NO. 46072-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOEL MCANINCH,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

A. REPLY TO ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion in denying the defendant's motion for relief from judgment, as the defendant's offender score was properly calculated.

B. STATEMENT OF THE CASE

The State agrees with the Statement of the Case given in the Brief of Appellant.

C. ARGUMENT

1. The trial court did not abuse its discretion in denying Defendant's motion for relief from judgment, as the offender score was properly calculated.

A court may relieve a defendant from a final judgment because of mistake, inadvertence, fraud, a void judgment, or for any other reason justifying relief. CrR 7.8(b). The standard of review on a CrR 7.8(b) motion is abuse of discretion. *State v. Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997). Abuse of discretion is present when a trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A discretionary decision is based on untenable grounds if it rests on facts that are not supported by the record, was reached by applying the wrong legal

standard, or was based on an erroneous view of the law. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). In this case, the sentence was not erroneous and the trial court did not abuse its discretion in denying the defendant's CrR 7.8(b) motion for relief.

The Sentencing Reform Act (SRA), RCW 9.94A, governs how a defendant's criminal history is to be calculated for sentencing purposes. According to the SRA, prior adult convictions should be counted as criminal history unless "wash out" provisions apply. RCW 9.94A.525(2). Section 11 of 9.94A.525 governs how to calculate the base offender score for a person charged with a felony traffic offense. That section states:

> If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide of Vehicular Assault; *for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction*; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction... (Emphasis added).

Therefore, an accounting of the defendant's offender score pursuant to RCW 9.94A.525(11) would include a point for the defendant's 2004 Attempt to Elude conviction, as that is a felony offense.

Section 2 of 9.94A.525 then governs which offenses "wash out," or do not count for purposes of calculating a person's offender score. According to Section 2, prior class C felony convictions are not included in

the offender score if the offender had spent five consecutive years in the community without having been convicted of any crime. RCW 9.94A.525(2)(c). Prior serious traffic convictions are not included in the offender score if the offender had spent five consecutive years in the community without having been convicted of any crime. RCW 9.94A.525(2)(d). Finally, RCW 9.94A.525(2)(e) specifically includes certain prior convictions if the present conviction is felony Driving under the Influence. Subsection (e) does not *exclude* any prior convictions; rather, it expands the categories of prior convictions that can be included if the present conviction is for felony Driving under the Influence, while also allowing those prior convictions to "wash out" after five crime-free years in the community. An accounting of the defendant's offender score under Section 2 would include a point for the 2004 Attempt to Elude conviction, as that is a class C prior felony conviction and the defendant did not spend five consecutive years in the community without committing any crimes, as evidenced by his undisputed 2007 and 2009 convictions for Driving under the Influence. CP 23. Further, Subsection 2(e) does not take away the point for the 2004 Attempt to Elude. To interpret that section as excluding the point for the 2004 Attempt to Elude conviction necessarily renders Section 11 meaningless.

Statutory interpretation is a question of law, which appellate courts review de novo. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). When construing a statute, the Court reads the statute in its entirety, and should view each provision in relation to other provisions. *Id.* at 277. "Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous." *Id.*, citing *Davis v. State ex rel. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). To the extent that the Court of Appeals has interpreted RCW 9.9A.525(2) to exclude Attempt to Elude as a prior conviction for purposes of calculating a defendant's offender score, it has thereby rendered RCW 9.9A.525(11) meaningless, which is improper under general rules of statutory interpretation.

Division Two of the Washington Court of Appeals examined RCW 9.9A.525(2) in *State v. Jacob*, 176 Wn. App. 351, 308 P.3d 800 (2013). That Court relied on *State v. Morales*, a Division One case, to find that RCW 9.9A.525(2) should be strictly interpreted to specify a limited class of prior offenses to be used in offender score calculations. *Jacob*, 176 Wn. App. at 357, citing *State v. Morales*, 168 Wn. App. 489, 498, 278 P.3d 668 (2012). However, neither *Jacob* nor *Morales* mention RCW 9.9A.525(11), and the decisions in those cases read Section 2 in such a way as to render Section 11 meaningless. If the only prior convictions that can be considered for

purposes of calculating an offender score are those enumerated in Section 2(e) – DUI, physical control, and serious traffic offenses – then the part of Section 11 that includes a point for "each felony offense" is meaningless. This is an inappropriate reading of the SRA. To the extent that *Jacob* and *Morales* rely on this interpretation of the SRA, they should not be followed.

Sections 2 and 11 of the SRA can be reconciled, and the canons of statutory interpretation require that they be so reconciled rather than reading the statute in such a way as to render one section meaningless. First, an examination of Section 11 shows that one point is to be counted for each adult felony offense. Therefore, in this case, the defendant's offender score would include his 2004 Attempt to Elude conviction, assuming that conviction does not "wash out." To determine if the conviction "washes," the court looks to Section 2. Under Section 2, the Attempt to Elude conviction washes if the defendant had spent five consecutive years in the community without any convictions. RCW 9.94A.525(2)(c). The defendant in this case did not have five conviction-free years after the Attempt to Elude conviction, so it does not "wash" under subsection (c) and should be included as a point in the defendant's offender score. Finally, Subsection (e) does not mandate a different result. A strict construction of Subsection (e) necessarily renders Section 11 meaningless and superfluous, which is improper. Reading the SRA in its entirety and giving meaning to

all sections, as required by the tenets of statutory interpretation, leads to the conclusion that the defendant's 2004 Attempt to Elude conviction counts as a point for purposes of his offender score.

Furthermore, one of the purposes of the SRA is to "ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and *the offender's criminal history*." RCW 9.94A.010(1) (emphasis added). Section 2 of RCW 9.94A.525 therefore excludes certain prior convictions because of their age or because the offender was not convicted of other crimes for five years. The purpose of RCW 9.9A.525(2) is to wash away convictions that do not accurately reflect the dangerousness or criminality of a particular offender. However, excluding a prior conviction that does not "wash out" pursuant to Section 2 also leads to an inaccurate reflection of the dangerousness or criminality of the defendant. Section 2 must be read in conjunction with the rest of the SRA, including RCW 9.9A.525(11), in order to adhere to the intent of the SRA. Taking RCW 9.94A.525 as a whole, and reading each section in relation to the others, prior felonies always count for purposes of calculating an offender score, unless they "wash." In this case, the defendant's 2004 Attempt to Elude conviction counts as one point pursuant to RCW 9.94A.525(11), and does not wash under RCW 9.94A.525(2).

The trial court did not abuse its decision in denying the defendant's CrR 7.8(b) motion as the SRA, when read in a way to give meaning to all its sections, would include a point for the defendant's prior Attempt to Elude conviction. The trial court's decision was therefore not based on untenable grounds.

2. The petitioner's restraint is lawful, the petition does not set forth a basis for relief, and the petition is moot.

A petitioner may request relief through a PRP when he is under unlawful restraint. RAP 16.4(a) – (c). Our Supreme Court has limited collateral relief available through a PRP "because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders." *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 670, 101 P.3d 1 (2004), quoting *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 329, 823 P.2d 492 (1992). The defendant's restraint in this case is lawful. In his PRP, the defendant challenges Cowlitz County Cause Number 10-1-0129-1-2, which involved a 2011 felony DUI conviction. However, he is not restrained pursuant to that cause number. He is restrained pursuant to Cowlitz County Cause Number 13-1-00063-3, the case at issue in the instant appeal. Because the defendant is not restrained pursuant to the cause number he is challenging, his PRP is improper. RAP 16.4(b). His restraint pursuant to

Cause Number 13-1-006303 is not contested in the defendant's PRP and is lawful.

Furthermore, a case is moot if a court can no longer provide effective relief. *State v. Harris*, 148 Wn. App. 22, 26, 197 P.3d 1206 (2008), citing *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). The defendant's release from total confinement renders his personal restraint petition moot. *See Matter of Myers*, 105 Wn.2d 257, 261, 714 P.2d 303, 305 (1986). As a general rule, reviewing courts will dismiss an appeal if it presents moot issues. *Id.*, citing *Sorenson v. Bellingham,* 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Here, the defendant is challenging his restraint stemming from a 2011 felony DUI conviction. He was sentenced to 33 months in that case, which he has already served. The relief he seeks in the PRP is to have his offender score retroactively calculated to not include the 2004 Attempt to Elude conviction, which would likely give him a shorter sentencing range. However, this Court cannot give the defendant back time he has already served. The Court cannot provide the relief the defendant is seeking, so the case is moot.

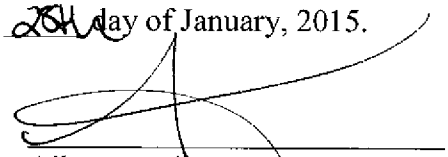
In *Sorenson,* however, the court recognized an exception to the mootness rule "when it can be said that matters of continuing and substantial public interest are involved." *Sorenson,* 80 Wn.2d at 558, 496 P.2d 512. The court must consider three criteria in determining whether the requisite

degree of public interest exists: (1) the public or private nature of the question presented, (2) the need for a judicial determination for future guidance of public officers, and (3) the likelihood of future recurrence of the issue. *Id.* The defendant does not argue that his claimed restraint under the 2011 matter involves matters of continuing and substantial public interest. As such, his petition should be dismissed as moot.

D. CONCLUSION

The sentencing court properly calculated the defendant's offender score pursuant to RCW 9.9A.525(11) and 9.9A.525(2). This Court should affirm the trial court's denial of defendant's motion for relief and affirm the defendant's sentence. Furthermore, the PRP does not set forth a basis for relief, is moot, and the petitioner's restraint is lawful. The PRP should be denied.

Respectfully submitted this 26th day of January, 2015.



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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 23rd 2015.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 28, 2015 - 2:15 PM

Transmittal Letter

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