

NO. 65816-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WOODIE KEES,

Appellant.

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

REPLY BRIEF OF APPELLANT

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2011-03-08 10:00 AM
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A. ARGUMENT.

THE COURT FAILED TO PROPERLY
DETERMINE MR. KEES'S OFFENDER
SCORE.

a. The State presented insufficient evidence to establish Mr. Kees's criminal history and offender score. The documents proffered by the State and included in the Judgment and Sentence as the "criminal history" indicate that Mr. Kees's most recent conviction was on August 29, 2002, for VUCSA (possession without a prescription). Under Washington's "wash out" provision, the State was required to prove that Mr. Kees's prior convictions had not washed out. RCW 9.94A.525(2).

Here, the trial court's findings of Mr. Kees' criminal history provided only that his most recent felony conviction was the 2002 VUCSA possession of a controlled substance without a valid prescription. CP 43. Thus, to include any of the prior offenses in its offender score calculation, the trial court was required to conclude there was no five-year period in which Mr. Kees was crime free. The court's findings do not support such a conclusion.

The current offense was committed on February 11, 2010. The last offense was sentenced on August 29, 2002. As with each of the other offenses, the court did not make any findings as to Mr.

Kees's date of release from confinement for that offense. And thus, the only available date for purposes of determining whether to include any of the prior offenses is the date of sentence. The present offense was committed more than five years after that date. Thus, the court's findings support an offender score of "0."

b. A defendant cannot agree to an illegal sentence.

The State argues Mr. Kees acknowledged his criminal history by failing to object at the time of sentencing. Resp. Brief at 14-16. Our Supreme Court has held that a defendant cannot agree to a sentence in excess of the authority provided by statute. In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In Goodwin, the defendant pled guilty and signed a plea agreement that he was acknowledging the prosecution's statement of his criminal history. 146 Wn.2d at 864. The offender score included a prior conviction that should have washed out based on a gap in time between convictions and the defendant's age. The Goodwin Court rejected the State's efforts to preclude Goodwin from being resentenced based on an accurate offender score, because "a defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence." Id.

at 872. The Goodwin Court took “the opportunity to clarify the law,” and ruled that “a defendant cannot agree to punishment in excess of that which the Legislature has established.” Id. at 873-74.

Likewise, Mr. Kees could not empower a court to disregard its sentencing authority and impose a sentence that is not permitted under the sentencing statutes, by his alleged waiver of this issue.

At a sentencing hearing under the Sentencing Reform Act (SRA), the State must prove an individual’s criminal history and offender score calculation by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); RCW 9.94A.530. RCW 9.94A.500(1) requires that the sentencing court make the determination, by a preponderance of the evidence, of the nature and extent of an individual’s criminal history. When the record does not support the criminal history and offender score calculation, the error may be raised on appeal even if no objection was raised below. Ford, 137 Wn.2d at 484-85; Goodwin, 146 Wn.2d at 873-74.

c. Remand is required. Where the State has failed to prove – and the trial court has failed to find -- an individual’s criminal history and offender score calculation by a preponderance

of the evidence, remand is required. Ford, 137 Wn.2d at 480-81; RCW 9.94A.530; RCW 9.94A.500(1).

The State maintains that “when the trial court signed Appendix B to Kees’ [sic] Judgment and Sentence, it specified the convictions it found to exist from evidence proffered by the State in its presentence statement and pursuant to RCW 9.94A.500.” However, the State misconstrues the record in this argument. Appendix B, which was, indeed, signed by the trial court, contained no mention of any criminal history since Mr. Kees’s 2002 VUCSA conviction, as stated in Appellant’s Opening Brief. See Appendix. The State failed to meet its burden to show that the trial court was aware of, or signed off on, any intervening misdemeanor convictions ascribed to Mr. Kees, which would pertain to the wash-out provision. Moreover, the trial court made no findings as to any misdemeanor convictions ascribed to Mr. Kees during the intervening years.

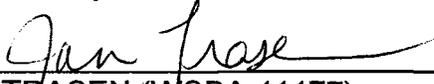
Where the trial court’s findings did not authorize any additional criminal history or reason to elevate Mr. Kees’s sentence, the judgment and sentence is invalid on its face and must be vacated for resentencing.

B. CONCLUSION.

For the foregoing reasons, as well as the reasons stated in Appellant's Opening Brief, Mr. Kees respectfully requests this Court reverse his conviction and remand the case for further proceedings. In the alternative, this case should be remanded for a proper calculation of Mr. Kees's offender score and resentencing.

DATED this 8th day of March, 2011.

Respectfully submitted,



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Respondent,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> BRIAN WYNNE, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> WOODIE KEES 917927 MONROE CORRECTIONAL COMPLEX-WSR PO BOX 777 MONROE, WA 98272-0777	(X) () ()	U.S. MAIL HAND DELIVERY _____

20110308 PM 4:47

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF MARCH, 2011.

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