NO. 46124-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ILLYA N. WATKINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Anne Hirsch, Judge
Cause No. 13-1-01612-9

AMENDED BRIEF OF APPELLANT

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01. The trial court erred in miscalculating Watkins's offender score by including his current gross misdemeanor conviction for assault in the fourth degree involving domestic violence.

02. The trial court erred in miscalculating Watkins's offender score by including his five prior gross misdemeanor convictions involving domestic violence.

03. The trial court erred in permitting Watkins to be represented by counsel who provided ineffective assistance by stipulating to the miscalculation of of his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the sentencing court miscalculated Watkins's offender score by (1) including his current gross misdemeanor conviction for assault in the fourth degree and by (2) including his five prior gross misdemeanor convictions involving domestic violence? [Assignment of Errors 1-2].

02. Whether Watkins was prejudiced as a result of his counsel's inviting error by stipulating to the miscalculation of his offender score where the court (1) included his current gross misdemeanor conviction for assault in the fourth degree involving domestic violence and (2) included his five prior gross misdemeanor convictions involving domestic violence? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

Illya N. Watkins was charged by first amended information filed in Thurston County Superior Court March 14, 2014, with theft in the first degree, count I, and assault in the fourth degree, count II, contrary to RCWs 9A.56.030(1)(a), 9A.56.020(1)(a)(1) and 9A.36.041, respectively. Each count further alleged domestic violence, in violation of RCW 10.99.020. [CP 20].

On the same day, Watkins entered a plea to the charges, setting forth the following in his statement on plea of guilty:

> [X] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.
>
> ....
>
> I plead guilty to:
> Count I – Theft 1 (DV)
> Count II – Assault 4 (DV)
> in the 1st Amended Information. I have received a copy of that Information

[CP 33].

In the same document, Watkins acknowledged that he understood his standard range for count I was "22 to 29 months(,)" that the maximum term and fine for the offense was "10 years, $20,000(,)" and that his sentence range for count II, a gross misdemeanor, was "0-364 Days" and that the maximum term and fine for the offense was "1 year, $5,000." [CP

27]. He also acknowledged that "[n]o person has made promises of any kind to cause me to enter this plea except as set forth in this statement [CP 33]," and that the prosecuting attorney would make the following recommendation to the judge:

> 29 months in custody w/CFTS, 12 months of community custody, no new crimes, obtain DV eval & do rec'd treatment, NCO w/victim, obey rules of DOC, standard LFO's ($200, $500, $100 DNA) & $100 DV fee. [Defendant] may ask court to modify the NCO to allow prison contact. *State agrees not to file any additional charges from this case.

[CP 29].

The court accepted Watkins's plea of guilty to the charges after determining that he had gone over the plea form with his attorney, that he understood the court was not bound by anyone's recommendation, that he understood the various consequences of his plea and that he was making his plea freely and voluntarily. [RP 03/14/14 8-15].

Through counsel, Watkins stipulated to an offender score of seven:

> We are – we're stipulating to the score being seven. As I mentioned, the points get up there quickly when we start taking into consideration domestic-violence convictions, and that includes his juvenile, I mean his misdemeanor history as well, so we are stipulating, Your Honor.

[RP 03/14/14 6-7].

In directly questioning Watkins about his stipulation to his prior record and offender score [CP 23-24, attached as Exhibit A], the court informed him that his five prior gross misdemeanors involving domestic

violence, which his attorney had referenced, would count in determining his score of "seven." [RP 03/14/14 7]. The offender-scoring sheet submitted with the stipulation, however, lists an offender score of 7 for Watkins's theft in the first degree (domestic violence) conviction, which was determined by adding 6 of his prior "felony convictions" to his other current "repetitive domestic violence offense" stemming from his gross misdemeanor conviction for assault in the fourth degree. [CP 25, attached as Exhibit B]. The scoring sheet lists "0" for prior "repetitive domestic violence offense convictions." [CP 25].

As noted in the stipulation, attached as Exhibit A, Watkins's prior felony history includes seven offenses, four of which are out of state, including one that indicates "(DOES NOT MATCH WA FELONY)." [CP 23, attached as Exhibit A]. Given there was no comparability analysis, as required by State v. Labarbera, 128 Wn. App. 343, 349, 115 P.3d 1038 (205), and given counsel's and the court's statements vis-à-vis the scoring of Watkins's five prior gross misdemeanors involving domestic violence, it appears Watkins's was given 5 points for these latter offenses, 1 point for a prior unnamed felony, and 1 point for his other current gross misdemeanor offense involving domestic violence.

The court sentenced Watkins to a standard range sentence of 29 months and timely notice of this appeal followed. [CP 37-47, 50-51].

D. ARGUMENT

01. THE SENTENCING COURT MISCALCULATED WATKINS'S OFFENDER SCORE BY (1) INCLUDING HIS CURRENT GROSS MISDEMEANOR CONVICTION FOR ASSAULT IN THE FOURTH DEGREE INVOLVING DOMESTIC VIOLENCE AND BY (2) INCLUDING HIS FIVE PRIOR GROSS MISDEMEANOR CONVICTIONS INVOLVING DOMESTIC VIOLENCE.

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). As a matter of law, where a standard range sentence is given, the amount of time imposed may not be appealed. RCW 9.94A.585(1); State v. Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). An appellant, however, may challenge the procedure by which a sentence within the standard range was imposed. Mail, at 710-11; State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986).

01.1 Current Conviction for Domestic Violence Assault in the Fourth Degree

Watkins's offender score of 7 for his conviction for theft in the first degree (domestic violence), count I, was

determined, in part, by including his gross misdemeanor offense in count II for assault in the fourth degree (domestic violence) as a "repetitive domestic violence offense" as set forth in RCW 9.94A.030(41)(a)(i), which defines "repetitive domestic violence offense" to include any "[d]omestic violence assault that is not a felony offense under RCW 9A.36.041." [CP 25].

> 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. (emphasis added).

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

Watkins's conviction in count II for assault in the fourth degree (domestic violence), a gross misdemeanor, cannot be construed, as happened here, as a "prior conviction for a repetitive domestic violence offense." It is not a prior conviction, it is not a felony, and it is not subject to the scoring provisions of the Sentencing Reform Act. City of Bremerton v. Bradshaw, 121 Wn. App. 410, 413, 88 P.3d 438 (2004).

> 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.525(1). And the rule of lenity applies here to the interpretation of the above-quoted RCW 9.94A.525(21)(c), thus requiring this court to construe the statute strictly against the State and in Watkins's favor. See State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Absent the existence of ambiguity, this court ascertains the meaning of a statute from its language alone. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Conversely, under the rule of lenity, any ambiguity is interpreted to favor the defendant. State v. Spandel, 107 Wn. App 352, 358, 27 P.3d 613 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), review denied, 145 Wn.2d 1013 (2001).

01.2 Five Prior Gross Misdemeanor Convictions Involving Domestic Violence

As previously presented, it appears Watkins's offender score of 7 for his conviction for theft in the first degree (domestic violence), count I, also included his five prior gross misdemeanor convictions involving domestic violence–"VNCO-DV," sentenced 8/18/00" [CP 23-24]– as "repetitive domestic violence offense(s)" as per RCW 9.94A.030(41)(a)(ii), which 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."

As earlier cited, RCW 9.94A.525(21)(c) restricts the use of such convictions:

> (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. (emphasis added).

Concomitantly, the offender-scoring sheet used in this case reflects the same language under the heading "ADULT HISTORY."

> Enter number of repetitive domestic violence offense convictions (RCW 9.94A.030(41)) (sic) plead and proven after 8/1/11. (emphasis in the original).

[CP 25, attached as Exhibit B].

Interpretation of a statute is a question of law that this court reviews de novo. Colby v. Yakima County, 133 Wn. App. 386, 389, 136 P.3d 131 (2006). The starting point is the plain language of the statute. State v. Wilbur, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). RCW 9.94A.525(21)(c) could not be more clear, allowing a sentencing court to count one point for a "prior conviction for a repetitive domestic violence offense ... plead and proven after August 1, 2011." The conviction date for the prior offenses at issue, however, was August 8, 2000, 11 years earlier. In any event, as argued above in reference to Watkins's other current

offense, the rule of lenity would come into play, with the result that any ambiguity would be interpreted in Watkins's favor. State v. Spandel, surpa.

01.3 Conclusion

Remand is required to resentence Watkins on count I based on an offender score that does not include his current gross misdemeanor conviction for assault in the fourth degree (domestic violence) and his five prior gross misdemeanor convictions involving domestic violence.

02. WATKINS WAS PREJUDICED AS A RESULT OF HIS COUNSEL INVITING ERROR BY STIPULATING TO THE MISCALCULATION OF HIS OFFENDER SCORE WHERE THE COURT (1) INCLUDED HIS CURRENT GROSS MISDEMEANOR CONVICTION FOR ASSAULT IN THE FOURTH DEGREE INVOLVING DOMESTIC VIOLENCE AND (2) INCLUDED HIS FIVE PRIOR GROSS MISDEMEANOR CONVICTIONS INVOLVING DOMESTIC VIOLENCE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors,

the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of any error initiated by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Both elements of ineffective assistance of counsel were established when counsel stipulated to Watkins's miscalculated offender score. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have invited error for the reasons argued in the preceding section. And the prejudice is self-evident: but for counsel's stipulation, Watkins's would not have been sentenced based on an

incorrect offender score, which rendered a higher standard range. Remand for resentencing should follow.

E. CONCLUSION

Based on the above, Watkins respectfully requests this court to vacate his sentence and remand for resentencing without consideration of his current gross misdemeanor conviction for assault in the fourth degree (domestic violence) and his five prior gross misdemeanor convictions involving domestic violence.

DATED this 31st day of August 2014.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 2nd day of September 2014.

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