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IN THE WASHINGTON STATE SUPREME COURT

State of Washington respondents vs. Steven E. Pink petitioner	Cause No. 99-1-60S COA No. 46858-1-II Consolidated with No. 48282-7-II Petition for Review Rap 13.4(b)

1 Identity of Petitioner: Mr Pink, Pro Se, requests the relief designated in part 2:

2. Statement of Relief Sought: Petitioner ask's this court to accept review under Rap 13.4(b), remand for resentencing, with the exclusion of 1 to 3 points from his offender score as follows:

3. Facts: Mr Pink plead guilty to first degree assault, then challenged the states burden of proof to valid prior convictions, and his offender score of 8.

Mr Pinks trial counsel objected, challenging his 1995 conviction for delivery of meth, his 1983 out-of-state Oregon conviction, and the alleged community custody point.

On direct appeal, appellate counsel challenged the 1995 delivery of meth conviction as unconstitutional, and facially invalid.

Mr Pink, Pro Se, additional grounds, challenged the 1983 Oregon conviction, as unconstitutionally obtained, facially invalid, which Court of Appeals did not hear or make a determination, stating it was improperly before the Court. See (Div II opinion).

In the consolidated PRP, Mr Pink argued trial court miscalculated his offender score, by seperating judicially court ordered concurrent 1981

sentences. In doing so, also breached the 1981 plea-agreements, which the state did not dispute. Nor, the Court of appeals addressed, and Mr Pink now appeals.

4. Argument and Authorities:

1. Review should be accepted under Rap 13.4 (b), because the Court of appeals decision is in conflict with decisions in this Court and other Courts, it is a significant constitutional question, as two to three of Mr Pinks alleged prior convictions have been obtained in violation of the Constitution, and are facially invalid,

First, as challenged by appellate counsel, Mr Pinks 1995 prior conviction for delivery of meth is facially invalid, was obtained in violation of the Constitution. When pleading guilty in 1995, the parties, and trial Court, misunderstood the applicable law, misinformed him as of a direct consequence of the plea. Both written statement, and Judgement and Sentence contain the same error, as each document reflects maximum sentence of five years, and a 10,000 fine, as a class C felony. See (brief of counsel), under RCW 69.50.408(a) doubled the statutory maximum sentence to 10 years, and 25,000 fine, because Mr Pink had a prior conviction for felony possession of marijuana, which was also reflected on said Judgement and Sentence.

Thus, Mr Pink was misinformed as to a direct sentencing consequence, and entered a guilty plea without a correct understanding of said direct consequence.

Even if the conviction is determined valid, the sentence is not, which conflicts with this Courts previous and current decisions, and should not have been considered at sentencing if the alleged prior is found to be facially invalid, or obtained in violation of the Constitution State v Ammons, 105 Wn.2d 175, amended, 105 Wn.2d 175 (1986); State v Holsworth, 93 Wn.2d 148 (1980); Boykin v Alabama, 395 U.S. 238 (1969); In re Isadore, 151 Wn.2d 294

(2004); State v Webb, 183 Wn.App. 242, 182 Wn.2d 1005 (2015); In re Coats, 173 Wn.2d 123 (2011), thus, even if the conviction is valid under statute, the sentence is not, thus it is facially invalid, irregardless of whether it miscalculated the sentence range lower or higher State v Mendoza, 157 Wn.2d 582 at 584 (2006).

Due process requires a guilty plea to be knowing, intelligent and voluntary, the maximum punishment and fine, is a direct consequence State v Veneal, 88 Wn.2d 552 (1977).

Thus, Court of appeals decision is in conflict with the above case law, and also violates holdings in In re Hoisington, 99 Wn.App. 423 at 428 (1999); Henderson v. Morgan, 426 U.S. 637 (1976); State v Ross, 129 Wn.2d 279 (1996).

Thus, the misinformation concerned a direct consequence Isadore at 296; Mendoza at 584; Coats, 173 Wn.2d 123; Webb at 250.

Accordingly review should be accepted, the sentence should be vacated, remanding for resentencing with a corrected offender score of 7.

2. Even though Court of Appeals did not consider the following issue, review should be accepted under Rap 13.4(b), because the Courts decision is in conflict with this Court and other Courts, it is a significant constitutional question, because the out-of-state Oregon conviction was obtained in violation of the Constitution, and is facially invalid.

The Oregon Conviction was objected to, and challenged by trial counsel, that all the documents submitted by the state, failed to show that Mr Pink was read any required Constitutional rights embodied within the plea-agreement, statement of defendant on plea of guilty, or by the trial Court, in open court prior to accepting the guilty plea See (additional ground for review, and submitted documents attached thereto).

As a result, which cannot be disputed, the Oregon conviction was obtained in

violation of the Constitution, and is facially invalid, and should not have been considered as two additional points, causing prejudice, elevating Mr Pinks offender score from 6 to 8, increasing punishment from 162 to 277 months.

At sentencing, the state submitted documents, claiming Mr Pinks attorney read said rights. But this does not establish the trial Court did as required by the Constitution, prior to accepting the guilty plea. Example, under this Courts holding in State v Holsworth, 93 Wn.2d 148 (1980) and cases cited therein, reversed Holsworths habitual offender findings based on the same constitutional error, setting aside the prior conviction, excluding it from his offender score, reversing the sentence.

Since there exists conflict between Court of Appeals, and this Court, and facts that cannot be disputed, the 1983 Oregon conviction was obtained in violation of the Constitution, is facially invalid, it should not have been included when calculating Mr Pinks offender score, thus, the sentence should be reversed, remanding for resentencing with an offender score of 5 to 6.

3. Review should be accepted under Rap 13.4(b), because the Court of appeals decision conflicts with this Court, and other Courts, is a Constitutional question, because the state and trial Court improperly seperated court order concurrent sentences when calculating Mr Pinks offender score.

The state, nor Court of appeals disputed, or addressed Mr Pinks PRP reply to states response, and facts submitted therein.

As a juvenile, on 1/6/81, Mr Pink committed theft 2, cause No 81-1-51-0, and the Court did not enter an order of a deferred sentence.

On 10/31/81, as an adult, Mr Pink committed the taking or riding in a

motor vehicle without permission, cause No. 81-1-192-3.
On 12/11/81, trial Court converted the juvenile, and adult convictions, and entered an adult Judgement and Sentence on both counts to be ran concurrent, as a result of a plea deal See (PRP Ex 1, 2 and 3).
In part, the state in response was correct that In re Sietz, 124 Wn.2d 645 (1994) was superseded by RCW 9.94A.360(b)(5) with (iii), now recodified by RCW 9.94A.525(5)(b) and 9.94A.589, but failed to notice, or address that the 1995, 1997 amendments was not retroactive.
In conflict with this Court, as held in In re LaChapelle, 153 Wn.2d 1, 100 P.3d 805 (2004), the 1995, 1997 amendments to definition of 'criminal history' in the sentencing reform act of 1981 SRA, did not apply retroactively to allow defendants previously washed out juvenile adjudications to be revived, or included in their offender score calculations and reversed.
Likewise as herein, the Court noted it was not until 2002 amendments to 1981 SRA, did the legislature clearly state its intent(" that no offender has a vested right in the 'definition of criminal history' in effect when a previous crime was committed, and the legislature asserted the power to change the way offender scores are calculated for sentencing purposes"). LaChapelle at N.9.
Since the legislature in 2002 clearly stated such, it only applies to current offenses committed on, or after the effective date of this act. (Laws of 2002, ch. 107 §4, which went into effect June 13, 2002). See 153 Wn.2d 11.
Since Mr Pink committed the current offense on 1/26/99, the state did not have authority to revive, or seperate the two 1981 judicially Court ordered concurrent convictions and sentence counting them as two points instead of one point.
This Court should therefore accept review, reverse, remanding for

resentencing with a corrected offender score of 7 accordingly.

4. Review should be accepted under Rap 13.4(b) because the Court of appeals decision conflicts with decisions in this Court, and other Courts, is a significant constitutional question, because the state violated Mr Pinks 1981 plea-agreement, by seperating judicially Court ordered concurrent sentences when calculating his offender score, which the state did not dispute on appeal, nor Court of appeals addressed.

To avoid needless duplication, see (PRP issue No. 1-4 and cases cited and argued therein).

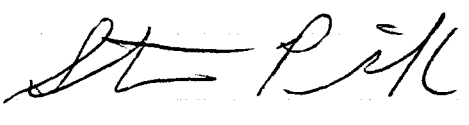
As argued above, and in Mr Pinks PRP, since it was not until 2002 when the law went into effect, again, the state did not have authority to revive, or breach the 1981 plea-agreement as to concurrent sentences, then seperate the convictions, resulting in the elevated offender ~~sfrom~~ score from 7 to 8, thus remand for resentencing is warranted.

5. As to ineffective assistance of counsel, if any issues presented herein, that this court finds favorable to Mr Pink, that were not objected to or challenged by trial counsel, then ineffective assistance of counsel should also be attached as previously argued, remanding for resentencing accordingly.

Conclusion

As a result of the above argued conflicts, this Court should accept review, remand for resentencing accordingly.

Sincerely



Steven E. Pink # 277511 C-206-B
MCC/MSU
P.O. Box 7001
Monroe, Wa. 98272

signed x [signature]

Dated x 11/21/16

Filed
Washington State
Court of Appeals
Division Two

November 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN E. PINK, Appellant.	No. 46858-1-II Consolidated with
In re the Personal Restraint Petition of STEVEN E. PINK, Petitioner.	No. 48282-7-II UNPUBLISHED OPINION

LEE, J. — Steven E. Pink appeals the sentence imposed following his guilty plea to first degree assault, alleging the sentencing court miscalculated his offender score. In calculating Pink's offender score as 8, the sentencing court included in Pink's criminal history two 1981 convictions, a 1983 Oregon conviction for second degree robbery, and a 1995 Washington conviction for unlawful delivery of a controlled substance – methamphetamine. Pink argues the 1995 conviction should not have been included. Additionally, in his statement of additional grounds (SAG), Pink argues the 1983 conviction should not have been included. In Pink's consolidated personal restraint petition (PRP), Pink argues the trial court miscalculated his

offender score by counting the two 1981 convictions separately and further alleges he was denied effective assistance of counsel for counsel's failure to raise this issue below. We hold that there was no sentencing error and counsel provided effective assistance. Therefore, we affirm Pink's sentence and deny his PRP, including his request for counsel.

FACTS

In 1999, a jury found Pink guilty of conspiracy to commit first degree murder and first degree assault for placing a bomb at his community correction officer's (CCO's) home. *State v. Pink*, noted at 118 Wn. App. 1049, 2003 WL 22183943 at *1 (2005). The bomb exploded when the CCO picked it up, causing severe injuries. *Id.* The sentencing court imposed an exceptional sentence, which this court overturned. *Id.* at *7.

Pink was returned to Grays Harbor County for re-sentencing. *State v. Pink*, noted at 144 Wn. App. 1001, 2008 WL 1723597 at *2 (2008). He had an extensive criminal history, which included a 1981 second degree theft conviction, a 1981 taking a motor vehicle without permission conviction, a 1983 Oregon conviction for second degree robbery, a 1990 Washington conviction for possession of a controlled substance—more than 40 grams of marijuana, and a 1995 Washington conviction for unlawful delivery of a controlled substance—methamphetamine. At the re-sentencing, Pink challenged the legal comparability of the Oregon conviction for second degree robbery. *Id.* at *4. The sentencing court found the Oregon robbery conviction was properly included in Pink's offender score and imposed a standard range sentence. *Id.* at *2-3. Pink appealed. This court affirmed the sentence, holding that the Oregon conviction was comparable to second degree robbery under Washington law. *Id.* at *5.

In 2009, Pink filed a PRP with our Supreme Court, arguing his conviction should be reversed because his public trial rights were violated when portions of voir dire were conducted in chambers. *In re Pers. Restraint of Pink*, 322 P.3d 790, ¶ 1 (mem) (2014). The court agreed and reversed his conviction. *Id.*

In 2014, the State filed a second amended information, charging Pink with first degree assault. Pink agreed to plead guilty to first degree assault in exchange for the State dropping the conspiracy to commit first degree murder charge. Pink agreed to the Prosecutor's Statement of Defendant's Criminal History, but wrote on the plea agreement, "point calculation is disputed." Clerk's Papers (CP) at 3. The criminal history included the convictions detailed above. The trial court accepted Pink's plea and calculated his offender score at 8, which included four points for the 1995, 1983, and two 1981 convictions. The trial court then sentenced Pink to 277 months, the high end of a standard range sentence. Pink challenges his new sentence through both a direct appeal and a PRP, which we consolidated.

ANALYSIS

A. DIRECT APPEAL

Pink first contends the sentencing court miscalculated his offender score. He argues the 1995 conviction is facially invalid and cannot be counted in his offender score.[1] We disagree.

[1] Pink noted his objection to his offender score on his plea agreement; nevertheless, the general rule is that a defendant may challenge his offender score for the first time on appeal. *State v. Mendoza*, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009).

1. Standard of Review

We review offender score calculations de novo. *State v. Hernandez*, 185 Wn. App. 680, 684, 342 P.3d 820 (2015), *review denied*, 185 Wn.2d 1002 (2016). The appropriate remedy for an improperly calculated offender score is remand for resentencing. *State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

2. 1995 Washington Conviction

Pink argues that the trial court erred when it considered his 1995 conviction because it is unconstitutional on its face. We disagree.

a. Legal principles

The State is not required to prove the constitutional validity of prior convictions before they can be used at sentencing. *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719, *cert. denied*, 479 U.S. 930 (1986). Moreover, a defendant generally has no right to contest prior convictions at a subsequent sentencing because there are more appropriate methods for contesting the validity of prior convictions. *Id.*

But a prior conviction that is unconstitutionally invalid "on its face" may not be considered at sentencing. *Id* at 187-88. "'On its face' includes the judgment and sentence and documents signed as part of a plea bargain." *State v. Webb*, 183 Wn. App. 242, 250, 333 P.3d 470 (2014) (quoting *State v. Thompson*, 143 Wn. App. 861, 866-67, 181 P.3d 858, *review denied*, 164 Wn.2d 1035 (2008)), *review denied*, 182 Wn.2d 1005 (2015). In other words, a conviction is facially invalid if constitutional invalidities are evident without further elaboration. *Ammons*, 105 Wn.2d at 188.

b. 1995 Washington conviction facially valid

Pink claims the 1995 plea statement and judgment and sentence are invalid because they incorrectly list the maximum penalty for his offense as five years imprisonment and a $10,000 fine. Pink claims his maximum was actually double that amount because of his prior 1990 for possession of more than 40 grams of marijuana conviction. He is incorrect.

Pink was convicted in 1995 of violating former RCW 69.50.401 (1989). Under that statute, "Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both." Former RCW 69.50.401(d). Former RCW 69.50.408(a) (1989), however, states, "[a]ny person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Pink's prior conviction for delivery of more than 40 grams of marijuana was under chapter 69.50 RCW. Thus, Pink argues that his statutory maximum was double what he was informed.

At the time of Pink's offense, convictions under RCW 69.50.401 were excluded from the doubling statute. Specifically, former RCW 69.50.408(c) (1989) provides, "this section does not apply to offenses under RCW 69.50.401." Accordingly, Pink's sentence for his former RCW 69.50.401 offense was not subject to doubling. He was correctly advised of the maximum sentence when he pleaded guilty in 1995 to delivery of methamphetamine. We also note that any claimed error would be inconsequential because the 1995 trial court sentenced him to 46 months,[2] which

[2] We note that the trial court also sentenced Pink to one year community custody. The law that confinement and community custody cannot exceed the statutory maximum was not enacted until 2009. *See* former RCW 9.94A.701(8), LAWS OF 2009, c. 375 § 5 (eff. July 26, 2009).

is less than the statutory maximum that Pink claims was erroneous. Thus, we hold Pink's offender score was not miscalculated based on the inclusion of his 1995 conviction.

3. SAG

In his SAG, Pink argues the trial court should not have included his 1983 Oregon conviction in calculating his offender score because the Oregon court did not read Pink his constitutional rights before accepting his guilty plea. He claims, therefore, that his plea was involuntary. This issue, however, is not properly before this court.

As stated above, a defendant generally has no right to contest prior convictions at a subsequent sentencing because there are more appropriate methods for contesting the validity of prior convictions. *Ammons*, 105 Wn.2d at 188. The exception would be a conviction that is unconstitutionally invalid on its face. *Id.* at 187-88. Pink's challenge to his 1983 conviction would require further elaboration than the judgment and sentence and plea statement; for instance, the verbatim report of proceedings would need to be reviewed. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (issues dependent on matters outside the record are not properly before the court on direct appeal). Without more, Pink's challenge to his 1983 conviction is not properly before us.

B. PRP

1. Standard of Review

To prevail on his PRP, because it is not based on constitutional grounds, Pink must establish that he is being unlawfully restrained due to a "'fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867, 50 P.3d 618 (2002) (quoting *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d

66 (1996)). This test is satisfied by showing that a sentence was based upon a miscalculated offender score. *Goodwin,* 146 Wn.2d at 876. A sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice. *Id.* at 868.

2. 1981 Convictions

Pink argues his 1981 convictions were sentenced concurrently; therefore, they should have only counted as one point in calculating his offender score instead of two. We disagree.

Former RCW 9.94A.360(5)(a)(ii)(1999) (recodified as RCW 9.94A.525(5)(a)(ii) LAWS OF 2001, chapter 10, section 6) reads in part: "In the case of multiple prior convictions for offenses committed before July 1, 1986, for the purpose of computing the offender score, count all adult convictions served concurrently as one offense." The fact that a court orders a subsequent sentence be served concurrently with the remainder of a previous sentence does not automatically convert the two sentences into one concurrent sentence for the purpose of the statute. *State v. Hartley*, 41 Wn. App. 669, 673, 705 P.2d 821, *review denied*, 104 Wn.2d 1028 (1985).

In July 1981, the sentencing court entered an order deferring Pink's sentence on his second degree theft conviction. In December 1981, the court revoked Pink's probation and sentenced him on the theft conviction. On the same day, Pink was sentenced for a subsequent taking a motor vehicle without permission conviction. The sentencing court ordered that the taking a motor vehicle sentence be served concurrent with the remainder of Pink's second degree theft sentence.

Former RCW 9.94A.360(5)(b)(iii) provides that prior convictions are concurrent if "the concurrent timing of the sentences was not the result of a probation or parole revocation on the former offense." Here, the concurrent nature of the prior sentences only arises due to Pink's probation on the earlier cause number being revoked.

Pink argues former RCW 9.94A.360(5)(b)(iii) and the recodified statute, RCW 9.94A.525(5)(b)(iii)), were not enacted at the time of his 1981 offense and do not apply retroactively. He is mistaken. Former RCW 9.94A.360(5)(b)(iii) became effective on January 1, 1999, before the January 26, 1999 offense for which he was being sentenced. The date of the offense for which he is being sentenced is the relevant date, not the date of the prior convictions. *See* RCW 9.94A.345 (sentence determined in accordance with law in effect at time of offense).

Accordingly, the 1981 convictions were not sentenced concurrently for offender score calculation purposes on Pink's 1999 offense. The sentencing court properly counted the convictions separately.

Pink next alleges he was denied effective assistance of counsel because counsel did not object to the 1981 convictions being counted separately. Based on the above disposition, though, he cannot show deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (a claim of ineffective assistance of counsel requires a showing that both counsel's performance was deficient, and the deficient performance prejudiced the defendant). Likewise, Pink's request for remand for resentencing and pre-hearing release are moot.

C. APPELLATE COSTS

Pink filed a supplemental brief opposing appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), asserting that he does not have the ability to pay. In light of Pink's indigent status, and our presumption under RAP 15.2(f) that he remains indigent "throughout the review" unless the trial court finds that his financial condition has improved, we exercise our discretion to waive appellate costs in this matter. RCW 10.73.160(1).

We affirm Pink's sentence and deny his PRP, including his request for counsel.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.