender is being sentenced and the offender score for the offense for which the offender is being sentenced.

At issue here is the appropriate calculation of Rodriguez's offender score for a felony DV offense. When Rodriguez was sentenced, her only criminal history was the gross misdemeanor DV-VNCO arising from the same incident as the felony DV-VNCO for which her offender score

was being calculated. To be counted as one point for the purposes of calculating Rodriguez's offender score on her felony DV-VNCO, the gross misdemeanor DV-VNCO must be (1) a prior conviction under the SRA and (2) a repetitive DV offense as defined in RCW 9.94A.030(41).[4]

(1) Prior conviction requirement under the SRA

Generally, an offender score is calculated based on RCW 9.94A.525. RCW 9.94A.525(1) defines what is considered a "prior conviction" and states:

> A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589.

Thus, when an offender is being sentenced on two or more current offenses, we must also consider RCW 9.94A.589. RCW 9.94A.589(1)(a)[5] states:

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[4] To be clear, we are determining the proper calculation of Rodriguez's offender score on the felony DV-VNCO for the purpose of determining Rodriguez's standard range sentence for the felony DV-VNCO. We understand that the SRA does not apply to misdemeanors or gross misdemeanors. *See* RCW 9.94A.010 ("The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders.").

Although, the SRA generally does not use misdemeanors or gross misdemeanors in calculating an offender score, it does have rules that allow misdemeanors and gross misdemeanors to be counted towards a felony offender's offender score when that offender is being sentenced for a particular crime. *See, e.g.*, RCW 9.94A.525(11) (scoring prior convictions for serious traffic offenses—including nonfelony DUI, nonfelony physical control, reckless driving—if the conviction for which the offender's offender score is being calculated is a felony traffic offense); RCW 9.94A.525(20) (scoring prior convictions for second degree vehicle prowling—a gross misdemeanor—if the conviction for which the offender score is being calculated is theft of a motor vehicle, possession of a stolen vehicle or first or second degree taking a motor vehicle without permission). These rules allow misdemeanors and gross misdemeanors to be used to calculate an offender score on a felony offense to which the SRA offender score rules apply; they do not impermissibly make the SRA applicable to misdemeanor and gross misdemeanor convictions.

[5] In LAWS OF 2014, ch. 101, §1, the legislature amended former RCW 9.94A.589(1)(a) (2002). The 2014 amendments do not change our analysis.

> Except as provided in (b), (c), or (d) of this subsection, whenever 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 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.

Here, the salient question is whether Rodriguez's conviction for gross misdemeanor DV-VNCO is a "prior conviction" under RCW 9.94A.525(1) or RCW 9.94A.589(1)(a) such that it is counted as a point under RCW 9.94A.525(21)(c) when calculating Rodriguez's offender score for her felony DV-VNCO. We must conclude that it is.

A conviction is an "adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). Rodriguez pleaded guilty to the gross misdemeanor DV-VNCO charge on December 14, 2012. She was being sentenced for the felony DV-VNCO conviction (the offense for which her offender score was being calculated) on December 21. Under the plain language of RCW 9.94A.525(1), Rodriguez's gross misdemeanor DV-VNCO is a prior conviction because it is an adjudication of guilt that existed prior to the sentencing on the felony DV-VNCO.

Moreover, even if we did not consider Rodriguez's gross misdemeanor DV-VNCO a prior conviction under the definition in RCW 9.94A.525(1), it still must be used as a prior conviction for the purposes of calculating Rodriguez's offender score for her felony DV-VNCO under RCW 9.94A.589(1)(a), which states that "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." The only time a current conviction is not counted as though it were a prior conviction under RCW 9.94A.589(1)(a) is if it is an "other current offense" that is the same

criminal conduct as the offense for which the offender score is being calculated. Although Rodriguez's gross misdemeanor DV-VNCO is an "other current offense" as it relates to the felony DV VNCO, it is not the same criminal conduct as the felony DV-VNCO. Therefore, under RCW 9.94A.589(1)(a) Rodriguez's gross misdemeanor DV-VNCO conviction is an "other current conviction" that is used as a prior conviction for the purposes of calculating Rodriguez's offender score on the felony DV-VNCO conviction.

(2) Repetitive domestic violence requirement under the SRA

Having determined that Rodriguez's gross misdemeanor DV-VNCO conviction is considered a prior conviction for the purposes of calculating her offender score on the felony DV-VNCO, we turn to the question of whether it is a "repetitive" DV offense. Under RCW 9.94A.525(21)(c) each prior adult conviction for a "repetitive domestic violence offense" is counted as one point toward the offender's offender score. RCW 9.94A.030(41) defines "repetitive domestic violence offense" as a DV assault that is not a felony, a DV-VNCO that is not a felony, a DV violation of a protection order that is not a felony, DV harassment that is not a felony, and DV stalking that is not a felony. RCW 9.94A.030(41) does not qualify the definition of "repetitive domestic violence offense" with anything other than the type of offense. Therefore, Rodriguez's argument that the statute requires a repetitive pattern fails. Rodriguez's gross misdemeanor DV-VNCO is a "repetitive domestic violence offense" as defined in RCW 9.94A.030(41).

When analyzed within the statutory scheme of the SRA as a whole, Rodriguez's gross misdemeanor DV-VNCO is both a "prior conviction" and a "repetitive domestic violence offense" for the purposes of RCW 9.94A.525(21)(c). Accordingly, the trial court did not err by counting

Rodriguez's gross misdemeanor DV VNCO as one point toward her offender score on the felony DV-VNCO.

B. GROSS MISDEMEANOR DV-VNCO SENTENCE

Rodriguez argues, and the State agrees, that the trial court erred by suspending Rodriguez's gross misdemeanor DV-VNCO sentence for 60 months and, as a result, improperly imposed terms of community custody, including a no-contact order with the victim, for 60 months.[6] We agree with Rodriguez and accept the State's concession of error.

Trial courts lack inherent authority to suspend a sentence. *Rice*, 180 Wn. App. at 312 (citing *State v. Gibson*, 16 Wn. App. 119, 127, 553 P.2d 131 (1976)). Therefore, a trial court's authority to suspend a sentence is limited to the manner provided by the legislature. *Rice*, 180 Wn. App. at 312. The legislature has authorized the superior court to suspend a sentence; however, it has limited the manner in which the superior court can suspend a sentence. RCW 9.92.064 states:

> In the case of a person granted a suspended sentence under the provisions of RCW 9.92.060, the court shall establish a definite termination date for the suspended sentence. The court shall set a date no later than the time the original sentence would have elapsed and may provide for an earlier termination of the suspended sentence. Prior to the entry of an order formally terminating a suspended sentence the court may modify the terms and conditions of the suspension or extend the period of the suspended sentence.

The legislature has also limited the term of a suspended sentence. Under RCW 9.95.210(1)(a), the superior court may suspend a sentence for a period "not exceeding the maximum term of sentence or two years, whichever is longer." The maximum sentence for a gross

[6] "A defendant may challenge a sentence imposed in excess of statutory authority for the first time on appeal because 'a defendant cannot agree to punishment in excess of that which the Legislature has established.'" *Rice*, 180 Wn. App. at 312-13 (quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

misdemeanor is 364 days. RCW 9A.20.021(2). Here, the trial court suspended Rodriguez's gross misdemeanor sentence for 60 months, far in excess of statutorily authorized maximum. Therefore, under either RCW 9.92.064 or RCW 9.95.210(1)(a), the trial court exceeded its statutory authority by suspending Rodriguez's gross misdemeanor DV-VNCO sentence for 60 months. And, because the trial court imposed community custody and the no-contact order for 60 months as a condition of this unauthorized suspended sentence, the imposition of community custody and the no-contact order for 60 months was also in excess of the trial court's authority.

We affirm Rodriguez's sentence on the felony DV-VNCO. We reverse her sentence on the gross misdemeanor DV-VNCO and remand to the trial court to resentence Rodriguez on this the gross misdemeanor conviction by correcting the term of the suspended sentence, community custody, and no contact order so that it does not exceed the statutorily authorized maximum.

Lee, J.

We concur:

Maxa, P.J.

Hunt, J.P.T.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. ANGELA RODRIGUEZ, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 44417-8-II

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 6TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVEIW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ANGELA RODRIGUEZ
3210 E. 17TH STREET
VANCOUVER, WA 98661

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 06, 2014 - 3:59 PM

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