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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 61621-8-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent/Cross-Appellant,

v.

MARTIN DALE ADAMS,
Appellant/Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

STATE'S REPLY BRIEF REGARDING CROSS APPEAL

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I. SUMMARY OF REPLY

Adams contends on reply that the washout statute describing when an offender is offense free in the community is unambiguous. The question remains under the statute whether offense free in the community applies to a situation where a defendant is in pretrial warrant status after arraignment for a case that subsequently results in conviction. Because the case subsequently results in conviction, Adams was not offense free in the community.

Adams also contends the error was harmless because the trial court indicated it would impose the same sentence. However, the offender score would be different, so the correct standard range should be indicated on the judgment and sentence.

II. STATEMENT OF PERTINENT CROSS APPEAL FACTS

On April 11, 2008, the issue of the scoring of Adam's prior convictions was raised. 4/11/08 RP 5-9. The issue was whether the defendant had been offense free in the community, despite the fact that another case that subsequently resulted in conviction was in warrant status during the period of time. The trial court initially seemed to agree with the State that the defendant was not offense free in the community. 4/11/08 RP 8. The sentencing was continued to address that issue and for other reasons. 4/11/08 RP 4, 9-10.

On April 23, 2008, Adams was sentenced. 4/23/08 RP 2-10. The trial court ended up holding that a prior conviction of the defendant was not included in offender score because the defendant had been offense free in the community, despite the fact that another case that subsequently resulted in conviction was in warrant status during the period of time Adams was in the community. 4/23/08 RP 4. The trial court made that ruling despite stating "I don't disagree with you" to the prosecutor. 4/23/08 RP 4. The trial court decided that whether Adams was an offender score of 5 or 6 he would impose a 22 month sentence. 4/23/08 RP 4-5.

III. ARGUMENT

- 1. The term offense free in the community for the purpose of washout does not apply when the defendant is in pretrial warrant during the washout period on a case that subsequently results in conviction.**

Adams claims the statute is unambiguous. The State does not disagree with that representation. However, the State interprets the language differently because the defendant was not offense free in the community. RCW 9.94A.525 describes that in order for the defendant's prior felony to wash the defendant must have "spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW

9.94A.525(2) (emphasis added). But for the whole period of washout, Adams was still pending trial on a felony charge that subsequently resulted in conviction. Because he was pending trial and the case subsequently resulted in conviction, he was not living openly in the community due to the unresolved felony.

2. The offender score was not harmless because the trial court must determine the proper offender score.

Adams also contends that the error was harmless because the trial court indicated the intent to impose the same sentence if the offender score was greater.

Adams relies on the case of State v. Argo, 81 Wn. App. 552, 915 P.3d 1103 (1996). In Argo, the defendant's offender score was reduced from 16 to 13 on review by the appellate court. However, the appellate court found the error was harmless because the standard range would have been the same. State v. Argo, 81 Wn. App. at 569, 915 P.3d 1103 (1996).

That is not the situation in the present case. Had the trial court properly determined that the prior conviction did not wash out, Adams' offender score would have increased from 5 to 6 on the burglary charge and from 4 to 5 on the possession of stolen property charge.

“Where the standard sentencing range is the same regardless of a recalculation of the offender score, any calculation error is harmless.” State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007).

State v. Priest, 147 Wn. App. 662, 673, 196 P.3d 763 (2008). The analysis of whether an offender score error is harmless, is based upon whether the range was actually different, not based upon whether the trial court would have imposed a different sentence. Here the range was different, and the case should be remanded for resentencing.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court determine that a defendant is not offense free in the community where the defendant had an outstanding warrant that subsequently resulted in conviction.

DATED this 17th day of July, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by: [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: JENNIFER D. STUTZER, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 17th day of July, 2009.


KAREN R. WALLACE, DECLARANT

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