

67727-6

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NO. 67727-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC LOWE,

Appellant.

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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred when it found that appellant had a juvenile assault conviction for purposes of his offender score.

Issue Pertaining to Assignment of Error

In 2000, appellant was charged in juvenile court with assault in the third degree, found guilty based on stipulated facts, and given a deferred disposition. In 2002, the conviction was vacated and the case dismissed with prejudice. Despite the vacation and dismissal, for appellant's current offense, the sentencing court counted the assault conviction when calculating his offender score. Did the court err?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged appellant Eric Lowe with (count 1) Murder in the First Degree; (count 2) Burglary in the First Degree; (count 3) Attempted First Degree Robbery; (count 4) Second Degree Assault; and (count 5) Unlawful Possession of a Firearm. Counts 1 through 4 included firearm enhancements. CP 154-155. Jurors found Lowe guilty on all counts and that he was armed with a firearm on the applicable charges. CP 67-75.

The State conceded that Lowe's conviction for Attempted First Degree Robbery merged with his Murder conviction. RP¹ 2-3. It calculated his offender score as 10 on the Murder conviction, 11 on the Burglary, 10 on the Assault, and 8 on the conviction for Unlawful Possession of a Firearm. RP 3; Supp. CP ____ (sub no. 80, State's Sentencing Memorandum). These calculations included a 2000 juvenile felony for assault in the third degree. RP 2; Supp. CP ____ (sub no. 80, State's Sentencing Memorandum, Attachment A).

In support of its calculations, the State submitted sentencing documents from Lowe's earlier convictions. CP 14-80. For the 2000 offense, the State submitted a Deferred Disposition Order, which indicates that on November 27, 2000, the juvenile court found Lowe guilty of assault in the third degree based on stipulated facts and imposed a deferred disposition. The court deferred disposition for one year on condition that Lowe pay certain costs, perform community service, and comply with community supervision requirements. CP 18-23. Paragraph 3.14 of the order indicates:

DISMISSAL: At the conclusion of the period of deferral set forth above in the order of deferral and upon a finding by the court of full compliance and the conditions of supervision and payment of full restitution,

¹ "RP" refers to the verbatim report of proceedings for the sentencing hearing on August 23, 2011.

the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice.

CP 22.

In an apparent oversight, the State failed to include in its documents the subsequent order on the deferred disposition dismissing the assault conviction with prejudice. That order was entered September 17, 2002. CP 88-89.

At sentencing, defense counsel placed on the record Lowe's belief that, because the 2000 juvenile offense was ultimately dismissed with prejudice, it should not count in his offender score. RP 21. Lowe also placed an objection on the record, indicating he had been led to believe that once he completed the terms of the deferred disposition, the assault could never be used against him. RP 23, 25.

The court believed there might be a statute or case law pertinent to the issue, but indicated it was going to count the 2000 offense as part of Lowe's offender scores and proceed with sentencing anyway. RP 23-24. The court also indicated it would leave the door open for counsel to raise the issue again. RP 23-24. Following the court's decision to proceed, Lowe mentioned a

continuance.² After a brief discussion with defense counsel, however, counsel indicated the defense was ready to proceed. RP 25-26.

Using the State's calculations of Lowe's scores, including the 2000 juvenile assault, the court imposed standard range sentences on all counts. CP 92-93. Total confinement ordered is 644 months. CP 93. Lowe timely filed his Notice of Appeal. CP 1-13.

Lowe subsequently filed a motion to amend his judgment and sentence by deleting the dismissed 2000 juvenile conviction from his criminal history, recalculating his offender scores, and resentencing him. CP 81-89. At the State's request, that motion was transferred to the Court of Appeals for consideration as a personal restraint petition.³ Supp. CP ____ (sub no. 98, State's Motion To Transfer Motion For Relief From Judgment); Supp. CP ____ (sub no. 104, Order Transferring Motion For Relief From Judgment).

² The continuance pertained to sentencing on another case – in which Lowe had pled guilty to Residential Burglary – for which Lowe was being sentenced at the same time. RP 2, 25.

³ The PRP is being considered in case number 68388-8-I.

C. ARGUMENT

THE SENTENCING COURT ERRED WHEN IT USED LOWE'S VACATED JUVENILE ASSAULT CONVICTION TO CALCULATE HIS OFFENDER SCORES.

Deferred dispositions remain one of the few opportunities in the juvenile system where "juveniles retain the opportunity to avoid adjudication altogether[.]" State v. J.H., 96 Wn. App. 167, 180, 978 P.2d 1121, review denied, 139 Wn.2d 1014, 994 P.2d 849 (1999), cert. denied, 529 U.S. 1130 (2000).

The deferred disposition statute, RCW 13.40.127, provides:

At the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice, except that a conviction under RCW 16.52.205⁴ shall not be vacated.

RCW 13.40.127(9).

"Vacate" means "[t]o nullify or cancel; make void; invalidate." Blacks Law Dictionary 1584 (8th ed. 2004). Once the trial court vacated Lowe's juvenile assault conviction in 2002, it was nullified, cancelled, voided, and invalidated. In other words, it ceased to exist. And because it ceased to exist, it could not be counted when calculating Lowe's offender score on the current convictions.

⁴ Animal cruelty in the first degree.

Based on its response to Lowe's motion to amend his Judgment and Sentence, the State will likely respond here by relying on the statutory definitions for "conviction" and "criminal history" and arguing that Lowe's juvenile conviction was never truly vacated. See Supp. CP ____ (sub no. 98, State's Motion To Transfer Motion For Relief From Judgment, at 5-6). Each of these arguments should be rejected.

RCW 9.94A.525 provides the rules for calculating offender scores and requires the inclusion of "prior convictions." See generally RCW 9.94A.525. Below, the State noted that under RCW 9.94A.030(9), "conviction" means "an adjudication of guilt pursuant to title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." See Supp. CP ____ (sub no. 98, State's Motion To Transfer Motion For Relief From Judgment, at 5). The State then argued that because Lowe was adjudicated guilty when he received his deferred disposition, the 2000 assault must be counted when calculating his offender scores on the current offenses. Id. at 5-6.

This Court reviews statutory interpretation issues de novo. State v. Roggencamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Interpretations that lead to absurd or unjust results are rejected in

favor of those that lead to reasonable ones. State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992).

While the statutory definition of “conviction” makes clear that an adjudication of guilt in a juvenile case qualifies as a conviction, “[w]hen a trial court defers disposition of a juvenile offense under RCW 13.40.127, there has been no final settlement of the case.” State v. M.C., 148 Wn. App. 968, 972, 201 P.3d 413 (2009). Lowe’s adjudication was settled in 2002 when it was vacated.

Under the State’s theory, so long as there was an adjudication at some point, the offense must be counted in the offender score. Subsequent events are irrelevant, so that even where a conviction or adjudication was vacated on appeal, in a post-trial motion, or in a personal restraint petition, for example, it would still count toward the offender score. This is not a reasonable interpretation.

This Court rejected a similar argument in State v. Smith, 158 Wn. App. 501, 246 P.3d 812 (2010). Smith sought to clear his record of a 1989 felony conviction. In 1995 he had been convicted of a misdemeanor, but that conviction was vacated. The issue on appeal was whether the 1995 offense – although vacated – still qualified as a conviction, which would make Smith ineligible for vacation of his earlier felony. Smith, 158 Wn. App. at 503. The State argued that

under the definition of “conviction” in RCW 9.94A.030(9), the misdemeanor qualified as an adjudication of guilt regardless of its subsequent vacation. Id. at 508. In rejecting the argument, this Court said:

Smith does not dispute that he pleaded guilty to the misdemeanor offense and was convicted in 1995. But this definition of “conviction” does not show that the legislature intended courts to disregard the effect of a subsequent vacation order

Id. at 509. The State’s effort to disregard the vacation order in Lowe’s case warrants a similar rejection.

Below, the State cited Division Two’s decision in State v. Cooper, 164 Wn. App. 407, 263 P.3d 1283 (2011). Supp. CP ____ (sub no. 98, State’s Motion To Transfer Motion For Relief From Judgment, at 5). But that decision does not dictate a different result. The issue in Cooper was whether two 2008 Texas deferred adjudications counted as convictions for offender score calculations on defendant’s 2010 Washington offenses. Division Two held they did because, although the Texas court had not yet formally entered adjudications of guilt, it had accepted the defendant’s guilty pleas. Because RCW 9.94A.030(9) defines “conviction” to include

“acceptance of a guilty plea,” the Texas offenses counted.⁵ Cooper, 164 Wn. App. at 408-411.

Cooper is correctly decided under its facts. Cooper’s 2008 deferred adjudications were apparently still pending when he was sentenced in Washington in 2010 (one adjudication was deferred for two years and the other four years). Cooper, 164 Wn. App. at 409. Unlike Lowe, Cooper’s adjudications had not been vacated. Had Lowe been in the same position, *i.e.*, had his deferred disposition still been pending when sentenced on his current offense, it also may have qualified as a conviction. That Lowe’s adjudication was ultimately vacated is the critical distinction.

In arguing for a contrary result below, the State also cited to the SRA’s statutory definition of “criminal history,” which means “the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.”⁶ Supp. CP ____

⁵ In addition, unlike Washington law, Texas law specifically permits sentencing courts to consider deferred adjudications – even where the adjudication was ultimately dismissed and discharged – at sentencing for a subsequent offense. Cooper, 164 Wn. App. at 412 n.5.

⁶ RCW 13.40.020(7)(b) expressly provides that for proceedings under chapter 13.40 (the Juvenile Justice Act), “[a] successfully completed . . . deferred disposition shall not be considered part of the respondent’s criminal history.”

(sub no. 98, State's Motion To Transfer Motion For Relief From Judgment, at 5-6 (quoting RCW 9.94A.030(11)). The statute provides that "[a] conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240,⁷ or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon." RCW 9.94A.030(11)(b).

Lowe's juvenile assault adjudication falls outside the definition of criminal history for the same reason it falls outside the definition of conviction. There was no final settlement of the case until the adjudication was vacated with prejudice, at which time it ceased to exist. Subsection (b) of the statute, describing the circumstances under which a conviction can be removed from criminal history, presumes that final settlement of the case resulted in entry of a conviction.

RCW 13.50.050 provides an analogous example. That statute also authorizes courts to vacate juvenile adjudications. See

⁷ These statutes permit vacation of misdemeanor and felony convictions after completion of the sentence and satisfaction of other requirements.

RCW 13.50.050(11).⁸ Once vacated, those adjudications are treated as if they never occurred. RCW 13.50.050(14). There is no need to rely on the SRA for exclusion from the defendant's criminal history.

But even if Lowe's vacated adjudication can be considered criminal history, notably, RCW 9.94A.030(11)(c) indicates, "The determination of a defendant's criminal history is distinct from the determination of an offender score. . . ." Thus, an adjudication falling within the definition of criminal history does not necessarily count in the defendant's offender score.⁹ And for the reasons already discussed, Lowe's vacated assault adjudication does not count in his

⁸ RCW 13.50.050(11) provides:

In any case in which an information has been filed pursuant to RCW 13.40.100 or a complaint has been filed with the prosecutor and referred for diversion pursuant to RCW 13.40.070, the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

⁹ For example, even a previously washed out conviction qualifies as "criminal history." State v. Varga, 151 Wn.2d 179, 191, 193, 86 P.3d 139 (2004). However, that same conviction may not count towards the offender score. See RCW 9.94A.525(2) (precluding use of conviction for offender score following period of time in community without new offense).

score.

This Court also should reject the State's argument – made below – that Lowe's juvenile adjudication was never actually vacated. As previously discussed, RCW 13.40.127(9) requires, "[a]t the conclusion of the period set forth in the order of deferral and upon a finding by the court of full compliance with conditions of supervision and payment of full restitution, the respondent's conviction shall be vacated and the court shall dismiss the case with prejudice"

Sentencing courts have no inherent authority beyond that set forth by statute. Statutes granting authority to suspend sentences are mandatory and "carefully and comprehensively spell out" the court's only options. State v. Clark, 91 Wn. App. 581, 585-586, 958 P.2d 1028 (1998) (quoting State v. Bird, 95 Wn.2d 83, 93, 622 P.2d 1262 (1980) (Dolliver, J. dissenting)).

Under RCW 13.40.127(9), there is no authority to dismiss the case but not vacate the conviction. The court's only option is spelled out quite clearly: "respondent's conviction shall be vacated and the court shall dismiss the case with prejudice." (emphasis added). This is exactly what occurred in Lowe's case. Although the court's order only mentions dismissal of the deferred

disposition, vacation was necessarily a consequence of the dismissal.¹⁰

The order dismissing Lowe's deferred disposition reveals that the dismissal followed a State's motion to revoke that disposition. But the State failed to move for revocation in a timely manner, filing its motion after Lowe's deferral period had already run. See CP 88 ("The State should have instituted proceedings to revoke the deferred disposition prior to the end of the period of deferral. The motion to revoke is denied.").

It is the State's burden to prove noncompliance with conditions of a deferred disposition. RCW 13.40.127(6). Juvenile courts are afforded the discretion to determine whether a juvenile has complied sufficiently with those conditions. State v. J.A., 105 Wn. App. 879, 881, 887-888, 20 P.3d 487 (2001). "Further, once a court enters an order finding no lack of compliance, that order carries through to the determination of full compliance under [RCW 13.40.127] section 9." Id. at 888.

¹⁰ Alternatively – had circumstances warranted – prior to completion of the deferral period, the juvenile court could have continued the case for another year or entered an order of disposition. See RCW 13.34.127(7)-(8). In Lowe's case, the court did neither.

In Lowe's case, the State failed to prove noncompliance. By denying the State's untimely motion to revoke his deferred disposition, the juvenile court found compliance with the conditions of his deferred disposition, a decision that carried through to the court's ultimate decision to dismiss and vacate under RCW 13.40.127(9). And because Lowe's juvenile assault conviction was vacated, it could not count in his adult offender score.

Finally, to the extent there is any ambiguity in the SRA regarding whether vacated juvenile adjudications should be counted in an offender score, the rule of lenity requires strict construction of a sentencing statute and the benefit of any doubt flows to the defendant. In re Post-Sentencing Review of Charles, 135 Wn.2d 239, 249-250, 955 P.2d 798 (1998).

Removing Lowe's vacated 2000 assault from his offender score reduces his scores by ½ point. And because each score is rounded down to the nearest whole number, each must be reduced by one whole point. See RCW 9.94A.525. Lowe should be resentenced using these proper scores.¹¹

¹¹ The only crime for which the proper score will change the standard range is count 5, Unlawful Possession of a Firearm, where the offender score is reduced from 8 to 7. On remand, however, the sentencing court will have an opportunity to reassess

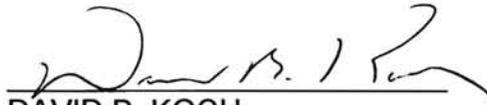
D. CONCLUSION

Lowe's sentences should be vacated and his case remanded for a new sentencing hearing using the correct offender scores.

DATED this 21st day of June, 2012.

Respectfully submitted,

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Attorneys for Appellant

Today I deposited in the mails of the United States of America a
postpaid envelope directed to attorneys of
reputable standing concerning a copy of the
document on which this declaration is captioned.

SNOHOMISH COUNTY, WA
I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

[Signature] 6-21-12
Name Done in Seattle, WA Date

Lowe's sentences on all of the counts in light of their reduced scores.

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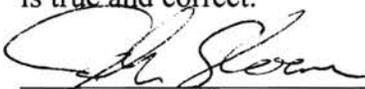
Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

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Containing a copy of the brief of appellant, in State v. Eric Lowe,
Cause No. 67727-6-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Done in Seattle, Washington

6-21-12
Date